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# THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

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## **MURDER.**—See HOMICIDE.

**MUST.**—The Saxon word “must” is used in statute to place beyond doubt or cavil what is intended. It is more imperative than “shall” and has not yet been twisted by judicial construction like the words “may” and “shall” into meaning something else.<sup>1</sup> But the word “must” has not always been construed so as to make it absolutely imperative.<sup>2</sup>

1. *Eaton v. Alger*, 57 Barb. (N. Y.) 179-190.

2. Sections 870 and 872 of the New York Civ. Code of Procedure provide that the examination of a party to an action may be taken at the instance of an adverse party at any time before trial, and specify what the affidavit to obtain an order for such an examination must contain. *Held*, that it is discretionary with the judge whether he grants the order to examine, although section 873 provides that the party to whom such an order is granted must grant an order for the examination if the action is pending, etc., and that while it is said in section 873 that the judge “must” grant the order where an affidavit conforming to the previous section is presented to him, yet we do not think that the language is absolutely mandatory, and that it was intended to deprive the judge of all discretion, and that the affidavit is required to disclose the nature of the action and to set forth that the testimony of the party is material and necessary, and the judge must be able to see, from the facts stated, that the testimony is material and necessary; that if, from the nature of the action and the other facts disclosed, he can see that the examination is not necessary

for the party seeking it, then it cannot be supposed that it was the legislative intent that he should be obliged, nevertheless, to make the order. *Jenkins v. Putnam*, 12 N. E. Rep. 613.

Section 544 N. Y. Civ. Code of Proc. provides that “the court . . . in a proper case ‘must,’ upon such terms as are just,” permit a supplemental answer. *Held*, that the court has a discretion to permit or to refuse a supplemental pleading, but that discretion must be exercised reasonably, and not capriciously or wilfully. *Spears v. Mayor etc. of New York*, 72 N. Y. 442.

Section 1678, which is designed to provide for judicial sales, declares that if the property consists of two or more distinct buildings, farms or lots, they shall be sold separately, unless otherwise ordered by the court. *Wallace v. Feeley*, 61 How. (N. Y.) 225; affirmed 88 N. Y. 646. It has been held that this section was directory; but subsequently, and by chapter 682 of the laws of 1881, that section was amended by substituting the word “shall” for “must,” and this would seem to be an indication on the part of the legislature to obviate the construction which has been placed on the word “must” by pro-

**MUTE.**<sup>1</sup>—See also WITNESS.

**MUTILATE—MUTILATION.**—Mutilate means something less than total destruction. Mere mutilation of a will would not of itself take from a will all legal force. A mutilation, however, which takes from the instrument an element essential to its validity

nouncing it to be directory merely in its effect.

Section 2393, and which is one of the sections relating to foreclosure by advertisement, declares that "if the property consists of two or more distinct farms, tracts or lots, they must be sold separately," but has the further provision, "and as many only of the distinct farms, tracts or lots shall be sold as it is necessary to sell in order to satisfy the amount due at the time of the sale and the costs and expenses allowed by law." Although the word "must" is used in this section, and if its effect were to be construed in view of the decision to which reference has been made, it would be necessary to declare it directory, such a conclusion would not be justified, taking the whole context of the section into consideration, and from which it is manifest that it was intended to be absolute and mandatory, as evidenced by the prohibition of the sale of any more of the farms, tracts or lots than necessary to satisfy the amount due at the time of the sale. The section may be said, with great propriety, to be not only mandatory but prohibitory, its whole context considered together. *Hemmer v. Hustace*, 51 Hun (N. Y.) 457.

In construing section 41, Rev. Stat. of Minn., p. 334, which provides that certain actions "must be tried in the county in which the parties, or one of them, resides at the commencement of the action . . . subject, however, to the power of the court to change the place of trial as provided in section forty-three" of the same statute, and that section provides, among other things, that "the court may change the place of trial on the application of all the defendants who answer," the court said: "The principal difficulty in construing these provisions of the statute arises out of the positive terms used in section 41, 'the action must be tried,' etc. In construing statutes, all the provisions relating to the same subject must be considered together and with reference to each other, and also with reference to the effect which each provision was designed to secure. . . .

The primary and controlling object to be secured by the provisions of the statute regulating the place of trial in transitory actions was, manifestly, to protect defendants against the oppressions which plaintiffs might otherwise maliciously or capriciously practice upon them through the general jurisdiction of the district courts. . . . Such being the design and purpose of the statute, Ought the word 'must' in section 41 to be construed as an absolute and inflexible mandate upon the court and the parties, so as to put the case, situated as this is, beyond the power of the court or the parties to proceed any further therein? I cannot consent to such construction. It irretrievably destroys the power of the court to try a cause of which it has a full and unquestionable jurisdiction. No acts or agreement of the parties, however solemn or explicit, could, under such construction, confer upon the court the power to try a cause out of the proper county." *Merrill v. Shaw*, 5 Minn. 148.

1. Under the old system if, the prisoner stood *mute* it was deemed that no trial could be had. If a plea could not be extorted from him, and it was ascertained that he was not dumb *ex visitatione Dei*, he was sentenced as on conviction. But as the legal system developed, methods of procedure yielded in importance to substantial rights, and the courts were authorized to enter a plea of not guilty for the prisoner who declined to plead, and to investigate the question of his guilt upon this enforced plea. *State v. Ward*, 48 Arkansas 36-39.

Where a defendant stood *mute* it was contended for him that the court had no jurisdiction to try him, and had no power to enter a plea of not guilty for him, or to proceed to trial as if he had pleaded not guilty. *Held*, that the court has power to try a person who refuses to plead to an information or who wilfully stands *mute* when arraigned on it, without entering for him a plea of not guilty, and has a right to proceed in such trial as if there were a plea of not guilty, even though no statute of the United States specific-

would have the effect to revoke it. Courts often speak of "records mutilated by erasures" and "records mutilated by corrupt interlineations."<sup>1</sup>

**MUTINOUS**—(See also **MUTINY**).—Mutinous is defined as "tending toward mutiny; as mutinous conduct or words."<sup>2</sup>

**MUTINY**—(See also **REVOLT**).—Mutiny is "insurrection against authority; revolt against discipline; resistance of officers, by sailors, soldiers or marines."<sup>3</sup>

**MUTUAL**.—The adjective "mutual" is defined as reciprocally acting or related; reciprocally receiving; reciprocally given and received; reciprocal; interchanged, as mutual love, assistance, advantage, aversion.<sup>4</sup>

ally prescribed such mode of procedure in the case of an information. *United States v. Borger, 19 Blatchf. 429.*

1. *Woodfill v. Patton, 76 Ind. 575; s. c., 40 Am. Rep. 269*, construing a statute which provides that no will shall be revoked unless the testator shall destroy or "mutilate" the same. In this case the testator drew pencil lines across his signature to the will. *Held*, that the will was revoked, and that it was a mutilation of it under the statute.

**Mutilation and Spoliation**.—See **ALTERATION OF INSTRUMENTS, 1 Am. & Eng. Encyc. of Law 497.**

2. *And. L. Dict.* 1 Bl. Com. 415.

3. *And. L. Dict.* 694.

4. The California Civ. Code provides that "consent alone will not constitute a marriage; it must be followed by a solemnization or by a 'mutual' assumption of marital, rights, duties or obligations." Where two persons made and signed a written contract of marriage and the wife also signed a written agreement not to make known the contents of the marriage contract for two years, unless the husband saw fit to do so; it also appeared that the parties to this contract cohabited together as husband and wife for more than a year, after which there was a disagreement between them, and the wife brought an action to obtain a divorce, etc. In this action it was urged that, under the code, there can be no "mutual assumption" of marital rights and duties which is unknown to the community at large, or to the acquaintance of the parties; and that the word "mutual" requires "an open and respectful" recognition before the community in all their social intercourse, that they stand to each other in

the relation of husband and wife. On this question the court said: "Where the holding out to the world the relation is evidence of a prior contract such evidence does not necessarily depend for its effect upon amenity of manners or upon the degree to which the parties extend to each other the affectionate respect which should attend the intercourse of husband and wife in well-ordered households. The statute does not make the validity of a marriage by consent depend upon the full performance of their mutual duties; the failure to perform certain important obligations is made ground for divorce. It may be conceded that the code requires the mutual assumption of such duties. The assumption of rights and duties must be 'mutual,' and the code is given effect if they are assumed between and towards each other. . . . When parties agree to a present marriage they mutually agree to take on themselves the obligations appertaining to the marriage state, but the code requires that, to justify a finding of marriage, there shall be additional evidence that they have assumed marital rights or obligations. If a case be supposed where, immediately after consent to present marriage, the parties have permanently separated, there would perhaps be no marriage, not because they would have not mutually agreed to assume marital obligations, but because the section of the code requires evidence of other and subsequent facts showing the actual assumption of marital obligations. In considering the evidence of such facts subsequently occurring, however, the direct evidence of previous consent is not to be rejected—all the evidence is to be taken together. As we have seen, cohabitation alone



**MUTUAL ACCOUNTS**—(See also ACCOUNT, vol. 1, p. 108; ACCOUNT RENDERED, vol. 1, p. 128; LIMITATION OF ACTIONS, vol. 13, p. 764; MERCHANTS' ACCOUNTS, p. 311, *supra*).—Mutual accounts are such as contain mutual credits between the parties, or an existing credit on one side which constitutes a ground for credit on the other; or where there is an understanding that mutual debts shall be a set-off *pro tanto* between the parties.<sup>1</sup> They are made up of matters of set-off. There must be a mutual credit founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts.<sup>2</sup>

does not prove marriage, because the relation between man and woman cohabiting may not be that of husband and wife. But cohabitation, with evidence of a reputation that they were married, created by the conduct of the parties, proves a previous consent and marriage. So, under the code, cohabitation with direct evidence of previous consent, proves a marriage; because when viewed with the previous consent, cohabitation is evidence of a 'mutual assumption' of marital rights, duties or obligations." *Sharon v. Sharon*, 16 Pac. Rep. 345.

1. 2 Bouv. L. Dict. 265.

2. *Green v. Disbrow*, 79 N. Y. 1; s. c., 35 Am. Rep. 496; *Angel on Limitations*, 136; *Norton v. Larco*, 30 Cal. 127; s. c., 89 Am. Dec. 70; *Lockwood v. Hanson*, 16 Oreg. 102; *Adams v. Carroll*, 85 Pa. St. 209; *Abbott v. Keith*, 11 Vt. 525; *Hutchinson v. Pratt*, 2 Vt. 149; *Wood v. Barney*, 2 Vt. 369; *Becker v. Jones*, 37 Hun (N. Y.) 35; *Trueman v. Fenton*, 1 Smith's Lead. Cas., H. & W's Notes 966; *Hutchinson v. Pratt*, 2 Vt. 149; *Wood v. Barney*, 2 Vt. 369; *Becker v. Jones*, 37 Hun (N. Y.) 35; *Warren v. Sweeney*, 4 Nev. 101; *Peck v. New York etc. U. S. Mail S. S. Co.*, 5 Bosw. (N. Y.) 226; *Abbott v. Keith*, 11 Vt. 525; *Hodge v. Manley*, 25 Vt. 210; *Schall v. Eisner*, 58 Ga. 190; *Seltzinger v. Alspach* (Pa.), 4 Atl. Rep. 203; *Beaty v. Bordwell*, 91 Pa. St. 438; *Mattern v. McDivitt*, 113 Pa. St. 402; *Penniman v. Rotch*, 3 Metc. (Mass.) 216; *Green v. Caldcleugh*, 1 Dev. & B. (N. Car.) L. 321; s. c., 28 Am. Dec. 567; *Higgs v. Warner*, 14 Ark. 102; *Loeffel v. Hoss*, 11 Mo. App. 133; *Huebner v. Roosevelt*, 6 Daly (N. Y.) 337; *Kimball v. Kimball*, 16 Mich. 211; *Thompson v. Reed*, 48 Ill. 118; *Cuck v. Quackenbush*, 13 Hun (N. Y.) 107; *Sawyer v. Lufkin*, 58 Me. 429; *Parker v. Schwartz*,

136 Mass. 30; *Safford v. Barny*, 121 Mass. 300; *Gordon v. Lewis*, 2 Sumn. 143; *Greene v. Darling*, 5 Mar. 201; *Fox v. Fisk*, 6 How. (Miss.) 328, 346; *Talcott v. Smith*, 142 Mass. 542; *Chamber v. Marks*, 25 Pa. St. 296; *Campbell v. White*, 22 Mich. 178; *Madden v. Blain*, 66 Ga. 49; *Sanders v. Sanders*, 48 Ind. 84, 86; *Davis v. Smith*, 4 Me. 337; *Cogswell v. Dolliver*, 2 Mass. 217; s. c., 3 Am. Dec. 49; *Smith v. Ruecastle*, 7 N. J. L. 357; *Coster v. Murray*, 5 Johns. (N. Y.) Ch. 522; *Tucker v. Ives*, 6 Cow. (N. Y.) 193; *Kimball v. Brown*, 7 Wend. (N. Y.) 322, 325; *Chamberlain v. Cuyler*, 9 Wend. (N. Y.) 126; *Sickles v. Mather*, 20 Wend. (N. Y.) 72; s. c., 32 Am. Dec. 521; *Chambers v. Marks*, 25 Pa. St. 296; *Fitch v. Hilleary*, 1 Hill (S. Car.) 292; *Wood v. Barney*, 2 Vt. 369; *Abbott v. Keith*, 11 Vt. 525; *Hodge v. Manley*, 25 Vt. 210.

When men deal with an express or implied agreement that what each sells or delivers shall, instead of giving rise to a demand payable at once, stand as a payment or set-off for what has been or may be received from the other, their liability will be limited to, and depend upon, the balance, as finally disclosed, and the statute will not begin to run until the date of the last item." *Green v. Disbrow*, 79 N. Y. 1; s. c., 35 Am. Rep. 496.

In ordinary cases of mutual dealings no obligation is created in regard to each particular item, but only for the balance, and it is the constantly varying balance which is the debt. It has uniformly been held that distinct and different items of charge in an open and mutual account do not constitute separate claims; but that the claim or debt is found in the balance of the account, and that it is the balance only that constitutes the claim of the party

to whom it is due. *Abbott v. Keith*, 11 Vt. 525; *Hodge v. Manley*, 25 Vt. 210.

It appears that it is unimportant as to the particular mode of keeping such an account whether on books or loose scraps of paper, or without any written charges, or whether it is all kept in one shape or in different forms. *Abbott v. Keith*, 11 Vt. 525.

Upon the trial of an action brought to recover for goods sold and delivered, it appeared that all the goods except one item, costing one dollar, had been delivered more than six years prior to the commencement of the action. It also appeared that more than six years prior to the commencement of the action the defendant had charged the plaintiff with one dollar and eighty cents, and within that period with two dollars for use of a wagon, and seventy cents for repairs on the same. *Held*, that the evidence was sufficient to authorize the jury to find that a mutual account existed between the parties, and that the trial court erred in refusing to submit that question to them. And it was that because the action was brought for goods sold and delivered, it was not improperly brought that the plaintiff could properly allege their claim upon one side of the account as for goods sold, etc., and if the defendant failed to allege or prove his claim, the plaintiffs could protest theirs against the bar of the statute by proving one or more items of the account existing on the part of the defendant, and the action will be deemed to have been brought for the balance within the meaning of the statute. *Becker v. Jones*, 37 Hun (N. Y.) 35.

There are cases in which the practical effect of their decisions are, that there can be no mutual accounts only between merchant and merchant concerning the trade of merchandise; or, in other words, that the statute of limitations does not admit of any exception being extended to any class of accounts excepting accounts concerning merchandise between merchant and merchant. *Landsdale v. Brashear*, 3 T. B. Mon. (Ky.) 330, 333; *Dyott v. Letcher*, 6 J. J. Marsh. (Ky.) 541, 545; *Smith v. Dawson*, 10 B. Mon. (Ky.) 112, 114; *Sprogle v. Allen*, 38 Md. 331; *Blair v. Drew*, 6 N. H. 235; *Livermore v. Rand*, 26 N. H. 85; *Craighead v. Bank of Tennessee*, 7 Yerg. (Tenn.) 399; *Lowe v. Dowborn*, 26 Tex. 507.

*South Carolina* seems to follow a different rule from the rest of the States.

There the rule is that where the demand of one party arises subsequent to the demands of the other it does not constitute a mutual account—that is, it is essential that the demands of the respective parties should arise together. *Cunningham v. Guigner*, Dud. (S. Car.) 351.

In *New Hampshire* a different rule is followed. In that State, items in mutual accounts, within six years next before action brought, constitute of themselves no admission of an unsettled account extending beyond six years, nor any evidence of a promise to pay a balance so as to take a case out of the statute of limitations. *Gage v. Dudley*, 64 N. H. 271; *Russell v. Copp*, 5 N. H. 154; *Blair v. Drew*, 6 N. H. 235.

It seems that in *New Hampshire*, the only exception made in regard to accounts by the statute of limitations, is the excepting of accounts "concerning the trade of merchandise between merchant and merchant, their factors and servants." *Gage v. Dudley*, 64 N. H. 271.

So that there is practically no distinction in *New Hampshire* in regard to mutual accounts. They are put on to the same footing as any other account, except as to accounts between merchant and merchant. And the doctrine, in regard to all accounts, except as to accounts between merchant and merchant, concerning merchandise, is that an acknowledgment, in order to take a case out of the statute, must contain an unqualified admission of a previous subsisting debt which the party is liable and willing to pay. *Gage v. Dudley*, 64 N. H. 271; *Ventris v. Shaw*, 14 N. H. 422; *Douglass v. Elkins*, 28 N. H. 26; *Manning v. Wheeler*, 13 N. H. 487; *Holt v. Gage*, 60 N. H. 536; *Blair v. Drew*, 6 N. H. 235. For a further discussion of this question, see the article on LIMITATION OF ACTIONS.

In *Iowa*, the statute of limitations commences to run from the date of the last item, whether debit or credit, on a continuous open current account. *Thorn v. Moore*, 21 Iowa 285; *Mills v. Davies*, 42 Iowa 91; *Keller v. Jackson*, 58 Iowa 629; Sec. 2531, Iowa Code. Hence the question of mutual accounts does not arise in the courts as a distinct feature from other accounts, for the reason that the rule applicable to the running of the statute as to mutual accounts is applied to all open current

It is not necessary that each party must have a cause of action against the other for his side of the account.<sup>1</sup>

An account of items upon one side and payments merely upon the other, is not a mutual account. The payments do not in such case enter into the account. They are at once applied and reduce the account.<sup>2</sup>

accounts so that the distinction made in other States in regard to mutual dealings and reciprocal demands does not arise under the Iowa statute.

**Reciprocal demand** is synonymous with mutual account. *Green v. Disbrow*, 79 N. Y. 1; s. c., 35 Am. Rep. 496, 500.

1. *Green v. Disbrow*, 79 N. Y. 1; 35 Am. Rep. 496.

But there are decisions that hold that "to constitute mutual accounts there must be mutual demands, each party must have a demand or right of action against the other." *Adams v. Carroll*, 8; Pa. St. 209; *Ingram v. Sherard*, 17 S. & R. Pa. 347; *Lowber v. Smith*, 7 Pa. St. 381; *Warren v. Sweeney*, 4 Nev. 101; *Peck v. New York etc. U. S. Mail S. S. Co.*, 5 Bosw. (N. Y.) 226.

In *Green v. Disbrow*, *EARL, J.*, in sustaining his point that the set-off need not necessarily be such a demand as would constitute a cause of action, criticises some of the cases holding adversely to him substantially as follows: "That in *Lowber v. Smith*, the precise point then decided was, that an account is not rendered mutual by credits therein—payments, either in money or property. But the judge, in deciding this case, used language not sanctioned by authority, and that the case had been criticised in 1 *Smith Lead. Cas.*, H. & W's notes 967; and in his opinion the reasoning of the judge who wrote the opinion is there shown to be clearly unsound. That the case of *Adams v. Carroll* was one when where all the items of the account were upon one side and the credits for money on the other side; and that it was properly held not to be a mutual account, but that the improper language was here again used that, 'to constitute mutual accounts, there must be mutual demands, each party must have a demand or right of action against the other.' He then states that: 'These Pennsylvania decisions were made under a statute, the language of which was like that in the statute of James I, and the *dicta* which I have quoted are not sanctioned by any Eng-

lish or American authority construing that statute. Similar language is used by *HOFFMAN, J.*, in *Peck v. New York etc. U. S. Mail S. S. Co.*, a case where all the items are upon one side, and simply money payments on the other." The learned judge, in further discussing this question, in speaking in relation to the items of the account in the case he was deciding, says: "It is true that the defendant could not have sued the plaintiff for these items, but that was so simply because the plaintiff did not owe him anything. But suppose the defendant had in the same way delivered goods to the plaintiff until the balance was in his favor, would it then be denied that he could not have sued and recovered against the plaintiff? It has never been decided that, in order to make an account of mutual or reciprocal demands, each party must have, as claimed by the learned counsel for the appellant, a cause of action against the other for his side of the account. There is but one cause of action in such case, and that is for the balance; but were it not for the account on the opposite side, each party would have a cause of action for the items of his account."

Where the set-off on one side was a valid account for work and labor and on the other side it was one for board furnished in the mean time, *held*, to be a mutual account. *Schall v. Eisner*, 58 Ga. 190.

But one item of credit alone is sufficient to make the account mutual and to take it out of the statutes. *Green v. Disbrow*, 7 Lans. (N. Y.) 381, 391; *Penniman v. Rotch*, 3 Met. (Mass.) 216; *Kimball v. Brown*, 7 Wend. (N. Y.) 322; *Norton v. Larco*, 30 Cal. 127; s. c., 89 Am. Dec. 70.

2. *Green v. Disbrow*, 79 N. Y. 1; 35 Am. Rep. 496; *Peck v. N. Y. & Liverpool U. S. Mail S. S. Co.*, 5 Bosw. (N. Y.) 226; *Abbott v. Keith*, 11 Vt. 525; *Hodge v. Edmond*, 25 Vt. 210; *Matthern v. McDivit*, 113 Pa. St. 402; *Weatherwax v. Cosumes*, 17 Cal. 344; *Adams v. Patterson*, 35 Cal. 122; *Frenatt v. Runyan*, 12 Ind. 174; *Dyer v. Walker*,

51 Me. 104; *Parker v. Schwartz*, 136 Mass. 30; *Webster v. Byrnes*, 32 Md. 86; *Abbey v. Owens*, 57 Miss. 810; *Warren v. Sweeney*, 4 Nev. 101; *Peck v. New York etc. Co.*, 5 Bosw. 226; *Bodell v. Gibson*, 23 Hun 40; *Green v. Disbrow*, 79 N. Y. 1; 35 Am. Rep. 496; *Green v. Caldcleugh*, 1 Dev. & B. 320; *Ingram v. Sheward*, 17 Serg. & R. 347; *Hay v. Kramer*, 2 Watts & S. 137; *Lowber v. Smith*, 7 Pa. St. 381; *Adams v. Carroll*, 85 Pa. St. 209; *Guichard v. Sapervede*, 11 Tex. 522; *Judd v. Sampson*, 13 Tex. 19. This is especially true when the payments are not general ones, but are intended on specific items of the account. *Penniman v. Rotch*, 3 Met. (Mass.) 223; *Peck v. New York etc. Co.*, 5 Bosw. (N. Y.) 226.

Yet there is no doubt but what money may form a proper charge or credit in a mutual account so as to save it from the operation of the statute. *Parker v. Schwartz*, 136 Mass. 30; *Knipe v. Knipe*, 2 Blackf. (Ind.) 340; *Plimpton v. Gleason*, 57 Vt. 604.

But where there is a due bill or negotiable note that represents a loan of money on one side and the sale of goods on the other side of an account, the account is not within the exception of the statute in relation to mutual accounts. *Clark v. Maguire*, 35 Pa. St. 259.

A payment, whether it be of money or of any article of personal property of a stipulated value made on account, and intended by the parties to be applied as a payment and not as a set-off *pro tanto*, will not make an account a mutual one. *Norton v. Larco*, 30 Cal. 127; s. c., 89 Am. Dec. 70.

But where articles of personal property are delivered by a debtor to his creditor who has an account against him, it will not be presumed that they were delivered in payment, but they are considered as matters of set-off, although the party making the entry as a credit affixes a value thereto. *Green v. Disbrow*, 79 N. Y. 1; s. c., 35 Am. Rep. 496; *Norton v. Larco*, 30 Cal. 127; s. c., 89 Am. Dec. 70.

But in a case where an action was brought for work that the plaintiff had performed for the defendant, for which a charge was made of \$2,300, and it was sought to bring in this claim within the saving of the statute by proof of the delivery by defendant to the plaintiff of a wagon within the prescribed statutory limit, for which the defendant received a credit of \$100,

the plaintiff, in his testimony in regard to this item, said: "On this account the defendant has paid, and is to be credited with the following sums of money," and then mentioned, among other items, "one wagon, \$100." The court held that there was no alternative but to treat this item as a payment of so much money paid on account, and that this payment did not make the account a mutual one, and that the plaintiff could not recover. This was so held upon the doctrine that there must be such a reciprocal demand that each party would have a right of action against the other. *Warren v. Sweeney*, 4 Nev. 100.

**Note.**—The statute of limitations of the State of Nevada, under which the case of *Warren v. Sweeney*, 4 Nev. 100, was decided, is so worded that the court in the case of *Wilcox v. Williams*, 5 Nev. 206, held that part payment is not sufficient as a new promise to take a case out of the operation of the statute. That is, the courts under that statute will not imply a new promise to pay a debt from the mere fact of payment, and this forces a debtor, in order to save his debt from the operation of the statute, to prove an actual new promise made by the creditor to pay the debt. This explains the decision of the court in the case of *Warner v. Sweeney*, in which they hold that the wagon was delivered as a payment on account, and at the same time the effect of their decision was that the account or debt was not renewed by such payment, although the statute had not run as to this item. But the case of *Warren v. Sweeney*, 4 Nev. 100, and the case of *Green v. Disbrow*, 79 N. Y. 1, are in direct opposition to each other on the question as to whether the delivery of goods from a debtor to his creditor is to be considered as a payment, or whether it is to be considered as a credit, or, in other words, a demand against the final creditor to which the final debtor is entitled to have it set off against the demand of his creditor. In both of these cases the creditor had, besides making some money payments, delivered articles of merchandise, or, in other words, personal property to the debtor to be applied upon the account. In *Green v. Disbrow*, the court held that the delivery of the butter and eggs was not payment, but that they were to be considered as matters of set-off. This view of the case made mutual de-

mands between the parties, and hence a mutual account, and saved it from the operation of the statute as well as from the line of decisions that hold that charges on one side and merely payments on the other do not constitute mutual demands, and hence they are not mutual accounts. In *Warren v. Sweeney* the court held that the delivery of the wagon was to be considered as a payment on account. This view of the case made it an account with the charges all on one side and merely payments on the other, hence it was not a mutual account, and, according to the Nevada statute, the debit side of the account was barred by lapse of time, and the creditor had no claim against the debtor because it was held to be a payment and not a demand or set-off. On this point it seems that these cases cannot be harmonized. It is a direct difference of opinion between these courts. It must be understood that the discussion of the question in relation to mutual accounts as to whether the delivery of an article by a creditor to a debtor to be applied on the account, is to be applied as a set-off or as a payment, does not affect the question that a payment (excepting in Nevada) will usually renew an account, provided that the statute has not run against it. This principle of law applies to mutual accounts as well as any other class of accounts, and it makes no difference whether such a delivery of goods is considered as a payment or a credit only (except in Nevada). Unless the creditor delivers it expressly for the purpose of having it applied on some particular item of the account it will have the effect, from the operation of the statute, of renewing the whole account as the law would imply, from either a new promise to pay the whole. (For a full treatment of this question see the article on *NEW PROMISE*.) Where this is the case the question as to whether an account is a mutual or some other kind of an account, as a rule, is not material, and is usually of no importance whatever. But it is of great importance as to whether the delivery of goods is considered as a payment on an account or whether they are considered as a set-off, making a demand only in favor of the final creditor against the final debtor, as it was in the case of *Green v. Disbrow*, where the statute had run against all of the credit items of the account (as kept by the plaintiff), and

also against the debit side of the account excepting one item. There was no claim made that the items of butter and eggs delivered by the defendant renewed the account, for they were barred by the statute if considered alone. The importance attached to these items was as to whether they made the account a mutual one. If so, it was saved from the operation of the statute, and if not, it was all barred by it except the last charge. And as to whether it was a mutual account or not depended how these items were applied on the account. If they were held to be a payment on account, then the account was not a mutual one, because there would be only charges on one side and payments on the other. But if they were held (as the case was decided) to be only credits in the nature of a set-off, then there were mutual demands or reciprocal demands on both sides of the account, and it was a mutual one. Had the Nevada case (*Warren v. Sweeney*) arisen under the New York statute the question as to whether the wagon was applied on the account as a payment or as a set-off would have been of no importance, for in either case it would have taken the account out of the operation of the statute. It has been formerly stated in this note that when the delivery of goods by a creditor to the debtor was such that the law would imply from it a new promise to pay the whole that "the question as to whether an account is a mutual or some other kind of an account is, as a rule, not material, and is usually of no importance whatever." Technically this might be stated in more positive terms, viz, "that it is always the rule and of no importance whatever," as it is always the rule where there is an account—that is, when there is no dispute but that there is an account between the parties. But there is a class of cases where this is disputed, among which the following cases appear: *Eldridge v. Smith*, 144 Mass. 35; *Helms v. Otis*, 5 Lans. (N. Y.) 137; *Talbott v. Todd*, 5 Dana (Ky.) 190; *Loeffel v. Hoss*, 11 Mo. App. 133; *Belles v. Belles*, 12 N. J. L. 339; *Huebner v. Roosevelt*, 6 Daly (N. Y.) 337; *Leitzinger v. Alspach* (Pa.), 4 Atl. Rep. 203; *Gilmore v. Reed*, 76 Pa. St. 462. In these cases, when the parties first began their deal, it was entirely a one-sided affair; that is, the items were all, or nearly all, upon one side of the account, and if there was a

few on the other side they were all cash items. But this state of affairs, after a time, seems to be entirely reversed, and for a long time the items appear upon the other side of the account, so that the statute has run against all of the items of the first part of the account and some of the latter part. Now, if the person who has furnished the goods for the latter part of the account brings suit against the person who furnished the goods that formed the items of the former part of the account, then the defendant in this case would set up his side of the account as a set-off, claiming that their dealing formed a mutual account, while the plaintiff would plead the statute as a bar to the set-off, and would claim that their dealings were not mutual but two separate sets of transactions; and if the one in whose favor the first part of the account was the one that brought the action, relying on the account as a mutual one, then the defendant would plead the statute of limitations as a bar to the plaintiff's part of the account, and claim on the part of the account not barred as a balance in his favor. In this class of cases it will be seen that the question as to whether the account is or is not a mutual one is quite important, but the main question is whether it is an account at all. That is, whether these two periods of dealings between the parties are to be kept entirely separate, and are entirely distinct transactions, or whether they are to be put together so as to form one account. If so, they are mutual; and whether they are to be treated as forming one account, or are to be kept separate, is a question in each and every case for the courts to determine from all the evidence and circumstances in the case, and from all the conditions and relations that the parties have borne to each other. From these facts it must be determined whether or not the parties expressly or by implication treated the dealings between them as one whole transaction or as several separate and distinct transactions.

An action was brought by a merchant against a farmer to recover a balance due the merchant on account. It appeared from the evidence that the account had reached back over a great many years, and that the farmer had obtained goods and groceries from the merchant, and that among a number of cash credits the farmer had furnished the merchant with butter and eggs,

amounting in all to about \$12. And it also appeared that more than six years had elapsed since the last item of credit had been made on the account, but that a small debit item for goods appeared on the account that had been purchased by the farmer, and this item was within the statutory limit of six years from the time the action was brought. The farmer, in his answer, plead the statute of limitations to the most of the account, claiming that the butter and eggs were applied as payment on the account, and hence it was not a mutual account within the meaning of the statute, and that this last debit item would not draw the rest of the account out from the operation of the statute. While the merchant claimed that the butter and eggs were merely credited upon the account as an off-set, and were not received as a payment, the evidence did not show that there was any special agreement between the parties as to the application of these articles on the account, but that they were usually sent by his son and his wife under the farmer's direction, that they be applied on the account. *Held*, that it could not be presumed that the butter and eggs were delivered in payment; and that before they can be held to have been so delivered there must be proof that it was so intended, and that both parties so understood it; that they were taken to the plaintiff by the defendant's direction, and that the plaintiff received them without any particular direction or agreement with the defendant and credited them on his account; that in legal effect they were sold to the plaintiff, the price of them to be credited on the account. And EARL, J., in delivering the opinion of the court in this case, further says: "Suppose none of the plaintiff's accounts had been barred by the statute, and he had sued the defendant to recover the whole of it, ignoring the credits, can it be doubted that upon the facts disclosed in the evidence he could not have interposed his account for the butter and eggs as a set-off? To hold otherwise and sustain the contention of the defendant would be to substantially nullify the statute of limitations in actions brought to recover upon accounts, as such accounts generally arise and exist under circumstances similar to those which appear here. That is, goods are delivered upon the one side to off-set, or to be credited upon goods delivered upon the other side, the account being permitted to run

for mutual convenience, and the balance to be paid by the party against whom, upon final adjustment, it shall be found to exist. *Green v. Disbrow*, 79 N. Y. 1; s. c., 35 Am. Rep. 496.

It appeared in an action that for years one Down was entitled to rent from one Jenkinson upon a leasing of certain premises owned by Down to Jenkinson, in which he kept a hotel, and that during the whole period Down was contracting debts with Jenkinson, among which were charges for the board of Down and his family, and to the payment of which the rent was applicable. There never was any settlement between the parties, Down having died and a receiver was appointed to take charge of his estate pending the admitting of his will to probate. Soon after his death Jenkinson made an assignment for the benefit of his creditors, and shortly thereafter died. The action was brought by the assignee of Jenkinson against the receiver of Down to recover a balance on the account, and the question for the court was whether there was an account between the parties. The defendants plead the statute of limitations, and claimed a balance due them from Jenkinson's estate for rent. As to the question of the statute of limitations the court held that the demands were not subject to the operation of the statute, and in the opinion in the case the court says: "The credit of the rent by Jenkinson from year to year was evidently in pursuance of an agreement between him and Down that the rent should be an off-set against Jenkinson's claims against Down, and Down appears to have acquiesced in such credit. The crediting of it, therefore, must be regarded as an annual payment on account, to be applied if, and so far as necessary, to the payment of Jenkinson's demands. Here were mutual accounts, mutual credits founded on subsisting debts on the other side, and an implied agreement at least for a set-off of such mutual debts. *Woolley v. Osborne*, 39 N. J. Eq. 55.

In *Gold v. Whitcomb*, 14 Pick. (Mass.) 188, the court held that a shopkeeper's account containing charges for articles sold to the defendant in which it appeared that some of them were sold within six years before the action was brought, and also containing credits given more than six years before the action was brought; that this was not a mutual account so as that the charges

within six years would draw the previous charges out of the operations of the statute of limitations. This is the statement of the decision in the head note, and there is no opinion of the court reported. And in *Green v. Disbrow*, 79 N. Y. 1; s. c., 35 Am. Rep. 496, *EARL, J.*, in referring to this case, says: "The case is but briefly reported without any opinion of the court. It does not appear what the items of credits were. They must have been payments of money. If not, the case is opposed to the undoubted law." This case is also criticised by *SHAW, C. J.*, in *Penniman v. Rotch*, 3 Metc. (Mass.) 217, as follows: "We are aware this decision is apparently opposed to *Gould v. Whitcomb*, 14 Pick. (Mass.) 188. In that case the plaintiff relied on a book account, of which part of the charges were over and part within six years; there were credits, but none within six years; and it was held that all the items which had stood more than six years before action brought were barred by the statute of limitations. But this decision proceeded on the old statute in which there was no provision similar to the revised statutes on which this depends. It was an implied exception to the words of the statute, and was founded on this principle, that when the plaintiff sues on account which is, in whole or in part, of more than six years' standing, if he can show that the defendant has made payments of money or advanced goods, labor or other value 'on that account,' it is an acknowledgment of the existence of the account, and raises an implied promise to pay the balance; or, in the language commonly applied to it, draws after it the whole account. But, of course, regarding such payment as an acknowledgment, it must be deemed an acknowledgment, an implied promise made at the time of such payment or advanced by the defendant; and, therefore, if that payment had been more than six years before action brought, it was no evidence of a promise within six years, and, of course, would avoid the operation of the statute. In the case cited, there being no credit within six years, there was no new promise to avoid the statute upon the principle of an open and mutual account, and therefore the statute was held to be a good bar to all debts of more than six years' standing when the action was brought. But we think the revised statutes have intro-

Mutual indebtedness does not work an extinguishment of the respective debts without an application of them to each other by the concurrent act of the parties.<sup>1</sup>

duced a new rule upon this subject somewhat more plain, exact and practical than the former statute; and by it the whole of an open and mutual account is taken out of the operation of the statute, if any transaction on either side can be proved to have been within six years next before the action brought. It follows, of course, that if there be no item upon either side within six years, the action is barred by the general limitation.

Where the items in the account are all charges against one party and in favor of the other, it is not a mutual account. It lacks the very essential element to make it such—mutuality. Such an account does not show a system of mutual dealings and of reciprocal demands between the parties. Such a case does not come within the rule that items within the prescribed statutory limit draw after them other items beyond that period. *Fitzpatrick v. Phelan*, 58 Wis. 250; *Butler v. Kirby*, 53 Wis. 188; *Cuck v. Quackenbush*, 13 Hun (N. Y.) 107.

A mutual account may include charges for goods sold, services rendered, money advanced, as in way of trade or business, for these all enter into the accounts of business men as parts of their business, trade or merchandising. But they will not include matters out of the trade or profession of either party, as money lent on bond or mortgage or due on the purchase of real estate, unless the debtor by some act of his adopted them as a part of such an account. *Green v. Ames*, 14 N. Y. 225.

But if there is any hiatus in a mutual account that exceeds the statutory period, the items beyond it are not saved, because the account is not considered an open account after that. *Chamberlin v. Cuyler*, 9 Wend. (N. Y.) 126; *Abbey v. Owens*, 57 Miss. 810; *Hibler v. Johnson*, 18 N. J. L. 266; *Booth v. Stockton*, 1 Harr. (Del.) 51.

Where the defendant advanced money for the purchase of stock, kept it in his possession, was to charge interest on the money advanced, and, when finally disposed of, he was to account to the plaintiff for half of the profits, or charge him with like propor-

tion of the loss—*held*, not to be a mutual account; that it was an account on one side only, growing out of a special contract. *Atwater v. Fowler*, 1 Edw. (N. Y.) Ch. 417.

Where the defendants, in an action, had accepted drafts for the plaintiffs' accommodation only, and which the plaintiffs' were bound to pay, and these acceptances had been entered to the plaintiffs' debit, so that the counter charge was necessary to balance the account; it also appearing that this was done for convenience merely, and that the accommodation drafts had no connection with defendant's other dealings with the plaintiffs, and that there two last items were the only items within the statutory period, the rest of the entries being all barred by lapse of time—*held*, that the payment of these drafts by the plaintiffs was merely a payment of their own debt and did not create any debt from the defendants, and that these charges on either side were a mere memorandum and not an item of legal debt or credit, and did not result in the creation of an obligation on either party to pay anything to the other. Hence it was not such a transaction as would bring the case within the exception of mutual accounts. *Stickney v. Eaton*, 4 Allen (Mass.) 108.

Where the parties to a mutual account stipulate for a time of closing it, either expressly or by implication, the statutes of limitation will run on the balance from that time. But in the absence of any such agreement, the cause of action accrues from the date of the last item. *Higgs v. Warner*, 14 Ark. 192.

1. *Carmalt v. Post*, 8 Watts (Pa.) 406; *Beaty v. Bordwell*, 91 Pa. St. 438. This expression is again used by the court in *Mattern v. McDivitt*, 113 Pa. St. 402, viz: "Mutual demands or debts do not extinguish each other; nor does either prevent the statute running against the other, unless both are such accounts as to bring the case within the exception." In the former case the plaintiff below brought suit to recover \$461.70 from the testator of the defendant below for work done and material furnished defendant's testator.



The defendant pleaded setoff, and sought to charge the plaintiff for the use and occupation of certain real estate of his testator. It appeared that, from the time that a right of action accrued upon this item for use and occupation until it was pleaded as a setoff, the statute of limitations had become a bar to its recovery, unless the furnishing of materials and labor by the plaintiff, which was of a more recent date, made a mutual account between the parties. The court held that there was nothing in the facts of the case to prevent the running of the statute as against this claim for use and occupation, and, in rendering the opinion, used the expression referred to. In the latter case the plaintiff below brought an action to recover for goods sold and delivered to the defendant by his testator. The defendant below pleaded the statute of limitations to the larger portion of the account, and to the balance claimed a setoff for professional services rendered (he being an attorney at law) to this amount, and also claimed a balance in his favor. The plaintiff below claimed that this was a mutual account, and that the statute had not run as to any portion of his testator's account. Upon these facts the court held that this was not a mutual account, and after giving several definitions of a mutual account draws the following conclusion, viz: "As defined the account (mutual account) on each side relates to trades in merchandise. This may include labor or any thing that is provable by book of original entry. Such account on one side is not enough. A demand on the other side founded on anything else than such accounts as concern the trade of merchandise is not sufficient to bring the account of the other within the exception;" and then, in further discussion of this question, uses the expression referred to above. The only meaning that can be taken from these expressions is, that mutual indebtedness is not sufficient of itself, without any agreement or understanding between the parties to apply them to each other, to bring a case within the exception of the statute, unless it is a mutual account *per se*. For the court, in the case of *Seitzinger v. Alspach*, says: "It is true, the mutual accounts need not necessarily be between merchants. Other persons may so deal together if there be reciprocal accounts between them as in like manner to take them out of the statute." And in *Mattern v.*

*McDivitt*, the court says: "Nor does either (mutual demands or debts) prevent the running of the statute against the other, unless both are such accounts as bring the case within the exception."

This question as to when mutual debts between two parties constitute a mutual account, is more clearly stated by the court in the case of *Eldridge v. Smith*, 144 Mass. 35, in which the facts appear as follows: The plaintiff sued as the surviving partner of a late firm, on an account most of which was for the hire and keeping of horses. The first item charged being in November, 1854, and the last one, in December, 1872. The defendant in his answer set up the statute of limitations to this account, and also filed an account in setoff for medical services and medicines furnished the plaintiff from February, 1874, to May, 1883. The plaintiff's partner died in 1872; the suit was brought December 28th, 1884. It will be seen that, unless the plaintiff could bring his case within the exception of the statute in regard to mutual accounts, that his whole claim was entirely barred by the statute before he brought suit. The court held that this was not a mutual account, and in deciding this question referred to *Penniman v. Rotch*, 3 Met. (Mass.) 216, and *Sofford v. Barney*, 121 Mass. 300, as enunciating the correct rule as to this class of cases, and then says: "Both of these cases make one of the elements of a mutual and open account to be that there must be a mutual agreement, express or implied; that the items of the account on the one side and the other are to be set against each other. In other words, there must be one account upon which the items on either side belong, and upon which they operate to extinguish each other *pro tanto* so that the balance on either side is the debt between the parties. It is quite clear that the right to set off independent debts under our statute is not sufficient to create a mutual open account. For instance, in this suit upon the plaintiff's account, the defendant might have a right to set off a promissory note of the plaintiff's, which the defendant holds as endorsee from the payee. But it cannot for a moment be contended that this would make the plaintiff's a mutual and open account. It is not enough that there should be mutual debts, but they must, by agreement of the parties, be parts of one account, upon which they would apply to and satisfy each other *pro tanto*."

On this question in the case of *Green v. Caldeleugh*, 1 Der. & B. (N. Car.) L. 321; 28 Am. Dec. 567, DANIEL, J., after stating the rule as to the statute of limitations concerning mutual accounts, and citing some authorities on that point, says: "But it seems to us that the true principle to be extracted from these decisions, applies only in those cases where these items are clearly parts of one continuing mutual account, which by the assent of the parties are to be charged therein, whenever the same shall be adjusted. This assent may be shown by direct evidence of an agreement to that effect. It may be inferred also when each party keeps a running account of the debits and credits of the account; or where one only, with the knowledge and concurrence of the other, is confided to keep the account of all the mutual dealings. In these cases the new items are evidence affirming the continuance of an unsettled account at that time and warranting the fair presumption of a promise to settle it, and to pay the balance which may be ascertained on settlement. The whole of the reciprocal demands comprehended in such running accounts are thereby taken out of the statute; the account is not to be split; but what shall be found upon all the items to be the balance is the true debit between the parties. That the mere fact of the existence of disconnected and opposing demands between two parties, one of which demands is of recent date, shall take the case out of the operation of the statute, shall be evidence of a promise to pay that other, or to allow it in a settlement, is, in our opinion, not an inference of law or of reason, although some adjudications and several loose *dicta* appear to sanction it." *S. P. Higgs v. Warner*, 14 Ark. 192; *Loeffel v. Hoss*, 11 Mo. App. 133; *Huebner v. Roosevelt*, 6 Daly (N. Y.) 337; *Kimball v. Kimball*, 16 Mich. 211; *Thompson v. Reed*, 48 Ill. 118; *Cuck v. Quackenbush*, 13 Hun (N. Y.) 107; *Sawyer v. Lufkin*, 58 Me. 429; *Parker v. Schwartz*, 136 Mass. 30; *Safford v. Barney*, 121 Mass. 300; *Gordon v. Lewis*, 2 Sumn. (U. S.) 143; *Greene v. Darling*, 5 Mass. (U. S.) 201; *Fox v. Fisk*, 6 How. (Miss.) 328, 346; *Talcott v. Smith*, 142 Mass. 542; *Chamber v. Marks*, 25 Pa. St. 296.

Where the only credit items on an account that was sought to be brought within the exceptions of mutual accounts were items of money and other

articles of merchandise, marked, "returned," *held* that these items were not sufficient to bring the case within the exception in relation to mutual accounts. *Campbell v. White*, 22 Mich. 178; 25 Mich. 462.

Where the transactions are remote and there is nothing in their own nature or the evidence in a case to connect them, there can be no propriety in extending the exception of the statute to embrace them. *Belles v. Belles*, 12 N. J. L. 339.

Where money is paid as a loan with an understanding between the parties that they are to be a part of their mutual dealing, and are to affect the general balance due thereon, it is sufficient to operate as a removal of the statute bar. *Plimpton v. Gleason*, 57 Vt. 604.

The mutuality of the reciprocal demands must be established to bring an account within the statute. Reciprocal demands which are not the proper subject of an unliquidated account will not answer the purpose. *Becker v. Jones*, 37 Hun (N. Y.) 35; *Cuck v. Quackenbush*, 13 Hun (N. Y.) 107; *Edmonstone v. Thomson*, 15 Wend. (N. Y.) 554; *Coster v. Murray*, 5 Johns. (N. Y.) Ch. 522; *Hallock v. Losce*, 1 Sandf. (N. Y.) 220; *Green v. Ames*, 14 N. Y. 225; *Huebner v. Roosevelt*, 6 Daly (N. Y.) 337; *Campbell v. White*, 22 Mich. 178; 25 Mich. 462; *Thompson v. Reed*, 48 Ill. 118.

**Mutuality of Parties.**—The mutual accounts and dealings which will save a balance on either side from the bar of the statute of limitations must be those between the accounting parties, and the whole transaction must be of such a character as to raise a legal presumption that the accounts are intended to apply to the payment or extinguishment of each other, and thus, like payments on a note, operate as an acknowledgment of the precedent indebtedness. But running accounts with a partner, though he be a surviving partner, and as such has the collection of the partnership assets, certainly cannot be called an account with the firm, and can therefore be of no avail to stop the running of the statute against a partnership claim. *Stewart's Appeal*, 105 Pa. St. 307.

A person having an open, mutual and current account, purchased an open book account which a third person had against that other, and without notifying him of the purchase, entered it into his account, and thus attempted to save it from the effect

of the statute. The account thus assigned was not barred when it was assigned, but was barred by the statute at the time suit was brought, unless it formed a part of the mutual account that already existed between them, which was not barred at this time. *Held*, that the item thus assigned to the plaintiff was barred by the statute; that, although it had been contended that, in reciprocal accounts the intention of the law was to compensate or immediately set off one account against the other, and that it was just that the law should provide as it does, that the limitation should run only from the last item of the account; yet, in order to do this and to retain the justice contended for, it must be confined to cases where the items are between the same parties, known to both, and originating between them, or adopted by them as part of their mutual account. *Green v. Ames*, 14 N. Y. 225.

**As to Manner of Keeping a Mutual Account.**—It has been held that, in order to create a mutual account, it is necessary that each party should keep a book account and have charges upon it against the other, or, at least, have written charges against each other. *Theobald v. Stinson*, 38 Me. 149; *Dyer v. Walker*, 51 Me. 104, 106; *Edmonstone v. Thomson*, 15 Wend. (N. Y.) 554, 555. But as to the main cases, it seems by the case *Lancey v. Maine Central R. Co.*, 72 Me. 34, 37, that they have been abrogated on amendment to the statute, which provides that "it shall be deemed a mutual and open account current, where there have been mutual dealings between the parties, the items of which are unsettled, whether kept or proved by one party or both. Stat. 1867, ch. 117. And the case of *Green v. Disbrow*, 79 N. Y. 1; s. c., 35 Am. Rep. 496, is considered as settling the law as to mutual accounts in *New York*—*held* that an account was a mutual one, although the account was kept by one party only. In *Kimball v. Kimball*, 16 Mich. 211, the court, in discussing this question where a butcher presented an account to the legal representatives of a deceased person for meats furnished the deceased, which would be barred by the statute unless it was a mutual account, *COOLEY, J.*, said: "It is not enough for the claimant to prove that, as a meat market man, he supplied and charged the deceased with meats. Here would be a credit on but one side—

it would not be mutual. There must have been a credit upon the other side; that is, on the part of the deceased, either expressly given or impliedly; that is, a mutual or alternate course of deal; in other words, there must have been a credit given by the deceased, either expressly or impliedly by his consent of some items of deal. It is not necessary that it should be put on a book by deceased, or be brought forward by his representatives here as a claim, if the claimant and the deceased, at the time, understood that the items credited by the defendant were so intended to go on the credit of the deceased upon the account; if not, then the items of credit will not operate to make a mutual account current." And in the case of *Abbott v. Keith*, 11 Vt. 525, *REDFIELD, J.*, in discussing this question, says: "It is apprehended, therefore, that the particular mode of keeping the account, whether on books or loose scraps of paper, or without any written charges, or whether it is all kept in one shape or in different forms, as in the present case, is unimportant. If all the items in the expectation of the parties have reference to and are to be adjusted in one accounting, it may be considered as one transaction as far as the statute of limitations is concerned.

It makes no difference that the account is kept by one of the parties only. *Chambers v. Marks*, 25 Pa. St. 296.

**A party bringing an action on a mutual account** may declare on the debit side of his account only when his only object is to obtain a balance, leaving the other party to file an account in offset, or to prove the items of his side of the account, in payment, if he can do so. If the defendant does neither, he can only avail himself of the statute of limitations by pleading it. Then the plaintiff may avoid it, and bring himself within the statutory exception, by proving affirmatively as he would any other fact, which is material in his case, and is traversed that there was such a mutual and open account current, and items of debit and credit on both sides, and then by proving items on either side within the statutory period, the exception would apply and show that the course of action accrued, by the terms of the statutory period, before the action brought. When this is done, the action will be deemed brought for the balance within the meaning of the stat-

## MUTUAL ASSENT—MUTUAL CREDITS.

**MUTUAL ASSENT.**—Until each party has assented to all the terms of a contract it is incomplete, and either party may withdraw his offer, unless a given time is agreed upon in which the other party may assent,<sup>1</sup> and where the offer is made by letter, the acceptance by written reply takes effect from the time it is sent and not from the time it is received; hence the offer cannot be withdrawn in the meantime.<sup>2</sup> If the letter contains alternative propositions, the offer may elect.<sup>3</sup>

**MUTUAL COMBAT.**—(See also ASSAULT; HOMICIDE).—When two persons meet not intending to quarrel, and angry words suddenly arise, and a conflict springs up in which blows are given on both sides without much regard to whom is the assailant it is a mutual combat.<sup>4</sup> But it is not necessary that there should be mutual blows to constitute a mutual combat although one of the parties was killed by the first blow, if an intention to fight existed, it was a mutual combat.<sup>5</sup>

**MUTUAL CONSENT.**—See note 6.

**MUTUAL CREDITS.**—(See also BANKRUPTCY; MUTUAL ACCOUNT; RECEIVERS; SET-OFF).—It seems that a mutual credit is a knowledge on both sides of an existing debt due to one party and credit by the other party founded on and trusting to that debt, as a means of discharging it.<sup>7</sup>

ute. *Penniman v. Rotch*, 3 Metc. (Mass.) 216; *James v. Clapp*, 110 Mass. 358; *Green v. Disbrow*, 79 N. Y. 1; s. c., 35 Am. Rep. 496; *Becker v. Jones*, 37 Hun (N. Y.) 35; *Cogswell v. Dolliwer*, 2 Mass. 217; s. c., 3 Am. Dec. 45; *Norton v. Larco*, 30 Cal. 127; s. c., 89 Am. Dec. 70.

**Application of the Statutes to Other Accounts.**—The statute of limitations commences to run against the items of all accounts that are not mutual accounts (excepting accounts concerning the trade of merchandise between merchant and merchant in States where such a statute may be in force) from the date of each item, and unless there is a new promise to pay, or evidence from which the law will imply a new promise to pay the whole, items which are not within the statutory period will not be saved by items that are within it. *Weatherwax v. Cosumnes Valley Mill Co.*, 17 Cal. 344; *Fralor v. Sonora*, 17 Cal. 595; *Cotes v. Harris*, Bull. U. P. 150; *Todd v. Todd*, 15 Ala. 743; *Wilson v. Calvert*, 18 Ala. 274; *Harris v. Jackson Co. Agr. Board*, 9 Ill. App. 271, 274; *Reeves v. Hurr*, 59 Ill. 81; *Buntin v. Lagow*, 1 Blackf. (Ind.) 372, 373; *Looney v. Levy*, 35 La. An. 1012; *Harrison v. Hall*, 8 Mo. App. 167; *Bennett v. Davis*, 1 N. H.

19; *Miller v. Colwell*, 5 N. J. L. 510; *Kimball v. Brown*, 7 Wend. (N. Y.) 322; *Edmonstone v. Thomson*, 15 Wend. (N. Y.) 554; *Hallock v. Losee*, 1 Sandf. (N. Y.) 220; *Palmer v. New York*, 2 Sandf. (N. Y.) 318; *Waldo v. Jolly*, 4 Jones (N. Car.) 173; *Hussey v. Burgwyn*, 7 Jones (N. Car.) 385; *Hay v. Kramer*, 2 Watts & S. (Pa.) 137; *Turnbull v. Strohecker*, 4 McCord (S. Car.) 210; *Hutchinson v. Pratt*, 2 Vt. 149; *Fitzpatrick v. Phelan*, 58 Wis. 250; *Leonard v. United States*, 18 Ct. of Cl. 382.

1. Sec. 2727 Ga. Code.

2. Sec. 2728 Ga. Code.

3. Sec. 2729 Ga. Code.

4. *Com. v. Webster*, 5 Cush. (Mass.) 295.

5. *Tate v. State*, 46 Ga. 148. See also 1 Am. & Eng. Encyc. of Law 807.

6. The California statute provides that in criminal cases the judge's charge to the jury must be reduced to writing, and that an oral charge can only be given "by the mutual consent of the parties." In this case it appeared from the minutes of the trial that an oral charge was expressly waived. *Held*, that this could not be construed otherwise than by a mutual consent. *People v. Kearney*, 43 Cal. 383.

7. *Munger v. Albany City Nat.*

## MUTUAL DEALINGS—MUTUAL INSURANCE.

**MUTUAL DEALINGS.**—See note 1.

**MUTUAL DEBTS.**<sup>2</sup>—See also **BANKRUPTCY**; **MUTUAL ACCOUNT**; **RECEIVERS**; **SET-OFF**.

**MUTUAL DEMANDS.**<sup>3</sup>—See also **MUTUAL ACCOUNT**; **RECEIVERS**; **SET-OFF**.

**MUTUAL INSURANCE**—(See also **BENEFICIAL ASSOCIATION**; **FIRE INSURANCE**; **INSURANCE**; **LIFE INSURANCE SOCIETIES**; **OFFICERS OF PRIVATE CORPORATIONS**; **STOCK AND STOCKHOLDERS**).

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1. The precise legal definition of the words "mutual dealings" does not seem to have been settled. In *Young v. Little*, 15 N. J. L. 1, the court said: "A defendant can only plead payment and give notice of set-off where there have been mutual dealings between him and the plaintiff, and where, if there is a balance due the defendant, he can have judgment for it against the plaintiff, and the same general language is used in the case of *Cumberland Bank v. Hann*, 18 N. J. L. 222." *Receivers v. Paterson G. L. Co.*, 23 N. J. L. 283.

Where the plaintiff company had deposited cigars with the defendants to secure a debt, an order for winding up the company was afterwards made, and, the secured debt having been paid off, the liquidator of the company claimed a return of the cigars, but the defendants refused to give them up. The liquidator brought an action of detinue for the cigars. Their value having been assessed, the defendants claimed, by way of counter-claim to set off, another debt due from the company to them against such value by virtue of the conjoint effect of section thirty-eight of the Bankruptcy act 1883 (the mutual dealings sections), and section ten of the Judicature act 1875, which applies to the rules of bankruptcy law to cases of winding up. *Held*, that they were not entitled to do

so on the ground that section thirty-eight is only applicable where the claims on each rule are such as result in pecuniary liabilities, whereas the right of the plaintiffs was to a return of the goods. *Eberle's Hotels & Restaurant Co. v. Jonas*, 18 Q. B. D. 465.

2. Where a person has given a town a bond in a criminal cause and he has a claim against the town, such a claim cannot be set off against the bond; they are not mutual debts. *Town of Wallingford v. Hall*, 45 Conn. 350.

In a suit brought by partners upon a partnership debt the defendant cannot set off a debt against one of the partners under statutes that provide for the selling off of mutual debts between parties to an action. *Meeker v. Thompson*, 43 Conn. 77-80.

3. An action was brought against the city of Boston to recover money due the plaintiff for his services as a teacher in the public schools in the city. The real party in interest was one Odin, to whom this claim had been assigned, and the city sought to set off certain taxes assessed to said Odin, and another as assignees of John Odin, which were unpaid. *Held*, that taxes assessed upon a citizen are neither demands founded on a judgment nor contract between the parties, and therefore these taxes and the said claim did not constitute mutual demands. There was a want of mutuality in the parties. *Pierce v. Boston*, 3 Metc. (Mass.) 520.

- 5. *Extent and Nature of Liability*, 34.
- 6. *Premium Notes*, 37.
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**I. DEFINITION AND DISTINCTIONS.**—The general definition of life insurance is applicable to contracts of mutual insurance, with but slight modification. The definition given in the statutes of Massachusetts relating to insurance on the assessment plan is applicable to all mutual insurance, since, whether the liability to assessments be fixed by the giving of premium notes or be left indefinite, the method of providing the fund for the payment of losses is the same. It is there defined as "any contract whereby a benefit is to accrue to a party or parties named therein, upon the death of a person, which benefit is in any manner conditioned upon persons holding similar contracts."<sup>1</sup>

The only distinction between contracts of mutual insurance and other insurance contracts consists in the fact that the liquidation of those of the former class is made from a fund obtained by periodical tax upon the members at stated intervals or as required, while in other cases the amount stipulated to be paid to the beneficiary is absolute and dependent only upon the success

<sup>1</sup> Statutes of Massachusetts, 1885, ch. 183, § 7; *Harding v. Littlehale* (Mass.), 22 N. E. Rep. 738. See INSURANCE, 11 Am. & Eng. Encyc. of Law 280.

Among the features distinguishing such companies from those who insure upon a capital paid up or secured are, that each insurer becomes a member of the association. The capital is com-

posed of premiums earned in the business and deposit notes. The deposit notes constitute the reserved fund, to be used as the necessities of expenses and losses require. The insurers become the mutual indemnifiers of each other against damage and loss from the elements insured against. *Planters' Ins. Co. v. Comfort*, 50 Miss. 662.

of the business and the ability of the insurer to pay the stipulated indemnity. Mutual insurance is largely done by what are called benefit assessment associations. In some of these the frequency as well as the amount of assessments is left wholly discretionary with the managing agents of the association; in other cases, premium notes are given for definite amounts, which amounts constitute the limit beyond which no assessment may be levied. But the manner in which the fund is to be raised to pay benefits and losses is unimportant, as, in a definition of mutual insurance, it is only an incident and a means of performing such contracts. Benefit associations often combine with business objects social and fraternal features; but whether organized as clubs, lodges and secret societies, or for the sole purpose of conferring upon their members the benefits of mutual insurance, the principles of insurance law equally apply to their contracts of insurance. When they combine business and social objects they have a dual nature, and in determining the rights and responsibilities of the members with respect to these contracts, this fact must be kept constantly in view. Different conclusions will be reached as we consider the one characteristic or the other.<sup>1</sup>

The general principles applicable to insurance contracts will, in this connection, be treated incidentally only, it not being within the purview of this article to consider other matters than those peculiar to, or specially pertaining to contracts of membership in mutual insurance and benefit assessment companies. The predominant feature of both benefit associations and other insurance companies is the payment of a specific sum on the death of the person who is a member of the organization, or whose life is insured. Both companies and societies may have, and usually do have, some careful medical examination, and certificates and the contracts of both are void by the violation of certain agreed conditions, or voidable by reason of misrepresentations prior to entering into the contract.<sup>2</sup>

Regular proprietary and stock insurance companies may assimilate the practice of collecting assessments after the manner of benefit societies without the insured becoming in any respect members of such companies and without entitling them to be called mutual insurance companies. In respect to the terms in the general insurance law applicable to contracts of membership in benefit societies, the "insurer" designates the society itself, while the power to designate recipients of the benefits is in the members. These recipients are the beneficiaries. The consideration for the contract is made up of assessments and dues, and the instrument evidencing the contract is the certificate of membership.

**II. KINDS OF MUTUAL INSURANCES—1. Premium Note Assessment.**—With respect to the nature of risks assumed mutual insurance may

1. *Mulroy v. Knights of Honor*, 28 Mo. App. 463.

2. *Bacon Benefit Societies and Life Ins.*, § 23.

be divided into life, accident, fire, marine, and other classes usually engaged in by insurers. With respect to the manner of securing the consideration and performing their contracts, mutual insurance companies are not susceptible of subdivision, although the methods of raising funds to meet losses and pay benefits are of almost infinite variety. Where a premium note is taken as a measure of liability to assessments, part of the note is regularly paid to meet assessments.

The only marked difference between contracts of membership in different societies is that, in some, premium notes are given and, in others, the limit to the power of assessment is either fixed in the charter and by-laws or not at all.

**2. Benefit Assessment—(a) Recent Development of Law on the Subject.**—Societies formed for the purpose of giving mutual relief to their members are of very ancient origin. They were numerous during the best days of Rome, when most of them were trade corporations, devoted to the interests of their crafts, though some of them were formed for good fellowship, to promote religion and other benevolent objects. As they are now known they are the legitimate successors of the clubs and guilds that have existed from ancient times in all countries. Through the centuries we can trace the co-operative idea from the sodalities and secret societies of remote periods to the formation of social and industrial associations of the present century, in which may be classed co-operative life insurance and fraternal bodies. In the Middle Ages social guilds sprang up all over Europe, chiefly in England and Germany, and one or more was found in every village. One of their principal objects was mutual assistance of the members in every exigency, especially in old age, in sickness, and in cases of impoverishment, if not brought on by their own folly; of wrongful imprisonment; of relief from losses by fire, water or shipwreck; by loans, provision of work, and the burial of the dead.<sup>1</sup>

Notwithstanding their ancient origin, the idea of co-operative insurance had not become a matter of considerable and general importance until within the last twenty-five years, and as a subject of litigation in the courts, such contracts had attracted but little attention until within ten years.<sup>2</sup>

1. Brentano's History and Development of Guilds.

2. The earliest case in the United States involving questions of benefit society life insurance was that raised in 1871, in *Wetmore v. Mutual Aid Ben. L. Ins. Assoc.*, 23 La. An. 770. The next case was decided in 1875. *Maryland Mut. Ben. Assoc. etc. v. Clendinen*, 44 Md. 429; s. c., 22 Am. Rep. 521. Since these cases there has been a constant increase year by year relating to contracts between benefit societies and their members. Like many other institu-

tions established for worthy objects, the law allowing their creation and exemption from burdens imposed upon regular insurance companies has been taken advantage of by the cunning and unscrupulous for the purposes of private gain.

The legislatures of California, of New York and of several other States early realized the magnitude of the trust necessarily reposed by the people in certain corporations, such as banking and insurance companies; and, in order to prevent gross abuses of trust and



Many of the secret fraternal orders in the United States have adopted the mutual benefit insurance system for relieving distress and providing against accident and misfortune among their members. Prominent in this respect are the Free Masons and Odd Fellows. Sometimes the insurance department is controlled and conducted directly by the organization, at others it is a separate auxiliary association.

confidence by them, enacted stringent laws for their restriction and regulation. The evident intendment of these enactments, taken as a whole, is the protection of the people from imposition and loss at the hands of dishonest and irresponsible insurers, and incidently the protection of legitimate, solvent and responsible companies which have complied with those restrictions and submitted to the burdens imposed by law, from unfair and unequal competition on the part of those of a different character which have not. It may, therefore, be stated as a fundamental principle that whatever has the effect of defeating either directly or indirectly this manifest purpose of the law is usurpation and a violation of its spirit. The usual *modus operandi* of "benevolent" insurers is for five or more individuals to sign, acknowledge and file in the office of the county clerk articles of incorporation, reciting that they do incorporate, not for profit, but for benevolent objects—that is, "to guard its members against the ills of pecuniary want during life, and especially during the period of infirm old age, and, at death, to make provision for their families and friends." How do they proceed to accomplish those benevolent objects? It is by visiting the sick and by relieving distress! Do they provide hospitals and alms houses as provisions against the disabilities and necessities of infirm old age? In case of a husband's death, do they hunt up the widow and orphans and present them with a fund collected equally and without charge from all surviving members, as authorized by the California Act of 1874, concerning mutual beneficial and relief associations? If they did all or any of these things and nothing more, no question could ever be raised as to the authority for the acts done under the acts of incorporation. Benevolent practices for which it is not only legal but commendable to incorporate and exercise a franchise under that act, would, in that case, be a public as well as a private blessing.

From a candid consideration of the character of business done by this class of associations it is easy to see that their business is not purely benevolent nor their motives entirely disinterested, whatever the character they give themselves in their articles and constitutions. There are only two classes of motives which actuate human beings—selfish and unselfish. The individuals who conduct the business under consideration are prompted by motives belonging to one or the other of these classes—that is, they are pushed forward by philanthropic zeal, or else the business yields them a profit. In the latter case the business does not come within any of the exceptions of benevolent associations from the restrictions of the insurance laws, howmuchsoever it ostensibly partakes of their nature in the high-sounding titles assumed by them. The section in the California Civil Code (451) reads as follows: "All associations or secret orders, and other benevolent or fraternal co-operative societies, incorporated or organized for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to its members or to the families of deceased members, and *not for profit*, are declared not to be insurance companies in the sense and meaning of the insurance laws of this State, and are exempt from the provisions of all existing insurance laws of this State."

While the contracts made by most associations of this class are in form and substance life insurance policies, it borders on the libellous to designate the business done by them as life insurance. It is classing with a legitimate and honorable calling that which often turns out to be grand larceny on a petty scale and petty larceny on a grand scale. But as it takes the place of life insurance and is believed and accepted as such by many, and prevents insurance in regular companies, it practically defeats the salutary provisions of the insurance laws and must be dealt with, to all practical intents

The English mutual benefit organizations possess the general feature of benefit associations in the United States, and those of both countries may well be called "the mutual assurance societies of the poorer classes, by which they seek to aid each other in the emergencies arising from sickness and death and other causes of distress."<sup>1</sup>

(b) *Forms of Organisation of Benefit Societies.*—Benefit societies, like other associations, of persons for agreed and lawful purposes may be simply voluntary associations, or they may become incorporated by special act or under general laws. Whether incorporated or not is important only as to determining their relations to third parties and the rights of the latter with respect to obligations growing out of the dealings with such associations. With reference to the contracts of the members with the association and their relative rights with each other, the fact of incorporation is unimportant. If incorporated, the special act or general incorporation law, together with such rules and regulations as they may adopt, enter into and affect the contracts of membership. If unincorporated, such by-laws alone, in connection with their contract of associa-

and purposes, as life insurance, legal or illegal. The articles of incorporation, standing alone, are without objection. It is in the conception and execution of benevolent designs that these benefactors of the race cause trouble.

But, granting that their contracts are honestly and impartially carried out, let us ask, as a legal proposition, what privilege is exercised, what advantage enjoyed and what opportunity for profit furnished companies which have complied with the laws by providing the guarantee fund and making annual statements to the State insurance commissioner that are not equally possessed, enjoyed and exercised by the class under consideration? And as the business of life, accident and health insurance is a franchise, a *quo warranto* proceeding will lie to forfeit the franchise usurped by this class of companies.

1. In *England* the law which now regulates friendly societies is that of 38 and 39 Vict., ch. 60, amended in 39 and 40 Vict., ch. 32. By it they are defined as "Societies established to provide by voluntary subscriptions of the members thereof, with or without the aid of donations, for the relief or maintenance of the members, their husbands, wives, children, fathers, mothers, brothers or sisters, nephews or nieces, or wards being orphans, during sickness or other infirmity, whether bodily or mental, in old age, or in widowhood, or for the re-

lief or maintenance of the orphan children of members during minority; for insuring money to be paid on the birth of a member's child, or on the death of a member; or, for the funeral expenses of the husband, wife or child of a member, or of the widow of a deceased member; or, as respects persons of the Jewish parish, for the payment of a sum of money during the period of confined mourning; for the relief or maintenance of the members when on travel in search of employment, or when in distressed circumstances, or in case of shipwreck, or loss or damage of or to boats or nets; for the endowment of members or nominees of members at any age; for the insurance against fire, to any amount not exceeding £15, of the tools or implements of the trade or calling of the members."

Mr. Bacon, in his treatise on benefit societies and life insurance, gives comprehensive and valuable information on the subject of benefit insurance by secret societies, and furnishes a list of leading beneficiary orders in the United States, together with their aggregate membership, p. 16. On p. 17, he says: "Closely allied to the beneficiary, or mutual aid life insurance organizations, are the secret ritualistic societies and charitable fraternities, whose characteristic features are good fellowship, social enjoyment and benevolence. The Freemasons, Odd Fellows and Knights of Pythias are examples. These numer-

tion, govern their rights and limit their liabilities. A contract of assurance effected with a friendly society unincorporated is generally not less beneficial than a policy effected with an incorporated company.<sup>1</sup>

While a majority of benefit societies are fraternal and social in their organization and have secret meetings and rituals, many are organized and conducted for the sole purpose of enjoying the benefits of co-operative insurance. Again, societies organized for fraternal and social objects, and having secret meetings and rituals, are composed of several distinct but not entirely disconnected judicatories or assemblies. The constitution and organization of such orders and societies into superior and subordinate lodges and assemblies, according to States and districts, and the enactment of numerous rules and regulations governing their relations to each other, give rise to many complex and difficult questions, for the settlement of which no known rules have been established by the courts, as much depends in each case upon its peculiar facts. However, where the element of property rights of members is the principal matter in dispute, the law makes no distinction between societies which are incorporated and those that are merely voluntary, but it does between questions involving the property rights of members and those concerning discipline only or policy of government.<sup>2</sup>

ous societies are secret in their organization and work, use a ritual and have initiatory ceremonies, and their members are pledged to secrecy. They are organized on the plan of local assemblies or lodges under the government and control of grand or supreme lodges. Some, like the Masons, make no promise of financial aid to members, but are charitable only, donating when necessity requires. Others, such as the Odd Fellows, expressly agree to pay stated amounts to their members in sickness or disability, and at death a certain sum for funeral expenses, and also to look after the widow and orphan. These societies have no life insurance feature."

1. *Courtenay v. Courtenay*, 3 Jones & La. T. 519.

Legal incorporation implies conformity with the terms of the charter or general law, as in the case of other corporations. *Morawetz on Corp.*, §§ 27, 28, 641-45, 939.

A society may acquire any rights conferred in the law under which it seeks to become incorporated. *Massachusetts Catholic Order of Foresters v. Callaghan*, 146 Mass. 391.

They have no implied powers other than those necessary for the purpose of

carrying into effect the powers expressly granted. *Ang. & Ames on Corp.* 111.

Articles of association are to be considered in the light of an agreement between the members, extending or limiting any general obligation which binds them to each other as members. *Protchett v. Schaefer*, 11 Phila. 116. See *Tyrrell v. Washburn*, 6 Allen 466; *Hyde v. Woods*, 2 Sawyer 655; affirmed 94 U. S. 523; *Leech v. Harris*, 2 Brewst. 571.

A voluntary association may do any legal act within the scope of its constitution and by-laws. The members are governed by the principles and rules of partnership and agency as respects third parties. *Leech v. Harris*, 2 Brewst. (Pa.) 571; *Ridgley v. Dobson*, 3 W. & S. (Pa.) 118; *Bullard v. Kinney*, 10 Cal. 60; *White v. Brownell*, 3 Abb. Pr., N. S. (N. Y.) 318; *Gorman v. Russell*, 14 Cal. 537; *Wells v. Gates*, 18 Barb. (N. Y.) 554; *Fleming v. Hector*, 2 M. & W. 171; *Dow v. Moore*, 47 N. H. 419; *Robinson v. Robinson*, 10 Me. 240; *Protchett v. Schaefer*, 11 Phila. (Pa.) 166.

2. In *Bauer v. Samson Lodge etc.*, 102 Ind. 262, the court said: "Claims for money due by virtue of an agreement are unlike mere matters of disci-

The result of all the decisions in this country and in England is that, with respect to property rights and contracts affecting property, the courts will apply the same principles to voluntary as to incorporated companies.

But while questions of discipline and government are constantly distinguished from those affecting pecuniary rights growing out of a contractual relation between the members and the organization, the right of property is often dependent on the question of doctrine, discipline, ecclesiastical law, rule, custom, or church government, and, in so far as the provisions of any of these are reasonable and not in conflict with law and the plain principles of justice, they will be allowed to control. A civil court will accept the decision which the members of a corporation or their duly authorized and appointed agents have made as conclusive, and be governed by it in its legitimate application in the case before it, whether involving an insurance or other contract.<sup>1</sup>

Since a corporation no less than a voluntary association is a mere association of persons for an agreed and lawful purpose, and since the real nature of the corporation depends upon the charter under which it is formed and must be determined by reference

pline, questions of doctrine or of policy, and are not governed by the same rules. . . . One who asserts a claim to money due on a contract occupies an essentially different position from one who presents a question of discipline, of policy or of doctrine of the order or fraternity to which he belongs."

All questions of policy, discipline and internal government and custom, when settled by judicatories of churches, fraternal associations and societies are generally accepted by the courts as final; but the rule is different when property rights are involved. *Watson v. Jones*, 13 Wall. (U. S.) 679.

In the case of *Smith v. Smith*, 3 Des-saus, 557, involving the right to a certain fund belonging to the incorporated Grand Lodge of Ancient York Masons, the action was brought in behalf of a voluntary association, claiming to be a successor of the corporation under the name of Grand Lodge of South Carolina. Incidentally, the distinction between certain masonic bodies and doctrines was discussed. The court laid down the rule that the Grand Lodge of Freemasons cannot make new regulations subversive of fundamental principles and landmarks without the clear consent of the subordinate lodges, and that the officers of the corporation composed of several integral parts

could not dissolve the corporation without the full consent of the great body of the society. See also *Goodman v. Jedediah Lodge etc.*, 67 Md. 117; *Court Mount Royal v. Boulton*, Q. B. (Quebec) 1881; *District Grand Lodge v. Jedediah Lodge*, 65 Md. 236. But see *Altmann v. Benz*, 27 N. J. Eq. 331.

*Austin v. Searing*, 16 N. Y. 112; s. c., 69 Am. Dec. 675, is a leading case upon the rights growing out of the complex organization of the Odd Fellows' fraternity, where all the constituent bodies were incorporated.

1. *Wilson v. John's Island Church*, 2 Rich. Eq. (S. Car.) 192; *Gibson v. Armstrong*, 7 B. Mon. (Ky.) 481; *Ferraria v. Vasconcelles*, 23 Ill. 403; *Watson v. Avery*, 2 Bush (Ky.) 332; *Harmon v. Dreher*, 1 Speer's Eq. (S. Car.) 87; *Smith v. Nelson*, 18 Vt. 511; *Shannon v. Frost*, 3 B. Mon. (Ky.) 253; *Miller v. Gable*, 2 Denio (N. Y.) 492; *Chase v. Cheney*, 58 Ill. 509; s. c., 11 Am. Rep. 95; *Watson v. Farris*, 45 Mo. 183; *German Reformed Church v. Seibert*, 3 Pa. St. 291; *McGinnis v. Watson*, 41 Pa. St. 21. See, as to jurisdiction, *Watson v. Avery*, 2 Bush (Ky.) 332; *Watson v. Avery*, 3 Bush (Ky.) 635; *Altman v. Benz*, 27 N. J. Eq. 331; *Hendrickson v. Shotwell*, 1 N. J. Eq. 577; *Lloyd v. Loring*, 6 Vesey 773; *Cullen v. Duke of Queensborough*, 1 Bro. C. C. 101.

thereto,<sup>1</sup> it follows that voluntary associations have many characteristics and rules in common, and all rights of the members and their powers, as well as of the association, are derived from the original compact between them contained in the constitution and by-laws.

Such constitution and by-laws, no less than a charter, regulate the admission of members and define their qualifications. The same rules of construction apply to the one as to the other, and a member may be expelled in accordance with the by-laws and constitution of a voluntary association with like effect as by compliance with those of a corporation.<sup>2</sup>

(c) *Legal Status.*—It is both unnecessary and foreign to the present purpose to consider the statutory enactments found in most, if not quite all, the States governing the business of insurance, and seeking to exempt from their provisions societies organized for benevolent and charitable purposes, having mutual benefit insurance as an adjunct, from the requirements and restrictions of such laws. The principal requirements of regular insurance companies are the deposit of a guaranty fund with a State officer, usually an insurance commissioner, and the making of periodical reports of the volume of business and financial condition to such officer.<sup>3</sup>

The courts have often been called upon to determine whether benevolent societies and benefit associations were really such, or came within the requirements intended for insurance companies. It is generally held, where the contract provides for the payment of a specified sum at death, or of benefits periodically, or upon certain contingencies, that it is one of insurance, and that the corporation or voluntary association is amenable to all the provisions and regulations concerning insurance companies.<sup>4</sup>

1. *Morawetz Priv. Corp.*, §§ 6, 7, 316, 580; *Com. v. St. Patrick's Soc.*, 2 Binn. (Pa.) 441; 4 Am. Dec. 453; *Leech v. Harris*, 2 Brewst. (Pa.) 571.

2. In *Diligent Fire Co. v. Com.*, 75 Pa. St. 291, the court said: "It is true the power of admitting new members being incidental to a corporation aggregate, it is not necessary that such power be expressly conferred by the statute. Yet when the statute does limit and restrict the power, it erects a barrier beyond which no by-laws can pass."

3. *Pub. Stat. Mass.* 1880, ch. 115, §§ 8-10; *Amended Stat.* 1882, ch. 195, § 2; *Rev. Stat. Mo.* 1879, §§ 972, 973; *Rev. Stat. Ohio* 1880, § 3630; *Ill. Stat.* 1885, ch. 32, § 31.

4. *State v. Critchett*, 37 Minn. 13, following *Foster v. Pray*, 35 Minn. 458; *State v. Trubey*, 37 Minn. 97; *Com. v. Wetherbee*, 105 Mass. 149; *Golden*

*Rule v. People*, 118 Ill. 492; *State v. Citizens' Ben. Assoc.*, 6 Mo. App. 163; *State v. Vigilant Ins. Co.*, 30 Kan. 585; *State v. Merchants' Exchange Ben. etc. Soc.*, 72 Mo. 146; *State v. Farmers' etc. Ben. Assoc.*, 18 Neb. 276; *State v. Bankers' & Merchants' Mut. Ben. Assoc.*, 28 Kan. 499; *Bolton v. Bolton*, 73 Me. 299; *State v. Standard L. Assoc.*, 38 Ohio St. 281; *Farmer v. State*, 67 Tex. 561; *State v. Miller*, 66 Iowa 26.

In *State v. Whitmore*, 75 Wis. 332, a construction was given to *Laws Wis.* 1879, ch. 204, § 1, which provides that "the secret, beneficiary, charitable and benevolent orders of Free Masons, Odd Fellows, and Knights of Pythias (naming several), are hereby declared not to be life insurance companies in the sense and meaning of the general laws of this State relating to life insurance and life insurance companies; and such societies, orders and associations are,

The decisive test applied by the courts is the object for which they are organized and the consideration upon which the contracts of membership are based.

It may be important, as a guide for determining whether the object of the company be benevolence or mutual profit of its members, to enquire whether any provision has been made for carrying out the benevolent purposes specified in the charter or articles.<sup>1</sup>

and shall hereafter be, exempt from the provisions of said general laws." By various amendments the provisions of the act were extended to other societies. Laws 1883, ch. 94, added to the section: "and no other societies are hereby declared to be exempt." It was held that an Odd Fellows' association, duly incorporated under the laws of another State for the purpose of fraternal benevolent insurance upon the co-operative or assessment plan, among the members of the Independent Order of Odd Fellows, was exempt under this statute and amendments thereto, though it was not named in that act or any amendment thereto.

By Rev. Stat. Ill. 1874, ch. 32, relating to corporations not for pecuniary profit, it is provided (section 31), that "associations and societies which are intended to benefit the widow, orphans, heirs and devisees of the deceased members thereof, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise, shall not be deemed insurance companies." Defendant organized under this chapter, and by the certificate filed with the secretary of State declared its purpose to be "to give financial aid and benefit to the widows, orphans and heirs or devisees of deceased members." Held, that a clause in a certificate issued to a member agreeing to pay him, on his arriving at a certain age, a sum equal to the number of members in his division, was *ultra vires*, but that it did not invalidate the certificate as one to pay the benefits to his widow, etc. *Rockhold v. Canton Masonic Mut. Ben. Assoc.* (Ill.), 19 N. E. 710. See also *Golden Rule v. People*, 118 Ill. 492.

A scheme of a so-called benevolent association, which depends for its success upon the lapsing of a very large proportion of its membership, was considered to be clearly not within the meaning of the New Jersey statute au-

thorizing the formation of benevolent and charitable institutions. And it was held that the court would appoint a receiver to take charge of and distribute the assets among the members. *Peltz v. Supreme Chamber of the Order of Financial Union* (N. J.), 19 Atl. Rep. 668.

In *Pennsylvania*, a beneficial association whose design was not to indemnify against loss, but to accumulate a fund from the contributions of its members to be used in their own aid or relief in case of sickness, injury or death, was held not an insurance company, but within the provisions of Act Pa., April 29th, 1874, cl. 9, allowing the organization of societies for beneficial or protective purposes. *Com. v. Equitable Ben. Assoc.*, 25 W. N. C. (Pa.) 34; s. c., 18 Atl. Rep. 1112.

But a different view was taken by the Supreme Court of Iowa upon a similar state of facts, the statutes of the two States on the subject being substantially the same. *State v. Nichols* (Iowa), 41 N. W. Rep. 4.

1. In *State v. Bankers' & Merchants' Mut. Ben. Assoc.*, 23 Kan. 499, the court said: "Elaborate and stringent provisions are made in relation to the beneficiary fund payable on the death of a member, and for collecting and enforcing the payment of such amounts as are assessed on each member; but we have been unable to discover any provision for enforcing any of the other declared objects of the association stated in the preamble to the constitution of the supreme lodge, including 'sick benefits.' If the provisions of a fraternal character be eliminated from the association, its primary and only purpose is that of a life insurance organization." See *Bolton v. Bolton*, 73 Me. 299; *Folmer's Appeal*, 87 Pa. St. 133; *Illinois Masons' Ben. Soc. v. Winthrop*, 85 Ill. 537; *Illinois Masons' Ben. Soc. v. Baldwin*, 86 Ill. 479; *State v. Citizens' Ben. Assoc.*, 6 Mo. App. 163.

"So far as corporations, carrying on a life insurance business, either on the plan of annual, semi-annual or quarterly premiums and the accumulation of a reserve fund, or upon the new assessment plan, where calls are made, as necessity requires, monthly or less or more frequently, are concerned, it may be said that it is hard to conceive of any reason why such organizations should be governed by any rules different from those regulating other corporations."<sup>1</sup>

The same rule has been applied to incorporated lodges, superior and subordinate, and to other secret, social and benevolent organizations.<sup>2</sup>

(d) *Internal Management and Powers.*—An incorporated benefit assessment association has the powers derived from its charter or the general law under which it is incorporated, as other corporations. No more can such a corporation than any other change the purpose for which it was organized, as specified in its articles, without the consent of all its members.<sup>3</sup>

1. Bacon on Ben. Socs. & Life Ins., § 78.

A "mutual reliance society," constituted for pecuniary gain, cannot be formed under the act for the incorporation of benevolent, charitable, scientific and missionary societies. *People v. Nelson*, 46 N. Y. 477.

2. *Erdman v. Mutual Ins. Co. etc.*, 44 Wis. 376; *Bolton v. Bolton*, 73 Me. 299.

3. For application of principle to business corporations, see *Zabriskie v. Hackensack etc. R. Co.*, 18 N. J. Eq. 178; *Morton v. Smith*, 5 Bush (Ky.) 467; *Marston v. Durgin*, 54 N. H. 347; *Torrey v. Baker*, 1 Allen (Mass.) 120; *Hochreiter's Appeal*, 93 Pa. St. 479; *Ray v. Powers*, 134 Mass. 22; *Abels v. McKeen*, 16 N. J. Eq. 462; *Kean v. Johnson*, 9 N. J. Eq. 401.

A mutual fire company, organized under Laws Wis., 1885, ch. 421, § 2, which enacts that "no such corporation shall insure any property other than detached dwellings and their contents, farm buildings and their contents, livestock in possession and running at large, farm products on premises and farming implements," has no power to insure an incubator building. *O'Neil v. Pleasant Prairie Mut. F. Ins. Co.*, 71 Wis. 621.

When the statutes under which mutual fire insurance companies are organized confine their business to certain territory, as to three counties, policies issued outside the three counties mentioned in a company's charter are *ultra*

*vires* and void. *Eddy v. Merchants' etc. Mut. F. Ins. Co.*, 72 Mich. 651.

Under Rev. Stat. Mo. 1879, § 5988, a mutual company does not expose itself to the charge of doing business upon the joint stock plan by receiving all cash premiums on all policies running less than six years; nor is there any objection to its issuing policies for less than six years, except policies issued on account of notes given to the organization of companies organized without a guarantee fund, which are expressly required to run for not less than six years. *State v. Manufacturers' Mut. F. Ins. Co.*, 90 Mo. 311.

The Massachusetts statute provides that certain benevolent associations may, "for the purpose of assisting the widows, orphans or other persons dependent upon deceased members, provide in its by-laws for the payment by each member of a fixed sum to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto." The supreme court of that State construed this statute to mean that associations organized under this provision have no power to create a fund for other persons than of the classes named. *Massachusetts Catholic Order of Foresters v. Callahan*, 146 Mass. 391; *Commercial League Assoc. v. People*, 90 Ill. 166; *Elsley v. Odd Fellows' Mut. Relief Assoc.*, 142 Mass. 224; *Benefit Soc. v. Dugre*, 11 *Revue Légale* (Queb.) 344.

Members of a mutual fire and marine

They have no power to provide for, or to make contracts of insurance for the benefit of others than those limited in the charter or general laws.<sup>1</sup>

And the same rule applies with respect to the powers of the majority and the rights of the minority as in other private corporations.<sup>2</sup>

The relative rights of members as such are governed by the terms of the contracts of membership, and are regulated by the articles of association or constitution and by-laws.<sup>3</sup>

If the association be voluntary—that is, unincorporated—the members are governed by such by-laws, rules and regulations as they may agree upon. In all cases of dispute as to rights or duties of such bodies, the original compact is the measure by which a decision is to be reached.<sup>4</sup>

company were held estopped from questioning its powers after having had full notice of an arrangement in which they had acquiesced and which had been advertised for more than twenty years. *Doane v. Millville Mut. M. & F. Ins. Co.*, 43 N. J. Eq. 522.

1. *State v. Moore*, 38 Ohio St. 7.

In *Rockholder v. Canton Masonic Mut. Ben. Assoc.* (Ill.), 19 N. E. Rep. 710, it was held that the defendant was not estopped to evoke the doctrine of *ultra vires*, because plaintiff had, from time to time after receiving his certificate, paid assessments, which were turned over by defendant to the persons entitled thereto under beneficiary certificates.

To same effect is *Bloomington Mut. L. Ben. Assoc. v. Blue*, 23 Ill. App. 518.

2. *Sizer v. Daniels*, 66 Barb. (N. Y.) 426; *Richmond v. Judy*, 6 Mo. App. 465; *State v. Central Ohio Mut. Relief Assoc. etc.*, 29 Ohio St. 399; *State v. Mutual Protection Assoc.*, 26 Ohio St. 19; *State v. People's Ben. Assoc.*, 42 Ohio St. 579; *State v. Standard L. Assoc.*, 38 Ohio St. 281; *National Mut. Aid Assoc. v. Gonser*, 43 Ohio St. 1.

3. One who becomes a member of a mutual insurance company after it has practically adopted the provisions of a statute authorizing the property insured to be divided into classes, and acted thereon for several years, cannot object, in an action to recover an assessment upon his deposit note, that the same were not formally adopted at a meeting regularly called for that purpose. *Citizens' Mut. F. Ins. Co. v. Sortwell*, 8 Allen (Mass.) 217.

4. *Austin v. Searing*, 16 N. Y. 112;

s. c., 69 Am. Dec. 665; *Chamberlain v. Lincoln*, 129 Mass. 70; *Leech v. Harris*, 2 Brewst. (Pa.) 587; *White v. Brownell*, 3 Abb. Pr., N. S. (N. Y.) 318; *Lowry v. Stotzer*, 7 Phila. (Pa.) 397.

The construction of all such constating instruments is the duty of the court, and neither the opinions of the officers of the society nor of its custom and usage in respect to their interpretation are admissible evidence in actions growing out of their contractual relation, if the language used be not ambiguous. *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 122; *Davidson v. Knights of Pythias*, 22 Mo. App. 263; *Manson v. Grand Lodge A. O. U. W.*, 30 Minn. 509.

But, in cases involving property rights, a member may at once resort to the courts. He is not bound to leave the determination of such rights to the tribunals of the order or association; but if he consent to an adjudication by the society, he is bound as by an arbitration, in the absence of oppression, fraud, or the violation of the principles of natural justice. It is not within the power of any organization, by the provision of its constitution and by-laws, or by the conduct of its internal affairs, to deprive a member or class of members of any substantial property right. Forfeiture of the conventional charter of a society incorporated by the State will not divest its property, nor can the property be affected by a secession of part of its members. Even if unincorporated, the majority of a society have generally the right to cut loose from a superior governing body, and the minority have no redress if the property is used for the general purposes for



**III. CERTIFICATES OF MEMBERSHIP**—1. **Essential and General Features.**—Certificates of membership, while differing in many respects, usually contain certain similar predominant features. These are, the provisions whereby the party becomes a member; the agreement to pay dues, assessments, and such other contributions as may be provided for in the contract and to abide by the constitution and by-laws of the association. On the part of the society, to pay benefits and death losses, as authorized by the charter or articles of association, either to the member or to such other person as is designated in the contract; or the member may be authorized in the certificate to designate some other person, or to change from the one designated in the contract to any other he may afterwards prefer. In all cases the document issuing to the members of a benefit society must be such as its laws prescribe. Certificates of membership are set out in full in the following cases:<sup>1</sup>

Such certificates are, in legal contemplation, policies of insurance, and are in many respects governed by the general rules of law which apply to insurance contracts.<sup>2</sup>

which it was acquired. See *Bacon on Ben. Soc. & Life Ins.*, § 116.

The authority of subordinate lodges to waive the requirements of the laws of the order of which they are constituent parts, in regard to assessments, has been questioned. *Borgraefe v. Supreme Lodge Knights of Honor*, 22 Mo. App. 127.

But where the constitution of the grand lodge of a fraternal order provided that, in case of failure by a subordinate lodge to do certain things, it "shall be deemed an extinct lodge, and its charter shall be forfeited," it was held that, as the subordinate lodge was incorporated under the State laws, its suspension by the grand lodge had no effect on its legal existence, and gave to the representatives of the grand lodge no right to the possession of property of which the former was the owner, and in which the grand lodge had no right, title or interest. *Merrill Lodge No. 299, I. O. G. T. v. Ellsworth*, 78 Cal. 166.

Where the minority members of a lodge had seceded from the lodge, and refused to pay dues, it was held that they had thereby forfeited their certificates. The court considered that as long as the member paid his dues, and remained in good standing, his certificate could not be forfeited by a forfeiture of the charter of the lodge declared by the general order, but might be for his failure or refusal to pay such dues. *Goodman v. Jedidjah Lodge*, 67 Md. 117.

1. *Supreme Lodge Knights of Honor v. Johnson*, 78 Ind. 110; *Richmond v. Johnson*, 28 Minn. 447; *Wendt v. Iowa Legion of Honor*, 72 Iowa 682; *Grand Lodge A. O. U. W. v. Child*, 70 Mich. 163; *Supreme Lodge Knights of Pythias v. Schmidt*, 98 Ind. 374; *Supreme Council of Royal Templars of Temperance v. Curd*, 111 Ill. 286; *Supreme Commandery Knights of the Golden Rule v. Alnsworth*, 71 Ala. 437; s. c., 46 Am. Rep. 332; *Holland v. Taylor*, 111 Ind. 121.

The charter provided that "every person who shall become a member of this company by effecting an insurance therein, shall, before he receives his policy, deposit with the treasurer the sum of twenty-five cents for every \$1,000 worth of property he shall have insured." Plaintiff had a policy on his barn, and subsequently applied for an insurance on the contents of the barn. Held, that at the time of the latter application he was a member. *Farmers' Mut. Ins. Co. v. Mylin (Pa.)*, 15 Atl. Rep. 710.

A new benefit certificate issued to change the beneficiary, upon application made in accordance with the by-laws of the union, and signed by the supreme president and secretary of the union, and sealed with the seal of the supreme union, is not invalid because not signed and sealed by the officers of the subordinate union. *Fiske v. Equitable Aid Union (Pa.)*, 11 Atl. Rep. 84.

2. *Elkhart Mut. Aid etc. Assoc. v.*

Such contracts are none the less contracts of mutual insurance, because the amount to be paid by the corporation is not a gross sum, but a sum graduated by the number of members holding similar contracts; nor because a portion of the premiums is to be paid upon the uncertain periods of the deaths of such members; nor because in case of nonpayment of assessments by any member, the contract provides no means of enforcing payment thereof, but merely declares the contract to be at an end, and all moneys previously paid by the assured, and all dividends and credits accrued to him, forfeited to the company.<sup>1</sup>

Houghton, 98 Ind. 149; s. c., 53 Am. Rep. 514; Supreme Lodge Knights of Pythias v. Schmidt, 98 Ind. 374; Bauer v. Samson Lodge, 102 Ind. 262; Supreme Commandery Knights of the Golden Rule v. Ainsworth, 71 Ala. 443; s. c., 46 Am. Rep. 332.

1. In *Com. v. Wetherbee*, *supra*, a contract had been made between the Connecticut Mutual Benefit Company and each of its members, and certificates of membership issued according to its charter, the consideration being assessments to be paid from time to time as levied by the managing agents. The court held that the contract did not differ in any essential particular of form or substance from an ordinary policy of mutual life insurance, and said: "The contract made between the Connecticut Mutual Benefit Company and each of its members, by the certificates of membership issued according to its charter, does not differ in any essential particular of form or substance from an ordinary policy of mutual life insurance. The subject insured is the life of the member. The risk insured is death from any cause not excepted in the terms of the contract. The assured pays a sum fixed by the directors and not exceeding \$10 at the inception of the contract, and assessments of two dollars each annually, and of one dollar each upon the death of any member of the division to which he belongs during the continuance of the risk. In case of the death of the assured by a peril insured against, the company absolutely promises to pay to his representatives, in sixty days after receiving satisfactory notice and proof of his death, 'as many dollars as there are members in the same division, the number of which is limited to five thousand. The payment of this sum is subject to no contingency but the insolvency of the corporation. The means of paying it are derived

from the assessments collected upon his death from other members; from the money received upon issuing other certificates of membership, which the by-laws declare may, after payment of expenses, be 'used to cover losses caused by the delinquencies of members;' and from the guarantee fund of one thousand dollars, established by the corporation under its charter."

A leading case on this subject is that of *Farmer v. The State*, 67 Tex. 561. A corporation had been organized under the name of the Masonic Mutual Benevolent Association of Texas, to provide for its members during life and their families after death, and provided in its constitution and by-laws to pay to members at death a certain sum in consideration of membership fee and future assessments. An examination as to health and physical condition by a physician was required before admission. It was held that the objects of the association were not benevolent, but that the consideration for the contracts between the members and the corporation was mutual profit; that it was an insurance company and amenable to all the provisions of Rev. St. Tex., tit. 20, relating to such companies. The appellants contended that a subsequent act of the legislature recognized the association as benevolent, and that it had made reports as required by the statute concerning such associations. The court said: "The evil the statute intended to remedy was the conducting of an insurance company for the profit of its officers, under the guise of benevolence and in evasion of the insurance laws. The statute recognizes the existence of mutual benefit societies claiming to be benevolent. It proposes to test whether they are really so, or carried on for the profit of their officers. It gives them an opportunity of establishing their benevolent nature by reporting certain named facts from which

The authorities are not uniformly clear as to where the terms of such contracts are to be found. Some of the courts say in the contract of membership itself; others, that it is in the constitution, by-laws, etc., of the organization. It is probably correct to say that it is in both and all.<sup>1</sup>

As contracts, they present no extraordinary features, nor do they call upon the courts for a difficult task of construction in and of themselves, however much the question may be complicated by the necessity of examining and interpreting provisions

this question can be determined. If they fail to make the report, the presumption is conclusive that it would disclose their object and effect to be the emolument of their officers by means of a life insurance business. If the report showed this to be their true character, they were not to be exempted from the burdens imposed on other insurance companies. There was not such virtue in the report itself as would shield the society from the consequences of an act against which the statute was attempting to provide. If the report upon its face showed that the purpose of the organization was benevolent, no conclusive presumption to that effect was established. The society could not protect itself by incorrect statements. The State had the best means it could suggest to call to account such corporations as were flying the flag of benevolence and yet doing business for the benefit of its officers. If this failed to disclose their true character, it did not intend to deprive itself of all power to ascertain that character by other appropriate evidence to allow violators of the law to escape upon their own statement of their innocence."

In *Bolton v. Bolton*, 73 Me. 299, the subject underwent thorough investigation, and an institution with purposes similar to the above was held to be a mutual life insurance company. In *State v. Critchett*, 37 Minn. 13, the Supreme Court of Minnesota held that a company, formed by married men with the purpose of endowing the wife of each member upon marriage with a sum of money equal to the then number of members, was not a benevolent association. The court said: "The members paid a *quid pro quo*, and did not receive their money as an act of benevolence on the part of their fellow members." See also *State v. Farmers' etc. Benevolent Assoc.*, 18 Neb. 281; *Com. v. Wetherbee*, 105 Mass. 149; *May Ins. 550*; *State v. Citizens' Ben.*

*Assoc.*, 6 Mo. App. 163; *State v. Merchants' Exchange etc. Soc.*, 72 Mo. 146; *People v. Nelson*, 46 N. Y. 477; *State v. Standard L. Assoc.*, 38 Ohio St. 281.

The attempts of individuals to associate themselves together, either in a corporate capacity or otherwise and obtain the benefits of insurance, and at the same time escape the burdens and duties imposed upon insurance companies, have led to the prosecution of actions *quo warranto* as a result of which they have been in several instances declared to be mutual insurance companies and their charters held forfeited to the State, for noncompliance with conditions imposed by statute upon insurance companies organized and conducted for profit.

The expositions given in the cases just cited, furnish a safe guide to the distinction between benevolent associations proper and those which are so in name only but really mutual insurance companies.

1. In *Hellenberg v. District No. 1 of I. O. O. B.*, 94 N. Y. 580, the court said: "The charter and by-laws of the corporation constitute the terms of an executory contract, to which the testator assented when he accepted admission into the order." In a similar case in Wisconsin the court said: "The constitution and by-laws certainly contain the contract which was entered into by the parties."

"The contract is contained in the certificates." *Schunck v. Gegenseitiger etc. Fund*, 44 Wis. 375.

The correct principle is thus stated, "The charter, by-laws and certificates of membership taken together show what was the understanding of the parties." *Worley v. Northwestern Masonic Aid Assoc.*, 10 Fed. Rep. 228; *Presbyterial Mut. Assurance Fund v. Allen*, 106 Ind. 593. For other declarations on this point, see *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 192;

of the charter and by-laws which, as has been stated, enter into and form a part of such contracts. The primary rule is that the intent of the legislature and of the parties to the contract or designation must be first ascertained and then given effect.<sup>1</sup>

The consideration of the contracts of benevolent associations consists in the assessments and dues paid, which answer the same purpose as premiums paid by the insured to other companies. The same conditions and provisions with respect to forfeiture of rights for nonpayment are usually provided for in these contracts as in ordinary policies of insurance.<sup>2</sup> The provisions of the certificate with respect to the payment of the sum therein stipulated for must be substantially complied with. Such a contract is not one of insurance for a single year with the privilege of renewal from year to year by paying the periodical dues and assessments, but it is an entire contract of assurance for life, subject to discontinuance and forfeiture for nonpayment.<sup>3</sup>

In a mutual insurance company membership dates from the consummation of a contract and not before.<sup>4</sup> During negotia-

*Dolan v. Court of Good Samaritan*, 128 Mass. 437; *Van Bibber v. Van Bibber*, 82 Ky. 350; *Splawn v. Chew*, 60 Tex. 535; *Eastman v. Provident Mut. Relief Assoc.* (N. H. 1883), 20 Cent. L. J. 266.

1. *Bishop on Con.*, § 380; 2 Pars. on Con., p. \*494; 1 Redf. on Wills, p. \*433 and vol. 2, p. \*20.

The whole of the statute, law, contract or designatory writing must be looked at and considered. The courts are uniform in holding that the rules and regulations of benefit societies are to be construed liberally when resorted to for the purpose of effecting benevolent objects. *Supreme Council American Legion of Honor v. Perry*, 140 Mass. 580, 589; *Supreme Lodge Knights of Honor v. Martin* (Pa.), 12 Ins. L. J. 628; 13 W. N. C. (Pa.) 160; *Maneely v. Knights of Birmingham*, 115 Pa. St. 306; *Erdmann v. Mutual Ins. Co.*, 44 Wis. 376; *Ballou v. Gile*, 50 Wis. 614; *Supreme Lodge Knights of Pythias v. Schmidt*, 98 Ind. 381; *Gundlach v. Germania Mechanics' Assoc.*, 4 Hun (N. Y.) 339; *Expressman's Aid Assoc. v. Lewis*, 9 Mo. App. 412; *Whitehurst v. Whitehurst*, 83 Va. 153; *Masonic Mut. Relief Assoc. v. McAuley*, 2 Mackey (D. C.) 70; *Duvall v. Goodson*, 79 Ky. 224; *Van Bibber v. Van Bibber*, 82 Ky. 347; *Massey v. Mutual Relief Assoc.*, 102 N. Y. 523; *Dietrich v. Madison Relief Assoc.*, 45 Wis. 79.

2. The payment of the premium in one case and of assessments in the

other, operates merely to continue the old contract. *Mutual Ben. L. Ins. Co. v. Robertson*, 59 Ill. 123; s. c., 14 Am. Rep. 8. But the nonpayment of assessments will not forfeit the rights of the member under the certificate unless so provided. *American Ins. Co. v. Klink*, 65 Mo. 78; *Woodfin v. Asheville Mut. Ins. Co.*, 6 Jones L. (N. Car.) 558.

3. *Worthington v. Charter Oak Life Ins. Co.*, 41 Conn. 399; *New York L. Ins. Co. v. Statham*, 93 U. S. 24.

*Acts 18th Gen. Assem. Iowa*, ch. 211, § 2, providing that an omission to attach to insurance policies the applications and representations upon which they are issued shall not invalidate the policy, but merely preclude the company from pleading or proving the falsity of such representations, is applicable to the policies of mutual benefit associations. *McConnell v. Iowa Mut. Aid Assoc.* (Iowa), 43 N. W. 188.

A condition in a policy of a mutual insurance company, that "when a note is taken for the cash premium, if it is not paid within sixty days after due, all obligations of the company to the insured, until such note is paid, are suspended," held valid. *Joliffe v. The Madison Mut. Ins. Co.*, 39 Wis. 111; s. c., 20 Am. Rep. 35.

4. *Ellenberger v. Protective Mut. F. Ins. Co.*, 89 Pa. St. 464.

A person who had presented to and was accepted by a mutual life insurance company his application for membership, and premium note properly signed,

tions for insurance, a mutual company occupies no other or better position than one organized on the stock plan, and cannot profit by the fraud of its agent; for the membership arises from but does not precede the contract.<sup>1</sup> As to all preliminary negotiations, the agent acts only on behalf of the company.

Where the insured surrenders his policy, and it is agreed by the company that it shall be cancelled, the insured, from that time, ceases to be a member, and, although liable to assessments, which accrued while he was a member, is not liable for debts contracted after the surrender of his policy.<sup>2</sup>

It is often necessary to keep in view the fact that, though the contract of membership embodies the contract of insurance, the latter is in effect a distinct and independent matter.

When mutual contracts are independent, the neglect of one party to perform will not absolve the other party from performance. A contract, made by a mutual insurance company with one of its members, is equally binding as if made with a stranger.<sup>3</sup>

In the absence of statutory restrictions, minors are not ineligible to membership in mutual benefit societies. The objection

is a member, notwithstanding the directors have not formally and officially accepted such application. *Van Slyke v. Trempealeau etc. Ins. Co.*, 48 Wis. 683; *Susquehanna Ins. Co. v. Perrine*, 7 W. & S. (Pa.) 348; *Eilenberger v. Protective Mut. F. Ins. Co.*, 89 Pa. St. 464; *Cumberland Valley Mut. Protective Co. v. Schell*, 29 Pa. St. 31; *Noyes v. Phoenix Mut. L. Ins. Co.*, 1 Mo. App. 584.

A person who has neither taken a policy in a mutual fire insurance company, nor signed an application, nor paid a premium, is not a member, and in case of the insolvency of the company is not liable to assessment. *Com. v. Massachusetts Mut. F. Ins. Co.*, 112 Mass. 116.

Where the execution and delivery of a deposit note for premiums was made a condition precedent to membership, and it was further provided in the charter that no one could be insured by the company except members, it was held that to constitute one a member for purposes of insurance he must place himself in such a position that only the fault of the company prevents his becoming a member. *Belleville Mut. Ins. Co. v. Van Winkle*, 12 N. J. Eq. 333.

1. As to fraud inducing the execution of the policy or certificate of membership, see *Salmon v. Richardson*, 30 Conn. 360; s. c., 79 Am. Dec. 255; *Jones v. Dana*, 24 Barb. (N. Y.) 395; *Deven-dorf v. Beardsley*, 23 Barb. (N. Y.) 656;

*Brown v. Donnell*, 49 Me. 421; s. c., 77 Am. Dec. 266; *Fogg v. Griffin*, 2 Allen (Mass.) 1; *Sterling v. Merchants' Mut. Ins. Co.*, 32 Pa. St. 75; s. c., 72 Am. Dec. 773.

2. *Akers v. Hite*, 94 Pa. St. 394; s. c., 39 Am. Rep. 792.

Notwithstanding a clause in the charter of a mutual insurance company declaring that all persons who shall insure with the company, and their heirs, etc., "so long as they shall be insured in said company, shall be and continue members thereof, and no longer," persons are still members of the company, and liable to contribute for the losses sustained, although they have alienated the property without the written consent of the company. *Hyatt v. Wait*, 37 Barb. (N. Y.) 29.

3. *New England Mut. F. Ins. Co. v. Butler*, 34 Me. 451. In *Hays v. Lye-coming F. Ins. Co.*, 98 Pa. St. 184, in reversing the judgment of the inferior tribunal, the court said: "The mistake made in the court below was in treating the case as though the plaintiff was a member of the company, whereas it had nothing more to do with the company than has one who is insured in a joint stock association to do with the affairs of such association. He is therein interested to the amount of his insurance and no further. If he meets with a loss he requires payment, but he can require nothing more, and it is none of his concern how the money

that an infant can avoid his contract is not important, as adult members may do the like without incurring liability.<sup>1</sup>

**2. Whole Term Life Certificates.**—In mutual, as in other companies, the contracts of insurance are made to cover either the whole period of life or a shorter term. In life, or, as they are called, whole term policies, the agreement may be to pay a sum certain or a given sum for each solvent member holding forfeited contracts at the date of death of the insured. Sometimes dividends are provided for to be applied in reduction of assessments, but this provision is seldom made in the contracts of strictly mutual benefit societies, where there are no stockholders. The practice of allowing dividends as a rebate is confined to certain companies, which combine the features of mutual benefit with capital stock.

**3. Endowment.**—Many benefit associations, especially those organized for the sole or main purpose of paying benefits and death losses, issue endowment as well as whole term certificates, thus further imitating the methods of regular or "old style" insurance. In endowment certificates the stipulated sum is payable to the insured if he should survive a certain period, or attain a specified age, and if he die before the expiration of the specified period, the payment to be made to his representatives or to a person designated.<sup>2</sup> There are two kinds of endowment certificates. First, where the sum specified becomes payable only if death should occur during the time specified in the policy. The insurance may be upon one or more lives, payable at the termination of one or of both; or, if one should terminate before the other, to the survivor. Second, where the sum is payable at the death of the insured, if that should occur before the death of another person named in the certificate, but not otherwise. Should such other person die before the insured, the transaction fails. Endowment certificates are contracts of life insurance as much as if they covered the whole terms.<sup>3</sup>

is raised by which he is paid. If payment is refused he must pursue his ordinary legal remedies, and to him attaches none of either the rights or disabilities of membership."

1. *Chicago Mut. L. etc. Assoc. v. Hunt*, 127 Ill. 257.

In the same case it was held not to be a valid objection to minors as members that they could not act as trustees, because of their immaturity of judgment. The same objection would hold against many adult members, yet their lack of intelligence or business experience would be no reason for excluding them from membership. *Id.*

2. According to article 11, section 1, of the constitution of the endowment rank of the Knights of Pythias, a bene-

fit certificate of life insurance is not forfeited for the nonpayment of the local lodge dues until the member is more than six months "in arrears" for the dues. *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 122.

3. *Briggs v. McCullough*, 36 Cal. 550; *Carter v. John Hancock Mut. Fishing Ins. Co.*, 127 Mass. 153; *Endowment & Ben. Assoc. v. State*, 35 Kan. 262; *Goodman v. Jedidjah Lodge*, 67 Md. 117.

Where a lodge had issued endowment certificates to each member, which entitled his wife and children, or other beneficiary whom he might name, to \$1,000 upon his death, it was held that such certificates are in all essentials insurance policies, and the courts will adjudicate the rights of the members, in reference

**4. Fire Policies.**—The charter, the policy issued by the company, and the conditions annexed thereto govern the rights and duties of the parties in a mutual fire insurance company, and must be read together. The main distinguishing feature of a fire policy is in the matter of assignability and the effect upon the contract of insurance of an alienation of the property covered. In this respect the result of all the authorities may be thus stated: 1. That a sale of the property covered cannot take place without the consent of the company.<sup>1</sup> 2. That the purchaser must be one whose purchase has been made with the consent of the company, or has been ratified and approved by it. 3. That the purchaser must be a different person from the parties insured, or either of them. In other words, the same must be to a third person, and not to one of the assured. The entire interest must be transferred to some one who was not interested in it previously. 4. That the assured cannot terminate his membership in the company, nor be released from the obligations of the premium note, without paying up all arrears of assessments for losses previously incurred.<sup>2</sup>

Interest in the property insured is an essential link in the relation of insurance, and the fact that a premium note has been executed as a means of securing the payment of losses during his membership, does not alter the case so as to make the vendor liable to assessments with which to pay the loss by fire of the property sold.<sup>3</sup>

**5. Extent and Nature of Liability.**—The liability assumed by the parties to a certificate of membership and insurance in a benefit assessment association may be of such extent and nature as they choose to make it, provided it be within the chartered powers of

to such certificates, upon the same principles as apply to insurance companies. *Goodman v. Jedldjah Lodge*, 67 Md. 117.

1. *Hyatt v. Wait*, 37 Barb. (N.Y.) 29.

The contract of insurance is a personal contract with the assured, and the policy does not pass so as to continue the liability of the company to an assignee or purchaser of the property insured, unless by the consent of the underwriters, or the properly authorized officer or board of the association. *Simeral v. Dubuque Mut. F. Ins. Co.*, 18 Iowa 319.

If the by-laws, charter or rules and regulations of the company printed on the policy require a specified method of making assignments, those not made in substantial compliance therewith are not binding on the company. *Cumings v. Sawyer*, 117 Mass. 30.

An assignee of a policy in a mutual fire insurance company, who is entitled

to the benefit of the insurance, is liable to assessment in case of the company's insolvency. *Com. v. Massachusetts Mut. F. Ins. Co.*, 112 Mass. 116.

2. *Hyatt v. Wait*, 37 Barb. (N.Y.)

29. The maker of a premium note given to a mutual insurance company for the nominal premium upon an open policy executed to cover such risks as may be afterwards endorsed thereon, is liable to the company on such note only to the amount of the actual premiums upon risks assumed by the company and endorsed thereon. *Maine Mut. M. Ins. Co. v. Stockwell*, 67 Me. 382; *Elwell v. Crocker*, 4 Bosw. (N.Y.) 22; *Lawrence v. McCready*, 6 Bosw. (N.Y.) 329; *Brower v. Hill*, 1 Sandf. (N.Y.) 629.

3. *Wilson v. Trumbull Mut. F. Ins. Co.*, 19 Pa. St., 372; *Indiana Mut. F. Ins. Co. v. Conner*, 5 Ind. 170; *Tuckerman v. Bigler*, 46 Barb. (N.Y.) 375; *Smith v. Saratoga Co. Mut. F. Ins. Co.*, 3 Hill (N.Y.) 500.

the association, or law under which the articles are filed, and not prohibited by law. The amount to be paid upon the happening of the event insured against may be definitely fixed in the contract, or it may be left exclusively to the provisions of the by-laws, as already adopted or to be thereafter enacted, or it may be specified in the certificate, with a reference to existing by-laws. Again, instead of a specified sum, the association may, and often does assume an indefinite liability as to the payment of the proceeds of an assessment of a certain amount upon each member.<sup>1</sup> On the other hand, the obligations of the certificate holder may be equally indefinite. Sometimes it is stipulated that the assessments shall not exceed a certain sum, which may either be evidenced by a written obligation, called a premium note, or mentioned in the certificate.<sup>2</sup>

In other cases the agreement by the member in his application may be simply to pay such assessments as the association or the directors see fit to make from time to time. Inasmuch as this power is conferred by the by-laws, which are subject to change at the will of the majority of the board of directors, there cannot in such case be said to be any contract of insurance outside the contract of membership, since the liability of the member upon the latter is unlimited during its continuance.<sup>3</sup> It is im-

1. In the absence of any by-laws to the contrary, the liability of a mutual company is for the total loss, not to exceed the amount of the policy, and is not limited to the amount derived from an assessment. *Id. Harl v. Pottawatomie Co. Mut. F. Ins. Co.*, 74 Iowa 39; *La Manna v. National Security L. & Acc. Co.*, 10 N. Y. Supp. 221.

An association was bound by its constitution and by-laws to pay an amount equal to \$1.50 for each certificate in force at the time payment became due, not to exceed \$4,000. It was also required to pay the full amount of its certificates at maturity, provided there were sufficient moneys in the fund from which they should become payable; and provided, further, that such money should be applied proportionately to all certificates becoming payable the same quarter. The \$4,000 was termed an endowment, and the period in which it became due, an endowment period. Assessments were both regular and special, and it was provided that they should be made by the directors. The association was also required to maintain two funds; one an endowment fund, out of which the endowments were payable; the other, an assessment fund, out of which beneficiaries were paid in case members died within the

endowment period. It was held that in the event of the death of a member, the association was liable to pay a sum equal to \$1.50 for each certificate in force and no more, where there were no moneys in the assessment fund applicable to such claims. *Kerr v. Minnesota Mut. Ben. Assoc.*, 39 Minn. 174.

2. See PREMIUM NOTES, III, 6, *infra*.  
3. *Mulroy v. Knights of Honor*, 28 Mo. App. 463; *Maryland Mut. Ben. Assoc. v. Clendinen*, 44 Md. 429; s. c., 22 Am. Rep. 52; *Miner v. Michigan Mut. Ben. Assoc.*, 63 Mich. 338; *Burbank v. Rockingham Ins. Co.*, 24 N. H. 550; 57 Am. Dec. 300; *Susquehanna etc. Ins. Co. v. Perrine*, 7 W. & S. (Pa.) 348; *Grand Lodge v. Elsner*, 26 Mo. App. 109; *McMurry v. Supreme Lodge Knights of Honor*, 20 Fed. Rep. 107; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. St. 402; *Simeral v. Dubuque Mut. F. Ins. Co.*, 18 Iowa 319; *National Ben. Assoc. v. Bowman*, 110 Ind. 355; *Masonic Mut. Relief Assoc. v. McAuley*, 2 Mackey (D. C.) 70.

In *Fugure v. Mutual Soc. of St. Joseph*, 46 Vt. 362, a husband had become a member in 1862. At that time the by-laws of defendant society provided that each member paying the regular assessment, should "be entitled to twenty-five cents per day during



material whether the by-laws, or the right to change them, be mentioned in the certificate or not.

Where the terms of the certificate are in conflict with the provisions of the by-laws, with respect to the member's liability, the former will prevail if not opposed to the organic law under which the association is created.<sup>1</sup>

It has been held that, without an assessment, members are liable for sick and funeral benefits due by a voluntary association.<sup>2</sup>

But the better and prevailing view is that under the constitution and by-laws, the credit is given, not to the members, but to a

their sickness;" and "to the widow of each member deceased, so long as she shall remain a widow, and shall enjoy a good reputation, twenty-five cents per day." It was further provided that, "so long as there shall be twenty dollars in the treasury the society cannot reduce its aid to the sick." There was also a special provision for the manner of altering or changing the by-laws; and there is also a provision in the charter that the society may alter or change its by-laws. In August, 1869, the defendant corporation adopted a set of by-laws which provided that such widows shall receive twenty-five cents per day "until she had received \$200." The plaintiff has received \$200, in accordance with the latter by-law of the society. The court said: "It is insisted that a right had become vested in the plaintiff (her husband died Jan. 5th, 1869) to have and receive of the defendant twenty-five cents per day during her widowhood, and that it was not competent for the defendant to diminish it. The means of making these contributions to the sick and the widows of deceased members were derived solely from voluntary assessments upon the members of the society and must be graduated by such assessments. And experience might prove that, without assessments greater than the members could bear, there must be a limitation to the stipend to widows. Prevailing sickness among the members may have so exhausted the means of the society that the provision for widows must necessarily be modified, or it could not discharge the duties for which it was formed. It must be incident to the very nature and purpose of such an association, that it should have power to modify and change its by-laws so as to graduate its charities as experience and necessity may require. It cannot, indeed, pervert its contributions to subserve other

ends and purposes; but the society may regulate the manner in which they shall carry out the purposes for which they associated." See also *Supreme Commandery Knights of the Golden Rule v. Ainsworth*, 71 Ala. 449; s. c., 46 Am. Rep. 332; *Bigelow v. Berkshire L. Ins. Co.*, 93 U. S. 284; *Korn v. Mutual Assoc. Soc.*, 6 Cranch 396. Compare *Poultney v. Bachman*, 62 How. Pr. (N. Y.) 466; *Gundlach v. Germania Merchants' Assoc.*, 4 Hun (N. Y.) 341; *Pellazzino v. German etc. Soc.*, 16 Cin. L. Bul. 27.

1. Thus it was held that a provision in a certificate of membership, in a mutual life association, evidently contemplating a mortuary assessment to meet each death loss, would prevail over a clause of the by-laws of the association tending to limit the number and amount of assessments to be levied, inconsistent therewith, though the application stipulates that the by-laws should be part of the contract. *Fitzgerald v. Equitable Reserve Fund Life Assoc.*, 3 N. Y. St. Rep. 214; *Davidson v. Old People's etc. Soc.*, 39 Minn. 303; 25 Am. & Eng. Corp. Cas. 601.

Where the act incorporating a mutual insurance company, provided that all persons who should insure with the corporation "should thereby become members thereof during the period they should remain so insured and no longer," it was held that, under this provision, membership continued during the entire term of the policy, though the property insured was destroyed before that term expired, and that, during the life of the policy, the insured was liable to assessment on his premium note, notwithstanding the destruction. *Bangs v. Skidmore*, 24 Barb. (N. Y.) 29; aff'd 21 N. Y. 134. See *contra*.

2. *Pritchett v. Shaefer*, 2 W. N. C. (Pa.) 317.

fund belonging to the collective body and created by joint contributions of the members.<sup>1</sup>

Members are, of course, not liable to assessments for losses and benefits which occurred prior to or after the making of such contracts. And though in most associations the termination or continuance of his relation is optional, still the certificate furnishes sufficient consideration for his agreement to pay any and all assessments made during the existence of the connection.<sup>2</sup> And this liability continues, although, in the mean time, the insolvency of the society has been decreed.<sup>3</sup>

6. **Premium Notes.**—The practice of evidencing and limiting the liability to assessment is not ordinarily, or often, a feature of benefit societies proper. It rather pertains to the business done by stock companies, which insure their shareholders on the mutual plan; especially to fire companies. However, premium notes may be,

1. *Payne v. Snow*, 12 Cush. (Mass.) 443; s. c., 59 Am. Dec. 203.

With respect to obligations and debts of a voluntary organization to others than members, such liabilities are not incurred by an individual member except by his own acts. None arises from the contract of membership unless imposed by statute. *Bacon Ben. Soc. and Ins.* 116.

It is often provided by statute, however, that members of voluntary associations, and all corporations not having a capital stock, shall be liable to creditors, jointly and severally, to the full amount of all indebtedness.

2. *Columbia F. Ins. Co. v. Kinyon*, 37 N. J. L. 33; *Farmers' Mut. F. Ins. Co. v. Chase*, 56 N. H. 341; *State v. Monitor F. Assoc.*, 42 Ohio St. 555; *McDonald v. Ross-Lewin*, 29 Hun (N. Y.) 87; *Stewart v. Northampton etc. Ins. Co.*, 38 N. J. L. 436; *Planters' Ins. Co. v. Comfort*, 50 Miss. 662; *Tolford v. Church*, 66 Mich. 431.

The liability of members of mutual insurance companies extends to all debts and obligations contracted while the contract of membership remains in force. *Van Buren v. St. Joseph etc. Ins. Co.*, 28 Mich. 398; *Commonwealth v. Massachusetts Mut. F. Ins. Co.*, 112 Mass. 116; *Orr v. Mercer Co. Mut. F. Ins. Co.*, 114 Pa. St. 387.

But members are not liable for losses or other liabilities occurring before the beginning or after the termination of the contract of membership. *Akers v. Hite*, 94 Pa. St. 394; s. c., 39 Am. Dec. 792; *Manlove v. Naw*, 39 Ind. 289; *Manlove v. Bender*, 39 Ind. 371; s. c., 13 Am. Rep. 280.

Unearned premiums do not come within the meaning of the Massachusetts statutes, imposing a personal liability upon members of mutual insurance companies. It is a condition to such statutory liability that the amount due upon premium notes shall be first exhausted. *Com. v. Monitor Mut. F. Ins. Co.*, 112 Mass. 150.

The liability to assessment of a policy holder in a mutual fire insurance company is not in accordance with the proportion of the expired to the unexpired term of the policy, but in accordance with the liabilities of the company. *Com. v. Massachusetts Mut. F. Ins. Co.*, 112 Mass. 116. Held in the same case that a policy holder in a mutual fire insurance company is liable to assessment while his policy remains uncanceled, although he has had no insurable interest under, or right to recover upon, the policy.

The insured of a mutual insurance company are not liable to pay losses or expenses that occurred prior to the date when they became members of said company. *Peoples' F. Ins. Co. v. Hartshorne*, 90 Pa. St. 465.

3. *Com. v. Massachusetts Mut. F. Ins. Co.*, 112 Mass. 116; 119 Mass. 45; *Vannatta v. New Jersey Mut. L. Ins. Co.*, 31 N. J. Eq. 15; *Union Mut. F. Ins. Co. v. Spaulding*, 61 Mich. 77.

The by-laws of a benefit society provided that proofs of death should be made in a specified manner and laid before the directors, who were given authority to make an assessment upon each of the class to which the deceased belonged. It was held that the assessment could be made only on those who

and sometimes are, employed by strictly mutual life and fire companies—principally by the latter.<sup>1</sup>

The premium note and policy, together, constitute the contract between the insurance company and the insured, and from them both the conditions of the agreement are to be ascertained.<sup>2</sup>

It is often provided in such cases, and policies of insurance executed in connection therewith, that the time of payment of instalments, or even of interest, shall be of the very essence of the contract, and that the policy shall become void upon failure to make payment at the specified time. Such provisions are usually held valid even in courts of equity.<sup>3</sup>

Upon a breach of such conditions the company may recover the full amount of the note, and not merely such part as would bear the same proportion to the full amount as that portion of the period of the risk, prior to the notice of default, bears to the entire period covered by the policy.<sup>4</sup>

Such failure does not absolutely avoid the policy, but suspends it, so that the company is not liable for a loss occurring during the

were members of the class subject thereto at the time the resolution was adopted. *Miller v. Georgia Masonic Mut. L. Ins. Co.*, 67 Ga. 221.

1. Whether the company has power to divide such notes into classes and separately assess them seems to be unsettled upon authority. *Allen v. Winne*, 15 Wis. 113.

2. *Shultz v. Hawkeye Ins. Co.*, 42 Iowa, 239. The parties usually have the same power to rescind it by mutual agreement as they had to make it. *Akers v. Hitte*, 94 Pa. St. 394; s. c., 39 Am. Dec. 792. Compare *New England Mut. F. Ins. Co. v. Butler*, 34 Me. 451. And see *American Ins. Co. v. Schmidt*, 19 Iowa, 502, where it was held that with respect to a premium note, a member stands on a different footing to that assumed in his contract of membership; accordingly, he is not chargeable with notice of the acts and proceedings of the directors of the company in a suit on a premium note, so as to deprive him of the benefit of any defence.

The issuing of a policy of insurance by an insolvent insurance company is a good consideration for a promissory note given for the premium, if the insolvency of the company was not known by its officers or agents at the time. *Lester v. Webb*, 5 Allen (Mass.) 569.

A mutual fire insurance company cannot maintain an action for the premium and deposit note against a person

on whose application they have made out a policy, at a rate of premium agreed upon, but who refuses, on request, to take the policy or sign the deposit note. *Real Estate Mut. F. Ins. Co. v. Roessle*, 1 Gray (Mass.) 336.

3. *Knickerbocker L. Ins. Co. v. Dietz*, 52 Md. 16; *Patch v. Phoenix Mut. L. Ins. Co.*, 44 Vt. 487; *Anderson v. St. Louis Mut. L. Ins. Co.*, 1 Flip. (U. S.) 559; *Knickerbocker L. Ins. Co. v. Harlan*, 56 Miss. 512.

It is competent for a mutual fire insurance company, organized under the laws of this State, to provide in its articles of association, or by its by-laws, that all premium notes shall be paid in instalments as ordered by the directors, after notice, and that if not so paid, the entire notes shall become due and collectible. *German Mut. F. Ins. Co. v. Franck*, 22 Ind. 364.

Upon payment of the full amount the insured becomes the owner of a paid-up policy for the remainder of the original term. *American Ins. Co. v. Klink*, 65 Mo. 78.

4. *American Ins. Co. v. Klink*, 65 Mo. 78.

A provision in the charter of a mutual fire insurance company, that, in case of default, to pay an assessment upon a deposit note, "the directors may sue for and recover the full amount of said deposit note," does not prevent the bringing of such an action in the name of the treasurer of the company, when the note is made payable "to said company

continuance of such default, but, upon the payment of the note (whether voluntary or enforced), the policy revives and reattaches.<sup>1</sup>

An assessment, regularly made by the proper authority, is generally a prerequisite to a right of action by the company on a premium note.<sup>2</sup>

The maker is liable to pay an assessment made upon his note to meet a deficiency in funds, caused by the inability of other members to pay the proportion of losses assessed upon their notes,<sup>3</sup> which may be made on the whole amount of the note, although the promisor has an insurable interest in a part only of the property covered by the policy.<sup>4</sup>

But the mere assessment of a premium note, after knowledge by the company of a breach of a condition, whereby the policy has become void, does not revive it, but is consistent with the right

or their treasurer for the time being." *Jones v. Sisson*, 6 Gray (Mass.) 288.

1. *American Ins. Co. v. Klink*, 65 Mo. 78.

A policy of insurance stipulated that if the premium note was not paid within sixty days after maturity, and suit for its collection should be commenced, this would operate as an absolute cancellation of the policy, which would not be waived by the collection of the premium. It was held, that it was competent for the parties to stipulate for a termination of the company's liability upon a default in payment of the premium, and that, accordingly, it was not liable for a loss suffered by a policy holder after collection of the premium note by action at law. *Shultz v. Hawkeye Ins. Co.*, 42 Iowa 239.

A member of a mutual fire insurance company is not discharged from his liability on his deposit note for losses already accrued, by the cancellation of his policy by a general corresponding agent of the company, accompanied by a promise to surrender the note, without proving the authority of such agent to surrender the note. *Marblehead Mut. Fire Ins. Co. v. Underwood*, 3 Gray (Mass.) 210.

2. A premium note payable "in such portions and at such times as the directors of said company require," is no evidence of liability when not accompanied by proof that the directors had made any assessment. *Hagan v. Merchants' etc. Ins. Co. (Iowa)*, 46 N. W. Rep. 1114.

Where the charter provides that all assessments shall be determined by the directors, and lays down the rules by

which the amount to be raised, and the manner it is to be apportioned are fixed, all that is necessary is, that the directors determine by vote that an assessment be made; and such vote is a sufficient requirement of a payment to be made on the premium note. *Atlantic Mut. F. Ins. Co. v. Sanders*, 36 N. H. 252.

But where a note was given to an insurance company, payable in such portions, and at such time or times as the directors may require, and a resolution of the directors assigned all the assets of the company, this note included, to the plaintiff in trust, that he should collect them to pay the debts of the company, it was held that this was a sufficient requirement. *Hill v. Reed*, 16 Barb. (N. Y.) 280.

3. *Bangs v. Grav*, 12 N. Y. 477, reversing *Matter of Bangs*, 15 Barb. 264; *Osgood v. Strauss*, 65 Barb. (N. Y.) 383.

A maker of a premium note may be assessed for losses suffered by members who paid their premiums in cash in advance. *Jackson v. Roberts*, 31 N. Y. 304.

The insured is entitled, however, to set-off for loss under the policy, where it is stipulated that the "loss shall be paid, the amount of the premium note being first deducted." *Columbian Ins. Co. v. Bean*, 113 Mass. 541.

Nor can the liability of the members upon their deposit notes be increased by the fact that the company has become insolvent, and its effects are transferred to a receiver. *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. (N. Y.) 605.

4. *New England Mut. F. Ins. Co. v. Belknap*, 9 Cush. (Mass.) 140.

of the company to treat it as void, since the maker of such note is liable, at all events, for his proportion of losses occurring during his membership to the full amount of the note.<sup>1</sup>

In case of alienation of the property covered by the policy, the insured will remain liable upon his deposit note, as well for losses occurring after as before the alienation, until all assessments are paid.<sup>2</sup>

Premium notes are assignable in like manner and effect as other absolute written promises.<sup>3</sup>

**7. Effect Upon Contract of Constitutions and By-laws.**—All the contracts of an incorporated benefit society are made with reference

Upon a recovery on a premium note for the nonpayment of assessments, the plaintiff is entitled to interest from the time when the assessments were payable. *Hyatt v. Wait*, 37 Barb. (N. Y.) 29.

1. *Huntley v. Beecher*, 30 Barb. (N. Y.) 580; *Neely v. Onondaga Co. Mut. Ins. Co.*, 7 Hill (N. Y.) 49; *Hyatt v. Wait*, 37 Barb. (N. Y.) 29; *Smith v. Saratoga Co. Mut. Ins. Co.*, 3 Hill (N. Y.) 508; *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328; *Allen v. Vermont Mut. F. Ins. Co.*, 12 Vt. 366; *Finley v. Locomot. Co. Mut. Ins. Co.*, 30 Pa. St. 311; s. c., 72 Am. Dec. 705; *Lyons v. Globe etc. Ins. Co.* 28 U. C. C. P. 62. But see *Millard v. Supreme Council American Legion of Honor*, 81 Cal. 340.

2. *Hyatt v. Wait*, 37 Barb. (N. Y.) 29.  
**Where Policy Is Assigned.**—A by-law of a town mutual insurance company, providing that "policies of insurance may be assigned with the consent of the president and secretary, the parties paying fifty cents recording fees, at the same time giving his undertaking to the company, and the company will not hold itself responsible for loss on property so transferred until such assignment so made and undertaking given," does not apply to a case where property covered by its policy is transferred, and the policyholder retains an insurable interest therein. *Jerde v. Cottage Grove F. Ins. Co. (Wis.)*, 44 N. W. Rep. 636.

But it is otherwise and the company is bound if it has received notice of the transfer, and made entry of the same on its books. *Cumings v. Hildreth*, 117 Mass. 309.

3. *Howland v. Myer*, 3 N. Y. 290; *Furniss v. Gilchrist*, 1 Sandf. (N. Y.) 53; *Brouwer v. Appleby*, 1 Sandf. (N. Y.) 158; *Brouwer v. Hill* 1 Sandf. (N.

Y.) 629; *Holbrook v. Basset*, 5 Bosw. (N. Y.) 147; *Brookman v. Metcalf*, 5 Bosw. (N. Y.) 429; *Marine Bank v. Clements*, 6 Bosw. (N. Y.) 166; *Hope Mut. L. Ins. Co. v. Taylor*, 2 Rob. (N. Y.) 278; *Brookman v. Metcalf*, 32 N. Y. 591; *Sands v. Campbell*, 31 N. Y. 345; *Crooke v. Mall*, 11 Barb. (N. Y.) 205; *Hone v. Folger*, 1 Sandf. (N. Y.) 177; *Hone v. Bullin*, 1 Sandf. (N. Y.) 181; *Merchants' Mut. Ins. Co. v. Rey*, 1 Sandf. (N. Y.) 184; *Aspinwall v. Meyer*, 2 Sandf. (N. Y.) 180; *Lawrence v. McCready*, 6 Bosw. (N. Y.) 329; *Chesbrough v. Wright*, 4 Barb. (N. Y.) 28.

A mutual insurance company took up a subscription, by which the subscribers agreed to give their notes for premiums in advance of insurance to be effected by them, the subscription not to be binding until the sum of \$300,000 was subscribed. That sum was in form subscribed, the defendants being subscribers, and the defendants voluntarily gave their notes for the amount of their subscription. All parties acted in good faith, and without any fraud, misrepresentation or concealment. *Held*, that such notes were, in the hands of the company, valid binding notes, which the company had a right to negotiate for the purpose of paying claims or otherwise, in the course of its business, notwithstanding it ultimately appeared that some of the subscriptions were not valid binding subscriptions, and notwithstanding, if the notes had not been given, the defendants might have legally refused to give them on the ground that the condition of the subscription had not been in fact satisfied. *Holbrook v. Basset*, 5 Bosw. (N. Y.) 147.

**Statute of Limitations.**—Where an insurance note given prior to 1853 was regularly assessed to its full amount, the time of payment fixed,

to all the laws of the organization. These are deemed part of each contract of membership, whether mentioned or not, and are as binding upon all the members as provisions contained in the charter.<sup>1</sup>

Each member is conclusively presumed to know them, and will not be heard to plead ignorance of their provisions in any case.<sup>2</sup>

But this has no reference to mere regulations adopted by the officers of the company in regard to the transaction of business, directions to agents and the like, but rather to such rules as enter into the charter or by-laws of the company, whereby the liability and rights of its members are fixed.<sup>3</sup>

All the essentials of valid by-laws in corporations generally must characterize those of incorporated benefit societies.<sup>4</sup>

and notice of the assessment duly published, as required by the charter and the by-laws of the company, an action upon it is barred by the statute of limitations in six years from its maturity. *Sands v. Lilienthal*, 46 N. Y. 541.

1. *Supreme Lodge Knights of Pythias v. Knight*, 117 Ind. 489; *Slater Mut. F. Ins. Co. v. Barstow*, 8 R. I. 343; *Commonwealth v. Massachusetts Mut. F. Ins. Co.*, 112 Mass. 116; *Com. v. Dorchester Mut. Fire Ins. Co.* 112 Mass. 142; *Susquehanna Mut. Fire Ins. Co. v. Gackenbach*, 115 Pa. St. 492; *Pennsylvania Training School v. Independent Mut. F. Ins. Co. (Pa.)*, 18 Atl. Rep. 392; *Shay v. National Ben. Soc.*, 7 N. Y. S. Nat. Rep. 287; *Sands v. Shoemaker*, 4 Abb. App. Dec. (N. Y.) 149; *Planters' Ins. Co. v. Comfort*, 50 Miss. 62; *Bersch v. Sinnissippi Ins. Co.*, 28 Ind. 64. See *Koehler v. Beeber*, 122 Pa. St. 291; *Susquehanna Mut. F. Ins. Co. v. Stouffer*, 125 Pa. St. 416; *Bogards v. Farmers' Mut. Ins. Co.*, 79 Mich. 440; *Mor. Priv. Corp.*, § 491.

The construction placed upon the by-laws of a friendly order by its officers and agents will not be heard in evidence to affect its construction by the court. *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 122.

2. *Pfister v. Gerwig*, 122 Ind. 567; *Bauer v. Samson Lodge*, 102 Ind. 262; *Mitchell v. Lycoming Mut. F. Ins. Co.*, 51 Pa. St. 402; *Coleman v. Knights of Honor*, 18 Mo. App. 189; *Coles v. Iowa State Mut. Ins. Co.*, 18 Iowa 425; *Simeral v. Dubuque Mut. F. Ins. Co.*, 18 Iowa 319; *Fugure v. Mutual Soc. St. Joseph*, 46 Vt. 368; *People v. St. George Soc.* 28 Mich. 261; *Sperry's Appeal*, 116 Pa. St. 391; *Osceola Tribe v. Schmidt*, 57 Md. 98; *Coles v. Iowa State Mut. Ins. Co.*, 18 Iowa 425;

*Bellville Mut. Ins. Co. v. Van Winkle*, 12 N. J. Eq. 335; *Diehl v. Adams Co. Mut. Ins. Co.*, 58 Pa. St. 443; s. c., 98 Am. Dec. 302; *Hanf v. Northwestern Masonic Aid Assoc. (Wis.)*, 45 N. W. Rep. 315; *Turnbull v. Woolfe*, 9 Jur., N. S. 57; 11 W. R. 55; 7 L. T., N. S. 483; *Fuller v. Madison Mut. Ins. Co.*, 36 Wis. 599; *Treadway v. Hamilton Mut. Ins. Co.*, 29 Conn. 68; *Oceanic etc. Assoc. v. Leslie*, 22 Q. B. D. 722; *United Kingdom etc. v. Nevill*, 19 Q. B. D. 110; *Great Britain etc. Assoc. v. Wyllie*, C. A. 710.

The rule that members are bound to take notice of by-laws applies, although it be required by statute that all conditions of the policy shall be printed upon its face. *Com. v. Massachusetts Mut. F. Ins. Co.*, 112 Mass. 116.

This presumption held applicable to an assignee of a policy who held the policy over eighteen months, during which time he had opportunity to know his rights and liabilities and the conditions upon which his rights could be made secure. *Miller v. Hillsborough Mut. etc. Assoc.*, 42 N. J. Eq. 459. It was also held in this case that a mutual insurance company will not be deprived of the benefit of a defence to an action on a policy afforded by a condition contained in a by-law, the by-laws being made part of the policy by the terms of the latter, because of the fraud of its officers in leading plaintiff to suppose that there was no such condition.

3. *Walsh v. Aetna Life Ins. Co.* 30 Iowa 133; s. c., 6 Am. Rep. 664.

4. A provision of the constitution of a railroad relief association that, before the association will pay the beneficiary of the member killed, the amount of benefits due, the person legally entitled to damages for the death shall release

But while by-laws, duly enacted by a majority, are binding upon the members, they must conform to certain general requirements in respect to personal and property rights of members. There are many terms allowable and enforceable when found in a contract, which, if inserted in a by-law, would render it so far invalid. "A man may part with a common right voluntarily, of which it would be impolitic and unjust to deprive him by a by-law, passed without his assent, or, perhaps, knowledge, by those who would not consult his individual interests."<sup>1</sup>

The same objections will lie to by-laws of a voluntary association, which affect property or pecuniary interests, as to those of a corporation. The same general rules of law and equity, so far as regards the control of them, and the adjudication of their reserved and inherent powers to regulate the conduct and to expel their members, apply to them as to corporations and joint stock companies.<sup>2</sup>

But a distinction exists, with respect to by-laws, on the subject

the railroad company from all claims for damages, was held not so unreasonable as to be void. *Fuller v. Baltimore etc. Relief Assoc.* (Md.), 10 Atl. Rep. 237. And the same conclusion was reached in the case of a constitution providing that "all claims against the association shall be referred to the board of directors, whose decision shall be final," and that "assessments shall not be made except on its authority." *Rood v. Railway Passenger & Freight Conductors' Mut. Ben. Assoc.*, 31 F. 62.

See BY-LAWS, 2 Am. & Eng. Encyc. of Law, 706.

1. Ang. & Ames on Corp., § 342; *Goddard v. Merchants' Exchange*, 78 Mo. 609; 9 Mo. App. 290; *Austin v. Searing*, 16 N. Y. 112; s. c., 69 Am. Dec. 665.

It has been held that, as between the members of a mutual insurance company and the company itself, the terms of a premium note may be altered by a by-law made after the execution of the note. *Mutual Ben. L. Ins. Co. v. Jarvis*, 22 Conn. 133.

Plaintiff agreed, in his application for fire insurance in a mutual insurance company, to be governed by all the conditions in the charter and by-laws, as they then existed, and any changes that might thereafter be made. And a change was afterwards made, the effect of which was to limit the risk on plaintiff's property. Plaintiff received a copy of the new by-law, and made no objection, and continued his membership. It was held that he was bound

by the new by-law. *Borgards v. Farmers' Mut. Ins. Co.*, 79 Mich. 440.

Where a certificate issued under said by-laws uses the words "act or occupation classed as more hazardous" instead of the language of the by-law, but the classification made by the association is based on occupations and not on acts, the rights of the member are the same under the certificate as under the by-laws. *Union Mut. Acc. Assoc. v. Frohard* (Ill.), 25 N. E. Rep. 642.

On the same principle where the terms of a policy are in conflict with a by-law of the society, it having power under its charter to issue such a policy, the society must be deemed to have waived the provisions of the by-law in favor of the assured. *Davidson v. Old People's Mut. Ben. Soc.*, 39 Minn. 303.

Though a by-law of an insurance company may provide that any of its policies upon property previously insured, shall be void, unless such previous insurance be endorsed on the policy at the time of its being issued, still such by-law is inoperative, if, in the policy itself, such previous insurance be recognized and approved. *Philbrook v. New England Mut. Fire Ins. Co.*, 37 Me. 137; *New Hampshire F. Ins. Co. v. Rand*, 24 N. H. 428; *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. (N. Y.) 605; *Great Falls Mut. F. Ins. Co. v. Harvey*, 45 N. H. 292; *American Ins. Co. v. Woodruff*, 34 Mich. 6; *Planters' Ins. Co. v. Comfort*, 50 Miss. 662.

2. *Lecch v. Harris*, 2 Brewst. 571;

of expulsion of members. By-laws of corporations, having as their object the expulsion of members, must be reasonable, whether property rights are involved or not, while those of voluntary associations not affecting property are binding, without regard to the question of reasonableness, if not otherwise objectionable. Courts will only enquire whether, in their adoption, the methods and formalities prescribed and agreed upon by the members themselves have been observed.<sup>1</sup>

The payment of sick benefits is a common feature of benefit societies, and they are oftener provided for in the by-laws than in the certificates of membership. Especially does the last remark apply to the great fraternal bodies, including grand and subordinate lodges. In all cases which have arisen involving these benefits, it has been held that the laws of the society are to be considered in determining the right, and they are to govern, unless contrary to municipal law.<sup>2</sup>

But a right to sick benefits may become vested, so that it may not be defeated by a change in the by-law, under the provisions of which it was acquired. After the sickness of a member has begun, the contingency provided for in the contract entitling him

*Beaumont v. Meredith*, 3 Ves. & B. 180; *Otto v. Journeymen Tailors etc. Union*, 75 Cal. 308; *Babb v. Reed*, 5 Rawle 158; 28 Am. Dec. 650; *Loubat v. Leroy*, 15 Abb. N. C. 1; *Gorman v. Russell*, 14 Cal. 531; *Lindley on Par.* 56.

1. *Kehlenbeck v. Logeman*, 10 Daly (N. Y.) 447; *McDonald v. Ross-Lewin*, 29 Hun (N. Y.) 87; *Manning v. San Antonio Club*, 63 Tex. 166; s. c., 51 Am. Rep. 639; *Elsas v. Alford*, 1 City Ct. Rep. 123; *Fritz v. Muck*, 66 How. Pr. (N. Y.) 74; *Innes v. Wylie*, 1 Car. & K. 262; *Hyde v. Woods*, 2 Sawyer (U. S.) 655; *White v. Brownell*, 2 Daly (N. Y.) 329. Compare *Heath v. President of N. Y. Gold Exchange*, 7 Abb. Pr., N. S. (N. Y.) 251; 38 How. Pr. 168; *Savannah Cotton Exchange v. State*, 54 Ga. 668; *Gray v. Christian Soc.*, 137 Mass. 329; s. c., 50 Am. Rep. 310; *District Grand Lodge v. Jededah Lodge*, 65 Md. 236; *Mulroy v. Knights of Honor*, 28 Mo. App. 463; *Austin v. Searing*, 16 N. Y. 112; s. c., 69 Am. Dec. 665; *Supreme Council of the Order of Chosen Friends v. Garrigus*, 104 Ind. 133; s. c., 54 Am. Rep. 298; *Bauer v. Samson Lodge*, 102 Ind. 262.

2. *Bacon Ben. Soc. & Ins.*, § 92. See also *St. Patrick's Ben. Soc. v. McVey*, 92 Pa. St. 510; *McCabe v. Father Matthew etc. Soc.*, 24 Hun (N. Y.) 149.

In the latter case it was held that a member of a beneficial society does not stand in the relation of a creditor to it, and can only claim such benefits as are prescribed by the by-laws existing at the time he applies for relief; that it is wrong to treat the by-law in existence when the plaintiff became a member as part of a contract unalterable except with his consent. In the first case the court said: "The plaintiff was bound by these changes. The charter gave no right of action. The constitution and by-laws were liable to change. The changes were made in the way pointed out by the constitution and laws. . . . No notice was required to be given to plaintiff. The by-laws provide for none, and they do provide for a change by resolution proposed one week before it could be passed. It was doubtless designed that this delay would operate to give notice to all persons interested. A notice to all the members would be a great burden."

A member is bound by a by-law which vests in a committee authority to determine whether a member, claiming to be sick, is entitled to the benefit provided for in the by-law, and the decision of such committee upon the application of a member for aid is final. *Van Poucke v. Netherland St. Vincent De Paul Soc.*, 63 Mich. 378.



to benefits has happened, and he cannot be by the act of the insurer deprived of them.<sup>1</sup>

The effect of the violation of a by-law upon the rights of the parties is often an important question, the result sometimes being to render the contract voidable by the company. In contracts concerning fire insurance, the violation of provisions of the by-laws, in relation to subsequent insurance, encumbrances and classification of risks, is generally involved.

Here, again, the rule that the members of mutual companies are presumed to know the by-laws, constitutes a marked distinction between their contracts and those of regular stock companies. It is held in many cases that the officers, being special agents with powers limited and defined by the by-laws, cannot suspend them when matters touching the substance or essence of the contract are involved.<sup>2</sup>

But if this view may be considered as at all settled upon the authorities, it is subject to many exceptions. The first important exception rises out of the distinction that is taken by the courts between mandatory and merely directory requirements.<sup>3</sup>

1. *Poultney v. Bachman*, 62 How. Pr. (N. Y.) 466.

In this case the court said: "The contract is to be interpreted like any other contract of insurance, in which, as a rule, is incorporated a clause giving the insured or insurer the right to end the risk. It would certainly be a somewhat novel construction of the clause conferring such power of termination; to hold that, after a loss has occurred to the insured, against which the agreement was to protect, the payment of the sum stipulated for could be either reduced or repudiated by the insurer. Yet this, as it seems to me, is the precise position assumed by the defendant. Upon his becoming sick, as has been before stated, the plaintiff's right to four dollars per week during his illness became a vested one, and it would be most unreasonable and unconscientious so to construe the by-law giving the power of amendment, as to confer upon the members of the lodge the authority to deprive him of that to which he had thus become clearly entitled." See *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *Bauer v. Samson Lodge*, 102 Ind. 262; *Gundlach v. Germania Mechanics' Assoc.*, 4 Hun (N. Y.) 339; *Pellazzino v. German Catholic Soc.*, 16 Cin. L. Bul. 27. But see *Torrey v. Baker*, 1 Allen 120; *Fugure v. Society St. Joseph*, 46 Vt. 362.

A contrary conclusion was reached where both the general laws of the State, and the by-laws of an incorpo-

rated society gave it the right to repeal alter, or amend its by-laws. It was held not a breach of contract for such society to amend a by-law which provides that, in case of sickness, a member shall be entitled to receive \$10 per week, by limiting such allowance to a certain number of weeks thereafter, though a member was sick at the time of such amendment. *Stohr v. San Francisco Musical Fund Soc.*, 82 Cal. 557.

**Notice of Changes.**—Members of a mutual benefit association are chargeable with notice of amendments to its constitution and by-laws where they are provided for therein. *May v. New York Safety Reserve Fund Soc.*, 14 Daly (N. Y.) 389.

2. *Behler v. German Mut. F. Ins. Co.*, 68 Ind. 354; *Leonard v. American Ins. Co.*, 97 Ind. 305; *Hale v. Mechanics' Mut. F. Ins. Co.*, 6 Gray (Mass.) 169; s. c., 66 Am. Dec. 410; *Evans v. Tri-Mountain Mut. F. Ins. Co.*, 9 Allen (Mass.) 329; *Brewer v. Chelsea Mut. F. Ins. Co.*, 14 Gray (Mass.) 209. Compare *Westchester F. Ins. Co. v. Earle*, 33 Mich. 150.

It was held in *Day v. Mill Owners' Mut. F. Ins. Co.* (Iowa), 38 N. W. Rep. 113, that one who, by insuring with a mutual fire company, has become a member, is not estopped to deny that amendments to the constitution not made known to him when he took the policy were part of the contract.

3. In *Union Mut. F. Ins. Co. v.*

The principles of agency must be considered in determining questions of this kind. Where directors are, as in many States, empowered to exercise all the corporate powers, their act may well be considered that of the corporation, which may waive conditions and rules established for its own benefit, as in the case of other parties to contracts.<sup>1</sup>

If it be said that such acts are *ultra vires*, it may be replied that after the party has acted under the contract, it may be considered as partly executed, and to estop the company from claiming its lack or excess of corporate power.<sup>2</sup>

The rule that laws cannot be retroactive, applies to by-laws as to other legislation; therefore, their operation must be future and not relate to transactions under which vested rights have accrued. The only question which can arise upon changes in the by-laws, is to what extent the original contract, agreeing to future changes, is affected.<sup>3</sup>

Keyser, 32 N. H. 313; s. c., 64 Am. Dec. 375, the directors acted under a charter, which vested all powers relating to contracts in them; one provision of which was that they should divide the property insured into classes. After by-laws had been made establishing a rule for the division of risks, they knowingly insured property in one class which belonged in another, and in passing upon the question raised by this violation of the laws of the company, the court said: "In this case the action of the directors may have been irregular, contrary to the established usage, and in violation of their own rules, and of the by-laws; but it was still within the scope of their authority, expressly conferred on them by the charter, and therefore binding on the company."

1. Davenport v. Peoria M. & F. Ins. Co., 17 Iowa 276; New England F. & M. Ins. Co. v. Schettler, 38 Ill. 166; Insurance Co. v. Wilkinson, 13 Wall. (U. S.) 222; Emery v. Boston Marine Ins. Co., 138 Mass. 410.

In a case calling for a construction of Stat. Mass. 1882, ch. 78, providing that "the benefit to accrue by reason of the decease of members of the Boston Police Relief Association, or their wives, may be extended" to members retired under Stat. 1878, ch. 244, § 5, the former statute was held to be permissive merely. It was further held that the association may extend the benefit to a part only of the class named, by a by-law; and if this is done, the association will not be bound by the acts of its officers in extending the benefit to

those not included by such by-law. Burbank v. Boston Police Relief Assoc., 144 Mass. 434.

It is said in some of the cases that the provisions of the by-laws of a corporation are made for the benefit of the company and may be waived. Splawn v. Chew, 60 Tex. 532; Manning v. Ancient Order United Workmen, 86 Ky. 136; Sanborn v. Fireman's Ins. Co., 16 Gray (Mass.) 448; s. c., 77 Am. Dec. 419; Cumberland Valley Mut. Protection Co. v. Schell, 29 Pa. St. 31; Prince of Wales etc. Co. v. Harding, 1 E. B. & E. 183; Sheldon v. Connecticut Mut. L. Ins. Co., 25 Conn. 221; s. c., 65 Am. Dec. 565.

2. See Fuller v. Boston Mut. F. Ins. Co., 4 Metc. (Mass.) 206; Lamont v. Grand Lodge Iowa Legion of Honor, 31 Fed. Rep. 177; Bloomington Mut. Ben. Assoc. v. Blue, 120 Ill. 127; New England F. & M. Ins. Co. v. Schettler, 38 Ill. 166.

3. Stewart v. Lee Mut. F. Ins. Assoc., 64 Miss. 499.

A party had insured his property and given his note for the amount of the premium, with interest, and the company afterwards passed a by-law, at a meeting where he was not present, declaring that if the interest on any premium note should be three months in arrears, "the policy shall be suspended, and of no effect to make the company liable for loss until the interest be paid." His property insured was destroyed by fire, when the interest on his note had been more than three months in arrears. It was held that this by-law had no effect on the contract between the par-

The contract of membership, so far as it carries with it property rights, is not forfeitable otherwise than under statutory authority. Therefore, a by-law of a benefit society, passed without power conferred for the purpose in the charter or general law, after the issuance of a certificate, and providing for forfeitures of the interest which its members hold under their certificates to share benefits and death losses, would be of no force or validity.<sup>1</sup>

But provisions for forfeiture, existing at the time of entering into such contracts, or whether pre-existing or not, if embodied in the certificates, have frequently been held valid and enforceable.<sup>2</sup>

A penalty is sometimes authorized by statute, and inflicted under the provision of the by-laws.

Such provisions, whether found in statutes, charters, or by-laws, are strictly construed.<sup>3</sup>

It may be provided that, upon failure to pay an instalment or assessment due upon a premium note, the entire amount of which is given shall become due and payable.<sup>4</sup>

**IV. BENEFICIARIES—1. Designation.**—An important difference between ordinary insurance companies and benefit societies consists in the fact that the beneficiaries of the latter are generally restricted and limited to those who are heirs, relatives, or dependents of the insured. Whether contained in the charter, articles, or by-laws, the restrictions must be observed, and in making contracts the society has no power to go beyond them. It is usually prescribed in the charter or articles who may become members and enjoy the benefits of membership as beneficiaries, after the death of members; and the rights of the parties cannot be altered

ties, and that the company must pay the insured the amount of his loss. *Insurance Co. v. Connor*, 17 Pa. St. 136.

In one case it was held that a contract could not be varied by the directors by means of a by-law, so as to put an assured in a particular class which called for an assessment only on the policy-holders of that class, unless the assured knew of and assented to such by-law. *Stewart v. Lee Mut. F. Ins. Assoc.*, 64 Miss. 499. See *Bacon Ben. Soc. & Ins.*, § 185.

As to the power to enact by-laws with reference to changes of beneficiary, and the effect of such by-laws, see *CHANGE OF BENEFICIARY*, IV, 3, *infra*.

1. In *Pulford v. Fire Department*, 31 Mich. 458, 465, the court said: "There can be no power to impose forfeitures unless granted by clear legislative enactment. No such power is consistent with common law or ancient right, and it cannot be obtained from anything

but the sovereignty. The only means for the enforcement of corporate charges and penalties is by action. Summary means and methods unknown to the common law must be authorized by express authority. And it would not be reasonable to enforce a pecuniary obligation or penalty by means disproportionate to its importance. The law of the land is made the test for analogies in cases where it affords analogies." See also *Matter of Long Island R. Co.*, 19 Wend. (N. Y.) 37; s. c., 32 Am. Dec. 429; *Westcott v. Minnesota Min. Co.*, 23 Mich. 145.

2. See VII. FORFEITURE AND SUSPENSION OF CONTRACTS, *infra*.

3. *Mor. Priv. Corp.*, 123.

4. *Jones v. Sisson*, 6 Gray (Mass.) 288; *Bangs v. McIntosh*, 23 Barb. (N. Y.) 591; *St. Louis Mut. F. & M. Ins. Co. v. Boeckler*, 19 Mo. 135; *Beadli v. Chenango Co. Mut. Ins. Co.*, 3 Hill (N. Y.) 161; *Bangs v. Bailey*, 37 Barb. (N. Y.) 630, see *PREMIUM NOTES*, III, 6, *supra*.

by contract, by either or both of the parties, in violation of such restrictions.<sup>1</sup>

The doctrine of *ultra vires* applies to such cases as to acts of corporations generally, and the same exception and application of the doctrine of estoppel is made where, by the death of the member, the contract has become executed.<sup>2</sup>

In the absence of any restrictions, the society may constitute any one the beneficiary of a member.<sup>3</sup>

1. *Luhrs v. Supreme Lodge Knights and Ladies of Honor*, 7 N. Y. Supp. 487; *Supreme Council American Legion of Honor v. Perry*, 140 Mass. 589; *Kentucky Masonic etc. L. Ins. Co. v. Miller*, 13 Bush (Ky.) 489; *Presbyterian Mut. Assurance Fund v. Allen*, 106 Ind. 593; *Elsey v. Odd Fellows Mut. Relief Assoc.*, 142 Mass. 224; *State v. People's Mut. Ben. Assoc.*, 42 Ohio St. 579; *Supreme Council Knights of Honor v. Nairn*, 60 Mich. 44; *National Mut. Aid Assoc. v. Gonser*, 43 Ohio St. —; *Leonard v. American Ins. Co.*, 97 Ind. 305; *Ben. Soc. v. Dugre*, 11 R. L. (Queb.) 344.

*Bacon Ben. Soc. and Ins. Secs.*, 168, 248; *Kentucky Masonic etc. L. Ins. Co. v. Miller*, 13 Bush (Ky.) 489.

For a review of the principles governing the subject of insurable interest, see *Connecticut Mut. L. Ins. Co. v. Shaefer*, 94 U. S. 457; *INSURANCE*, 11 Am. & Eng. Encyc. of Law 312; *LIFE INSURANCE*, 13 Am. & Eng. Encyc. of Law 650; *FIRE INSURANCE*, 7 Am. & Eng. Encyc. of Law 1020.

It is only when the right of designation of beneficiary is unrestricted that the question of insurable interest and the rules of construction governing the same become important. *Freeman v. National Ben. Soc.*, 42 Hun (N. Y.) 252, provided the contract be not in fact a mere cover for a wagering transaction.

*Stat. Mass. 1882, ch. 195*, authorizing corporations organized under Pub. Stat., ch. 115, for the purpose of assisting the widows, orphans or other persons dependent upon members to include among the beneficiaries other relatives of deceased members, does not authorize a certificate payable to a creditor of a member. *Skillings v. Massachusetts Ben. Assoc.*, 146 Mass. 217.

Under the by-laws of an association providing that a member may designate as beneficiary of the fund accruing at his death, on the certificate held by him, any one "related to him," the wife

of his nephew cannot be made such beneficiary, as the by-laws contemplate only blood relations. *Supreme Council of the Order of Chosen Friends v. Bennett* (N. J.), 19 Atl. Rep. 785.

The by-laws of a mutual beneficiary association organized under *Stat. Mass. 1877, ch. 204, § 1* (Pub. Stat., ch. 115, §§ 2, 8), provided that only male Roman Catholics between the ages of 20 and 51 years were eligible to membership. The application of decedent which designated plaintiff as his beneficiary described him as about 49 years old, when in fact he was over 51 years old. It was held that even if the officers of the corporation attempted to waive the condition as to age they could not do so. *McCoy v. Roman Catholic Mut. Ins. Co. (Mass.)*, 25 N. E. Rep. 289.

2. *Martin v. Stubbings*, 126 Ill. 387; *Michigan Mut. Ben. Assoc. v. Rolfe*, 76 Mich. 146; *Marsh v. Supreme Council American Legion of Honor*, 149 Mass. 512; *Lamont v. Grand Lodge Iowa Legion of Honor*, 31 Fed. Rep. 177; *Mutual Ben. Assoc. v. Hoyt*, 46 Mich. 473; *Bloomington Mut. Ben. Assoc. v. Blue*, 120 Ill. 127; s. c., 60 Am. Rep. 558.

3. *Mitchell v. Grand Lodge Iowa Legion of Honor*, 70 Iowa 360; *Swift v. Railway etc. Mut. Ben. Aid Assoc.*, 96 Ill. 309; *Massey v. Mutual Relief Soc.*, 102 N. Y. 523; *Eckert v. Mutual Relief Soc.*, 2 N. Y. Supp. 612.

In the following cases the terms of the constating instruments were held not to contain limitations upon classes eligible as beneficiaries. Where the words of the articles of association were that "the general nature of its business, and its general purpose, is the insuring the lives of the members upon the plan of paying to the representatives of every deceased member a certain sum, to be assessed upon and received from the other members of said association." *Walter v. Odd Fellows' Mut. Ben. Soc.*, 42 Minn. 204. Where the law of the corporation required applicants to enter

But if the persons who may be beneficiaries, are, by the charter, limited to certain classes, and the certificate holder designate some one not of such classes, the designation is void, and any money paid to such beneficiary is held by him in trust for the

upon their applications "the name or names of the members of their family, or those dependent upon them," to whom they desired the benefit paid, and that members in good standing might surrender their certificates and have new ones issued, payable "to such beneficiary or beneficiaries dependent upon them as they may direct." *Marsh v. Supreme Council American Legion of Honor*, 149 Mass. 512. The same rule was declared of a provision in the constitution that the object of the "order" is to "afford financial aid and benefit to the widows, orphans and heirs or devisees of the deceased members of the order." *Lamont v. Grand Lodge Iowa Legion of Honor*, 31 Fed. Rep. 177. Likewise where the purpose of the association, as recited in the charter, was to furnish life indemnity or pecuniary benefits to devisees or legatees of members. *Bloomington Mut. Life Ben. Assoc. v. Blue*, 120 Ill. 121; 56 Am. Rep. 558. Likewise where the charter declared its purposes to be "benefiting and aiding the widows and orphans of deceased members." A by-law provided that the benefits on the death of a member should be payable "to such person as the deceased may have designated to receive the same, as appears on the books of the lodge of which he is a member." *Manely v. Knights of Birmingham*, 115 Pa. St. 105. Also where the articles provided that its object was to "provide benevolence and charity by establishing a widows' and orphans' fund, from which, on satisfactory evidence of the death of a member, . . . a sum not exceeding \$2,000 shall be paid to his family, or as he may direct." *Mitchell v. Grand Lodge Iowa Knights of Honor*, 70 Iowa 360.

A provision of the society's constitution limiting the beneficiaries to the members of assured's family, or those dependent upon him, is for the society's benefit only; and where it paid the money into court the limitation cannot aid the widow's claim. *Johnson v. Supreme Lodge of Knights of Honor (Ark.)*, 13 S. W. Rep. 794.

#### Construction of Statutes and By-laws.

—Where the the designation was to "legal heirs," it was held that, if there

were no children or descendants of any child, his widow was entitled to the whole fund. *Lawwill v. Lawwill*, 29 Ill. App. 643.

A member's mother comes within the term "families or heirs" as used in Ohio Rev. Stat., § 3630, relating to mutual benefit societies. *Young Men's Mut. Life Assoc. v. Harrison*, 23 Wk. Law Bul. 360.

A member's wife is preferred to his mother within the meaning of the laws of a benefit society, providing that care must be taken to see that the person or persons of a member's family legally dependent on him are the ones to be named as his beneficiaries. *Arthurs v. Baird*, 8 Pa. Co. Ct. Rep. 67, 71.

The term "legal representatives" refers to the widow, orphans and heirs of the member, within the meaning of the objects of an association, stating to be to provide pecuniary aid "for the widows, orphans, heirs and devisees of deceased members, and for no other purpose whatever." *Murray v. Strang*, 28 Ill. App. 608.

Where by the terms of the certificate the fund was payable to "the heirs of the person insured by virtue of this policy," and that it "will be paid to—, or lawful heirs," and the by-laws declare that "its object is to aid and benefit the families of deceased members of the brotherhood in a simple and substantial manner," a designation by the deceased of his wife and children as beneficiaries was held to entitle them to the fund. *Hannigan v. Ingraham*, 8 N. Y. Supp. 232.

A certificate was payable to insured's wife, E, or to such other person as might be entitled to the insurance. After the death of E the insured married plaintiff, but made no change as to the beneficiary. The objects of the association, as declared in its by-laws, were to afford financial aid to the widows, orphans and heirs of deceased members, or to such other persons as might be designated by the insured member. On the death of the member it was held that his widow and not the children of deceased wife was entitled to the insurance. *Riley v. Riley (Wis.)*, 44 N. W. Rep. 112.

persons entitled to receive it, under the laws of the society, in default of a designation.<sup>1</sup>

But a designation, valid in its inception, remains so, although the insurable interest or relationship of the beneficiary has ceased, unless it is otherwise stipulated in the contract.<sup>2</sup>

The real property interest is vested in the beneficiary, though it is simply equitable and liable to be defeated by the act of him in whose name it is made. The latter has the naked legal right.<sup>3</sup>

His only power over the benefit is that of appointing some one to receive it.<sup>4</sup>

Under some circumstances, if no designation is made, as required by the fund-law of the organization, the benefit reverts to the society.

The member has, however, a property right in the contract of membership, which the courts will protect, and which must be dis-

The wife of a nephew does not come within the meaning of the words "related to him" in a certificate. *Supreme Council of Order of Chosen Friends v. Bennett* (N. J.), 19 Atl. Rep. 785.

"Affianced wife" in a certificate does not come within the meaning under Stat. Mass. 1882, ch. 195 (Pub. Stat., ch. 115), which authorizes corporations to assist "the widows, orphans or other relations of deceased members, or any persons dependent upon deceased members." *Palmer v. Welch* (Ill.), 23 N. E. Rep. 412.

Adults are not orphan children within the meaning of the regulations of the beneficiary fund providing that, "should there be no widow, then the said amount shall be paid to the lodge of which the deceased was a member, for the use or benefit of his orphan children, in equal shares. In case there should be no widow, child or children, or designated person or object, the amount shall be paid to his executor or administrator." *Hammerstein v. Parsons*, 29 Mo. App. 509.

1. *Daniels v. Pratt*, 143 Mass. 216; *Supreme Lodge American Legion of Honor v. Perry*, 140 Mass. 580.

2. *Clark v. Allen*, 11 R. I. 439; s. c., 23 Am. Rep. 496; *Dalby v. India etc. Assoc. Co.*, 15 C. B. 365; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457; *McKee v. Phoenix Ins. Co.*, 28 Mo. 383; 75 Am. Dec. 129; *Provident L. Ins. & Investment Co. v. Baum*, 29 Ind. 236; *Campbell v. New England Mut. L. Co.*, 98 Mass. 381; *Bacon Ben. Soc. & Ins.* 253.

In one case it was held that a wife, designated as the beneficiary, from

whom the husband, who held the certificate, had been divorced, could not take under it, because the statute restricted the beneficiaries to the dependents, or families, or relatives. *Tyler v. Odd Fellows' Mut. R. Assoc.*, 145 Mass. 134.

3. *Bloomer v. Waldron*, 3 Hill (N. Y.) 365; *Arthur v. Odd Fellows' Ben. Assoc.*, 29 Ohio St. 557; *Maryland Mut. Ben. Soc. v. Clendinen*, 44 Md. 429; s. c., 22 Am. Rep. 52. This he can only exercise in accordance with the constitution and by-laws. *Swift v. Railway etc. Mut. Aid & Ben. Assoc.*, 96 Ill. 309; *Gentry v. Supreme Lodge Knights of Honor*, 23 Fed. Rep. 718; *Worley v. Northwestern Masonic Aid Assoc.*, 10 Fed. Rep. 227; *Eastman v. Provident Mut. Relief Assoc. (N. H.)*, 20 Cent. L. J. 266; *Barton v. Provident Mut. Relief Assoc.*, 63 N. H. 535; *Greeno v. Greeno*, 23 Hun (N. Y.) 478; *Masonic Mut. Relief Assoc. v. McAuley*, 2 Mackey (D. C.) 70; *Presbyterian Assurance Fund v. Allen*, 106 Ind. 593; *Richmond v. Johnson*, 28 Minn. 447; *Masonic Mut. Ben. Soc. v. Burkhardt*, 110 Ind. 189; *Kentucky Masonic Mut. L. Ins. Co. v. Miller*, 13 Bush (Ky.) 489; *Van Bibber v. Van Bibber*, 82 Ky. 347; *Duvall v. Goodson*, 79 Ky. 224; *Arthur v. Odd Fellows' B. Assoc.*, 29 Ohio St. 557; *Tennessee Lodge v. Ladd*, 5 Lea (Tenn.) 716; *Durian v. Central Verein*, 7 Daly (N. Y.) 168; *Supreme Council Catholic Mut. Ben. Assoc. v. Priest*, 46 Mich. 429. See CHANGE OF BENEFICIARY.

4. *Maryland Mut. Ben. Soc. v. Clendinen*, 44 Md. 433; *Arthur v. Odd Fellows Ben. Assoc.*, 29 Ohio St. 557; *Hel-*

tinguished from his right to appoint a beneficiary of the insurance money.<sup>1</sup>

A power of appointment, restricted to a particular class, is called special,<sup>2</sup> and the doctrines concerning and distinctions between general and special powers apply to certificates and constating instruments of societies. The designation must be by the prescribed instrument,<sup>3</sup> executed according to the requirements and formalities pointed out in the certificate or constating instruments, or both considered together.<sup>4</sup>

The law of *situs* of the subject of the power controls the execution of the power.<sup>5</sup>

That the benefit will not pass under the residuary clause of a will, nor by the general disposition of all the testator's property, unless some authority for that purpose is provided in the laws of the organization,<sup>6</sup> is well settled by the authorities.<sup>7</sup>

**2. Limitations and Their Constructions.**—The cardinal rule is that the one to whom a certificate is issued may have as wide a range of choice in selecting a beneficiary as the certificate, the organic law of the association, and its by-laws, taken together, give him;<sup>8</sup> and that, in the absence of restrictions, his power in this respect is unlimited.<sup>9</sup>

lenberg v. District No. 1 I. O. B. B., 94 N. Y. 580; Bishop v. Empire Order Mut. Aid, 43 Hun 472.

1. Bacon Ben. Soc. & Life Ins. 237.

2. 2 Washb. Real Prop. 307.

3. 2 Washb. on Real Prop. 317; 1 Sugden on Powers, 255; Daniels v. Pratt, 143 Mass. 216; Worley v. Northwestern Masonic Aid Assoc., 10 Fed. Rep. 227.

4. Holland v. Taylor, 111 Ind. 121; Daniels v. Pratt, 143 Mass. 216; Elliott v. Whedbee, 94 N. Car. 115; Supreme Lodge Knights & Ladies of Honor v. Grace, 60 Tex. 571; Supreme Council American Legion of Honor v. Perry, 140 Mass. 580; Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 593; 1 Sugden on Powers, 250, 255; 2 Washb. on Real Prop. 317.

Mr. Sugden says: "In the first it would be in direct opposition to the agreement to consider the estate charged when the mode pointed out is not adhered to; in the second, to dispense with the solemnities and forms required to attend the execution of the power, is to deprive a man of the bridle which he has thought to impose on his weakness or frailty of mind, in order effectually to guard himself against fraud or imposition."

A gift of a mutual benefit certificate by husband to wife, she being the beneficiary named therein, is not suf-

ficiently shown by the husband's declarations that he had given the insurance to her, and by her possession of it, he having afterwards obtained it, and procured a change in the beneficiary. Supreme Council Catholic Knights v. Morrison (R. I.), 17 Atl. Rep.

5. Bingham's Appeal, 64 Pa. St. 345.

6. Weil v. Trafford, 3 Term. Ch. 108.

7. Eastman v. Provident Mut. R. Assoc. (N. H. 1883), 20 Cent. L. J. 267; Greeno v. Greeno, 23 Hun (N. Y.) 478; Highland v. Highland, 109 Ill. 366; Morey v. Michael, 18 Md. 241; Hellenberg v. Dist. No. 1 of I. O. B. B., 94 N. Y. 580; Maryland Mut. Ben. Assoc. v. Clendinen, 44 Md. 429; s. c., 22 Am. Rep. 52; Arthur v. Odd Fellows' Ben. Assoc., 29 Ohio St. 557. *Contra*, Kepler v. Supreme Lodge Knights of Honor, 45 Hun (N. Y.) 274; Bown v. Catholic Mut. Ben. Assoc., 33 Hun (N. Y.) 263; St. John's Mite Assoc. v. Buchly, 5 Mackey (D. C.), 406.

It has been held, however, that defects or irregularities of form or manner of designation could be waived by a lodge. Kepler v. Supreme Lodge Knights of Honor, 45 Hun (N. Y.) 274.

8. See DESIGNATION OF BENEFICIARY, 1, *supra*.

9. Massey v. Mutual Relief Soc., 102 N. Y. 523; Freeman v. Nat. Ben. Soc., 42 Hun (N. Y.) 252; Mitchell v. Grand Lodge Iowa Knights of Honor, 70 Iowa

A liberal construction will be given to the certificate, organic law, and by-laws, with a view to determining whether the designated beneficiary comes within the class specified or not, and, at the same time, carrying out the benevolent purposes of the organization. And yet care will be taken that the statute law of the State be not violated nor public policy contravened.<sup>1</sup>

Unless the statute law or public policy of the place where enforcement is sought forbid, the *lex loci contractus* governs.<sup>2</sup>

General rules of construction must be resorted to and applied to the charters, laws, and certificates of benefit societies as well as to the various statutes relating to them. These are of a manifold nature and analogous to the general rules of construction of contracts and wills, for the subject matter partakes of the characteristics of them all.<sup>3</sup> And the court will, if possible, so construe the designation as to bring it within the power given by the statutes.<sup>4</sup>

360; *Gentry v. Supreme Lodge Knights of Honor*, 23 Fed. Rep. 718; *Bayse v. Adams*, 81 Ky. 368; *Supreme Lodge Knights of Honor v. Martin*, 12 Ins. L. J. 628; 13 W. N. C. (Pa.) 160; *Supreme Lodge Knights of Honor v. Nairn*, 60 Mich. 44; *Swift v. Railway etc. Mut. Aid & Ben. Assoc.*, 96 Ill. 309.

1. *Elsey v. Odd Fellows' Mut. R. Assoc.*, 142 Mass. 224, 225; *Maneely v. Knights of Birmingham*, 115 Pa. St. 305; *Supreme Lodge Knights of Pythias v. Schmidt*, 98 Ind. 374; *Ballou v. Gile*, 50 Wis. 614; *Supreme Council American Legion of Honor v. Perry*, 140 Mass. 580.

A collection of the terms used in the bylaws of some of the leading orders and benefit societies, designating the classes of persons to whom their benefits may be made payable, may be found in *Bacon's Ben. Soc. & Life Ins.* 254. The following words designating classes of persons entitled to benefits have received judicial construction: "Families and heirs," *National Mut. Aid Assoc. v. Gonser*, 43 Ohio St. 1; "to his family, or as he may direct," *Gentry v. Supreme Lodge Knights of Honor*, 23 Fed. Rep. 718; *Mitchell v. Grand Lodge Iowa Knights of Honor*, 70 Iowa 360; "widows, orphans, heirs and devisees," *Worley v. Northwestern Masonic Aid Assoc.*, 10 Fed. Rep. 227; "legal representatives," *Expressmen's Aid Soc. v. Lewis*, 9 Mo. App. 412; "widows, orphans, heirs or devisees," *Covenant Mut. Ben. Assoc. v. Sears*, 114 Ill. 108; "to his family or those dependent on him," *Ballou v. Gile*, 50 Wis. 614; "families of deceased members or their

heirs," *Elsey v. Odd Fellows' Mut. R. Assoc.*, 142 Mass. 224; "families or relatives," *Van Bibber v. Van Bibber*, 82 Ky. 347; *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 593; "to family, orphans or dependents," *Supreme Council American Legion of Honor v. Perry*, 140 Mass. 580.

2. *Daniels v. Pratt*, 143 Mass. 216; *Supreme Lodge Knights of Honor v. Nairn*, 60 Mich. 44; *Supreme Council American Legion of Honor v. Perry*, 140 Mass. 580.

3. *Bacon Ben. Soc. & L. Ins.* 255.

This author says: "The primary rule is, that the intent of the legislature, parties to a contract or designator must be first ascertained and then carried into effect; and this intention must be judged of exclusively by the words of the instrument, if unambiguous, as applied to the subject-matter and the surrounding circumstances. The whole of the statute, law, or designatory writing must be looked at and considered; and words are supposed, unless the contrary be shown, to have been used in their ordinary, every-day sense and with the meaning a long line of judicial decisions has given them." *Citing* 1 Redf. on Wills, \* 433 and vol. 2, \* 20; 2 Pars. on Con. \* 494; *Bishop on Con.*, § 380.

4. *Ballou v. Gile*, 50 Wis. 614; *Supreme Council American Legion of Honor v. Perry*, 140 Mass. 580; *Elsey v. Odd Fellows' Mut. R. Assoc.*, 142 Mass. 224.

In *Duvall v. Goodson*, 79 Ky. 224, the court said: "A life policy for the benefit of the family of the person pro-



The rules and regulations of benefit societies are construed liberally in order to effect benevolent objects.<sup>1</sup>

When several beneficiaries are named in a certificate, the same rule applies as in ordinary policies, which is that if one or more of them die before the maturity of the contract, the benefit enures to the survivors, and that so long as any of the beneficiaries are living, the assured has no interest in the policy and cannot assign it.<sup>2</sup>

If a certificate or policy name two beneficiaries, and provides that, in the case of the death of either, the full amount shall go to the survivor, the question of survivorship relates to the date of the death of the insured and not to the date fixed for payment.<sup>3</sup>

The word "or" will be understood between the words where several classes are named in succession without connective words, and the persons belonging to the respective classes will take in the order named. Thus, if brothers, sisters, heirs, etc., are named, and, at the date of the maturity of the contract, there are no brothers, the sisters will take, and the heirs if there are neither brothers nor sisters.<sup>4</sup>

**3. Change of Beneficiary.**—The right of the person to whom a certificate of membership in a benefit society is issued to direct the payment of the proceeds of the contract to a person other

curing, though not a testament, is in the nature of a testament, and in construing it the court should treat it, as far as possible, as a will, as in so doing they will more nearly approximate the intention of the persons the destination of whose bounty is involved in such cases."

1. *Gundlach v. Germania Mechanics' Assoc.*, 4 Hun (N. Y.) 339; *Supreme Council American Legion of Honor v. Perry*, 140 Mass. 580; *Supreme Lodge Knights of Honor v. Martin* (Pa.), 12 Ins. L. J. 628; 13 W. N. C. (Pa.) 160; *Maneely v. Knights of Birmingham*, 115 Pa. St. 306; *Erdmann v. Mut. Ins. Co.*, 44 Wis. 376; *Ballou v. Gile*, 50 Wis. 614; *Supreme Lodge Knights of Pythias v. Schmidt*, 98 Ind. 381; *Whitehurst v. Whitehurst*, 83 Va. 133; *Masonic Mut. Relief Assoc. v. McAuley*, 2 Mackey (D. C.) 70; *Duvall v. Goodson*, 79 Ky. 224; *Van Bibber v. Van Bibber*, 82 Ky. 347; *Massey v. Mut. Relief Assoc.*, 102 N. Y. 523; *Dietrich v. Madison Relief Assoc.*, 45 Wis. 79; *Expressman's Aid Assoc. v. Lewis*, 9 Mo. App. 412.

2. *Robinson v. Duvall*, 79 Ky. 83; *Day v. Case*, 43 Hun (N. Y.) 179.

3. *Union Mut. Aid Assoc. v. Mont-*

*gomery*, 70 Mich. 587; *Thomas v. Leake*, 67 Tex. 469.

In the second case the member had directed the benefit to be paid to his son and daughter or the survivor of them. The money was, by the terms of the certificate, payable ninety days after receipt of proof of the death of the member, and the son died after his father, but within the ninety days. In deciding that the son's executor and not the daughter was entitled to the son's share of the fund, the court said: "The provision relating to survivorship applies to the one of the two who shall survive the donor. If neither survive him, the fund goes to the heirs of the member. The time of payment provided for, namely, ninety days after the death of the member, has no reference to who shall take as survivor. The time of payment is defined simply to enable the corporation to raise the fund by assessment upon the members."

4. *Covenant Mut. Ben. Assoc. v. Sears*, 114 Ill. 108; *Kentucky Masonic etc. L. Ins. Co. v. Miller*, 13 Bush (Ky.) 489; *Addison v. New England Commercial Travellers' Assoc.*, 144 Mass. 591; *Ballou v. Gile*, 50 Wis. 614; *Masonic Mut. Relief Assoc. v. McAuley*, 2 Mackey (D. C.) 70.

than that named therein, is the most marked distinction between these forms of insurance and ordinary policies.<sup>1</sup>

Under the contracts and laws of most societies the power of appointment partakes so far of the nature of a testamentary devise that it may be revoked and a new designation made at any time before the maturity of the contract, and the same rules of construction apply as in case of other testamentary writings.<sup>2</sup>

1. Bacon Ben. Soc. & L. Ins. 289. In further discussion of the subject he says: "In a policy of life insurance the undertaking is with the assured, and the stipulated sum is payable to him upon the contingency named—the ending of the life insured. Owing to the form of the contract the rights of the person to whom the insurance is to be paid become at once vested when the policy is delivered, and cannot be altered or affected except by his consent. The member of a beneficiary organization, on the other hand, as we have seen, has no property interest in the benefit, but only the naked power of designating some one to receive it. This designated recipient also has no property nor vested rights in the benefit, because his interest is contingent and uncertain, the power of the member to revoke the appointment and substitute a new beneficiary being specially reserved by the laws of the society, which laws enter into and form a part of the contract."

Still the rules of a mutual benefit society may forbid the transfer of its benefit certificates for valuable consideration, and where so forbidden a contract for the sale of such certificate to one who has no insurable interest in the life of the assured is void under that rule, as well as being against public policy.

Stoelker v. Thornton (Ala.), 6 So. Rep. 680. In this case it was held, however, that though such a sale be against public policy, yet as a matter of contract right it is a question between the society and the purchaser; and, when the society recognizes its validity by issuing a new certificate, in which the purchaser is named as the beneficiary, and upon the death of the assured pays the money due under the certificate to such purchaser, no stranger or volunteer can assail the validity of the payment.

But it was held in the absence of such prohibitory provision being shown that an assignment of a benefit certificate in a benevolent association to one not related to the member, but who has

merely advanced him \$50 against public policy, and the fund goes to the heirs, after deducting dues and advancements made by the assignee; and that it was immaterial that by the rules of the order the fund was to be paid to the member's "family, or as he may direct," and that the certificate was surrendered and a new one issued to the assignee, according to the constitution. *Schonfield v. Turner*, 75 Tex. 324.

2. *Union Mut. Aid Assoc. v. Montgomery*, 70 Mich. 587; *Continental L. Ins. Co. v. Palmer*, 42 Conn. 64; s. c., 19 Am. Rep. 530; *Washington Ben. Endowment Assoc. v. Wood*, 4 Mackey (D. C.) 19; s. c., 54 Am. Rep. 251; *Duvall v. Goodson*, 79 Ky. 228; *National American Assoc. v. Kirgin*, 28 Mo. App. 80; *Thomas v. Leake*, 67 Tex. 469.

In *Holland v. Taylor*, 111 Ind. 125, the court said: "For many, and, indeed, for most purposes, mutual benefit associations are insurance companies, and the certificates issued by them are policies of life insurance governed by the rules of law applicable to such policies. There are, however, some essential differences usually existing between the contracts evidenced by such certificates and the ordinary contract of life insurance. The most usual difference is the power, on the part of the assured in mutual benefit associations, to change the beneficiary. But as in either case the rights of the beneficiary are dependent upon and fixed by the contract between the assured and the company or association, there seems to be no reason why the assured should have any greater power to change the beneficiary in one case than in the other, except as that power may be inherent in the nature of the association, or is reserved to him by the constitution, or by the laws of the association, or by the terms of the certificate." See also *Durlan v. Central Verein*, 7 Daly (N. Y.) 168; *Lemon v. Phoenix Mut. L. Ins. Co.*, 38 Conn. 301; *Johnson v. Van Epps*, 14 Bradw. (Ill.) 201; 110 Ill. 551; *Deady v. Bank Clerks' Mut. Ben.*

The doctrine is now well settled that in the absence of prohibitory provisions in the by-laws of the society or of a previous delivery of the certificate to the beneficiary, the latter may be changed by the member at will.<sup>1</sup> To render a second delivery of a certificate effective to vest such an interest in the beneficiary as

Assoc., 17 Jones & Sp. 246; Tennessee Lodge v. Ladd, 5 Lea (Tenn.) 716; Swift v. Railway etc. Mut. Aid & Ben. Assoc., 96 Ill. 309; Richmond v. Johnson, 28 Minn. 449. In the last case the court said: "Here is not an ordinary contract of insurance made between an insurance company and another person, the rights of the parties to be determined exclusively by the policy. The rights of Charles H. Richmond, and of any one claiming through him, depended not on the certificate alone, but rather on his membership in the association; and such rights were defined and controlled by its constitution and by-laws."

1. Union Mut. Aid Assoc. v. Montgomery, 70 Mich. 587; Massachusetts Catholic Order of Foresters v. Callahan, 146 Mass. 391; Schillinger v. Boes, 85 Ky. 357; Masonic Mut. Ben. Soc. v. Burkhardt, 110 Ind. 789; Lamont v. Grand Lodge Iowa Legion of Honor, 31 Fed. Rep. 177\*; Sabin v. Grand Lodge Ancient Order United Workmen, 8 N. Y. Supp. 185\*; Milner v. Bowman, 119 Ind. 448; Byrne v. Casey (Tex.), 8 S. W. Rep. 38; Knights of Honor v. Watson, 64 N. H. 577; Brown v. Grand Lodge of Iowa (Iowa), 45 N. W. Rep. 884; Highland v. Highland, 109 Ill. 366; Coleman v. Knights of Honor, 18 Mo. App. 189; Splawn v. Chew, 60 Tex. 532; Supreme Lodge Knights of Honor v. Martin, 13 W. N. C. (Pa.) 160; Ireland v. Ireland, 42 Hun (N. Y.) 212; Holland v. Taylor, 111 Ind. 121; Raub v. Masonic Mut. Relief Assoc., 3 Mackey (D. C.) 68; Lamont v. Hotel Men's Ben. Assoc., 30 Fed. Rep. 817; Supreme Council American Legion of Honor v. Perry, 140 Mass. 580; Gentry v. Supreme Lodge Knights of Honor, 23 Fed. Rep. 718; Supreme Council of the Catholic Mut. Ben. Assoc. v. Priest, 46 Mich. 429; Barton v. Provident Mut. Relief Assoc., 63 N. H. 535.

The change may be made by any act clearly signifying such intention in the absence of any law prescribing the manner of effecting it. Thus, the constitution of a benefit society provided that the funds to which a member was

entitled in case of death should be paid to his widow, or, in case of her death, to his children; and that a married member might bequeath one-half of the fund to either one or all of his children, but \$500 at least must be devised to his widow. Deceased designated plaintiff as his beneficiary three years before his marriage to defendant, and four years thereafter died childless. It was held that his marriage annulled the preceding designation to plaintiff, and that his widow was entitled to the fund. Sanger v. Rothschild, 2 N. Y. Supp. 794. Or the change may be brought about by operation of law, as where an appointment was made by a husband in favor of his wife, in accordance with the company's rule that a member might appoint any person as beneficiary; but the instrument did not designate to whom the money should be paid in case the beneficiary died before the insured. It was held that the appointment was revoked by the death of the beneficiary. Rev. Stat. Wis., § 2347, which empowers a husband to insure his life in favor of his wife, and provides that such insurance shall enure to her separate use and that of her children, not vesting in the original beneficiary the absolute right to the money. Given v. Wisconsin Odd Fellows' Mut. L. Ins. Co., 71 Wis. 547.

**Estoppel of Beneficiary.**—A first beneficiary may be estopped from setting up the invalidity of an attempted change, as where a member of a beneficiary society makes a change of beneficiaries by will, a method not in compliance with the contract of insurance, but the original beneficiary, his wife, induces the assured to rely upon her acquiescence in the provisions of such will, and accept benefits under it after his decease. Hainer v. Iowa Legion of Honor, 78 Iowa 245.

**Insurable Interest.**—The transfer of a certificate of a mutual benefit society to one having no insurable interest, is not for that reason invalid, unless such transfer is itself a wagering contract. McFarland v. Creath, 35 Mo. App. 112.

will require his consent to a change, there must be some sufficient consideration to support the transaction.<sup>1</sup>

And the right to change has been held not affected by the facts that the first beneficiary paid the assessments of the member and that the change was made without his consent.<sup>2</sup>

The laws of the organization regulate and govern the method of changing the beneficiary. Whatever formalities they prescribe must be observed and complied with. The expression of one method impliedly excludes all others.<sup>3</sup> However, the authorities are not uniform in holding that no change of beneficiaries can be

1. The rules of an association allowed the surrender of a certificate and the issue of a new one. A son, who was a member of the association, held a certificate payable to his mother, to whom it was delivered. Having married, the son afterwards obtained the certificate, and, without his mother's knowledge or consent, surrendered it for one payable to his wife, to whom he delivered it. Afterwards, without the knowledge or consent of the wife, he obtained the second certificate and procured its cancellation, and the issue of another payable to the mother. *Held* that, though the certificate was delivered as a gift to the wife, it was subject to the condition attached that assured might at any time surrender it, and name another beneficiary, and that the wife had no right to the fund. Following *Fisk v. Equitable Aid Union* (Pa.), 11 Atl. Rep. 84; *Appeal of Beatty*, 122 Pa. St. 428.

2. *Fisk v. Equitable Aid Union* (Pa.), 11 Atl. Rep. 84.

In *Byrne v. Casey*, 70 Tex. 247, it was held that a beneficiary cannot complain that a by-law in existence at the issuance of a certificate requiring the consent of the beneficiary, was amended so as to allow such change and surrender, without the consent of the beneficiary, the constitution of the society providing that the by-laws might be amended at any time.

3. *Supreme Council Am. Legion of Honor v. Smith* (N. J.), 17 Atl. Rep. 770; *Wendt v. Iowa Legion of Honor*, 72 Iowa 682; *Hainer v. Iowa Legion of Honor*, 78 Iowa 245; *Olmstead v. Masonic Mutual Ben. Soc.*, 37 Kan. 93; *Coleman v. Knights of Honor*, 18 Mo. App. 189. See also *Manning v. Supreme Lodge Ancient Order United Workmen*, 86 Ky. 136; *Kentucky Masonic etc. L. Ins. Co. v. Miller*, 13 Bush (Ky.) 489; *Greeno v. Greeno*, 23 Hun (N. Y. 478; *Highland*

*v. Highland*, 109 Ill. 366; *Elliott v. Whedbee*, 94 N. Car. 115; *Vollman's Appeal*, 92 Pa. St. 50; *Supreme Lodge Knights of Honor v. Nairn*, 60 Mich. 44; *Ireland v. Ireland*, 42 Hun (N. Y.) 212; *Gentry v. Supreme Lodge Knights of Honor*, 23 Fed. Rep. 718; *National Mut. Aid Soc. v. Lupold*, 101 Pa. St. 111; *Renk v. Herman Lodge*, 2 Den. (N. Y.) 409; *Hotel Men's Mut. Ben. Assoc. v. Brown*, 33 Fed. Rep. 11; *Eastman v. Provident Mut. Relief Assoc.* (N. H. 1883), 20 Cent. L. J. 266; *Harman v. Lewis*, 24 Fed. Rep. 97, 530; *Daniels v. Pratt*, 143 Mass. 216; *Bayse v. Adams*, 81 Ky. 368; *Olmstead v. Masonic Mut. Ben. Soc.*, 37 Kan. 93; *Luhrs v. Luhrs*, 6 N. Y. Supp. 51; *Gladding v. Gladding*, 8 N. Y. Supp. 880. Holding also that a recital in an endorsement made by the secretary on a certificate of membership in a mutual benefit association, that, at the written request of the holder of the certificate, the beneficiary was changed from his brother to his wife, is sufficient evidence of a compliance with the by-laws of the association, which provide that a change of beneficiary may be made on the written order of the holder of the certificate, signed in the presence of two witnesses. The records of the association during the life of the member are *prima facie* evidence in respect to the rights of the beneficiary, the latter having no vested interest in the certificate. *Bagley v. Grand Lodge Ancient Order United Workmen*, 131 Ind. 498. Where a member executed a paper assigning his policy to one of his creditors as collateral security, but no application for a change was made to the association, nor was the assignment made upon the prescribed blank, nor had the association any notice of it until after the death of the member intestate, and both the widow and the assignee claimed the benefits, it was held that the widow

made, otherwise than as provided in the laws of the society.<sup>1</sup> But by law provisions regulating the *manner* of changing beneficiaries are intended only for the convenience of the society, and may be waived by it<sup>2</sup> as well as by the original beneficiary.<sup>3</sup>

The same rules apply in determining when a change of beneficiary is complete as in the case of a transfer of shares in a capital stock corporation.<sup>4</sup> Whenever the member has done the acts required of him by the by-laws to effect the change, the neglect of the agents of the association to give it effect will not be allowed to defeat his object.<sup>5</sup> Nor can they require the performance of impossible conditions, though directed in the by-laws.<sup>6</sup> Though

was entitled to the fund. *Hotel Men's Mut. Ben. Assoc. v. Brown*, 33 Fed. Rep. 11.

1. See *Hirsch v. Clark* (Iowa), 47 N. W. Rep. 78; *Splawn v. Chew*, 60 Tex. 532; *Manning v. Ancient Order United Workmen*, 86 Ky. 136; *National Mut. Aid Soc. v. Lupold*, 101 Pa. St. 111; *Raub v. Masonic Mut. Relief Assoc.*, 3 Mackey (D. C.) 68; *Block v. Valley Mut. Ins. Assoc.* (Ark.), 12 S. W. Rep. 477; *Order of Mut. Companions v. Griest*, 76 Cal. 494; *Supreme Council of the Catholic Mut. Ben. Assoc. v. Priest*, 46 Mich. 429; *Nally v. Nally*, 74 Ga. 669; 8 c., 58 Am. Rep. 458.

2. *Southern Tier Masonic Relief Assoc. v. Laudenschach*, 5 N. Y. Supp. 901; *Mayer v. Equitable Reserve Fund L. Assoc.*, 2 N. Y. Supp. 79\*. And where defects in the formalities prescribed by the law of a society as to a change in the designation of a beneficiary have been waived by the society and the benefit paid, the former beneficiary cannot take advantage of such defects. *Manning v. Ancient Order of United Workmen* (Ky.), 5 S. W. Rep. 385.

3. In *Marsh v. Supreme Council American Legion of Honor*, 149 Mass. 512, it appeared that, by the laws of the corporation, a petition for substitution was required to have the seal of the member's subordinate council, and to be attested by the subordinate secretary. A member delivered his certificate and a petition for substitution to the subordinate secretary, who, acting in collusion with the original beneficiary, the member's wife, delivered the certificate to her, and forwarded the petition without sealing or attesting it. The corporation, notwithstanding these omissions, recognized the petition as valid, and stood ready to make the substitution if it had received the certificate. It was held that the wife would

not be heard to object that there was no valid substitution. *Marsh v. Supreme Council American Legion of Honor* (Mass.), 21 N. E. Rep. 1070.

A party may be estopped from setting up the invalidity of the change of beneficiary, as where the aunt of a member having the certificate in her possession refused to give it up for the purpose of allowing a change to be made. *Supreme Conclave Royal Aldelphia v. Cappella*, 41 Fed. Rep. 1.

4. See STOCK AND STOCKHOLDERS, Am. & Eng. Encyc. of Law.

5. *National American Assoc. v. Kirgin*, 28 Mo. App. 80; *Grand Lodge Ancient Order United Workmen v. Child*, 70 Mich. 163.

In *Reversing*, 6 N. Y. S. 51; *Luhrs v. Luhrs* (N. Y.), 25 N. E. Rep. 388. The constitution of the benefit society whose certificate was in question provided that a member might change his beneficiary by surrendering his certificate to the reporter of his lodge, who should forward it to the supreme reporter of the society, and that the latter should then cancel it and issue a new one, payable to the beneficiary designated. The certificate was surrendered in the manner prescribed, designating a new beneficiary, but the member died while it was in course of transmission. The supreme reporter, ignorant of this fact, issued a new certificate. Both certificates bore at the bottom a printed form of acceptance, and the member had signed his name thereto on the old one. It was held that the right to the new certificate attached when the old one was surrendered to the home lodge, and the new one, when issued, related back to that time, notwithstanding that the acceptance could not be signed, and therefore the new beneficiary was entitled to the fund.

6. *Isgrigg v. Schooley* (Ind.), 25 N. W. Rep. 151, following *Grand Lodge*

the general rule is that the consent of the beneficiary is not required<sup>1</sup> in order to effect a change, it may be otherwise provided in the by-laws.<sup>2</sup> And, even without such provisions, the interest of the beneficiary may become vested so that his consent will be necessary.<sup>3</sup>

The beneficiaries of a life insurance policy, who are affected by an attempted change of beneficiaries, may avail themselves of the failure of the insured to comply with the contract, as well as the company with which it was made.<sup>4</sup>

**V. SEPARATION OF FUNDS—1. Duties of Directors with Respect to.**—Independent of statutory provisions and those of the charter with respect to the security of policy holders of insurance companies in the matter of setting apart guaranty and reserve funds, such duty is sometimes imposed upon directors in the by-laws; and usually they have discretionary power to provide in this way for the safety and protection of certificate and policy holders, while insuring by similar segregation of sums derived from assessments, the payment of expenses of management, of benefits, relief, disability, dues, etc. As long as such separation and application do not amount to a diversion of the funds, or a deprivation of any right or just claim belonging to a member or creditor, it is but a fair and reasonable means for the accomplishment of the objects

*Ancient Order United Workmen v. Childs*, 70 Mich. 163, in which the facts were as follows: Deceased procured a certificate making his betrothed the beneficiary, but retaining the certificate in his possession. She, marrying another, and the certificate having been lost, he made a statement of the loss, and applied for a reissue of the certificate, making his son the beneficiary. Such application was refused—the rules of the organization requiring the change to be endorsed on the original certificate; but, by the advice of the officers of the organization, he attempted to make the change by giving a power of attorney to another to collect the amount which should accrue under the certificate. It was held that such acts constituted an equitable change of beneficiary, and that the son was entitled to the fund.

1. *Luhns v. Supreme Lodge Knights and Ladies of Honor*, 7 N. Y. Supp. 487; *Supreme Council Catholic Knights v. Morrison* (R. I.), 17 Atl. Rep. 57. See also *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189, construing the act of March 2, 1877 (Rev. Stat. Ind. 1881, § 3850), which declares certificates to be contracts between the association and the beneficiary, and holding that it did not

change the rule, except to prevent any future restrictions in the constitution or by-laws of such society upon the contract or the rights of the parties to change the beneficiary.

2. See *EFFECT UPON CONTRACT OF CONSTITUTION AND BY-LAWS*, III, 7, *supra*.

3. In *Butler v. State Mut. L. Assur. Co.*, 8 N. Y. Supp. 411, it was held that the beneficiary in a policy of insurance, payable to her trustee or his legal representatives, though she has no insurable interest in the life of the insured, acquired a vested interest in the policy on its delivery to the trustee, and a subsequent alteration so as to permit the insured to appoint a new trustee on the death of the former is nugatory without the consent of the beneficiary.

4. *Wendt v. Iowa Legion of Honor*, 72 Iowa 682, holding also that the fact that the insured authorizes a change in the beneficiaries and the secretary of the company assents and acts as though the beneficiaries had been properly changed, will not constitute a valid change as against the first beneficiaries, when the secretary has performed acts beyond his authority, and the provisions of the constitution as to such changes have not been complied with.

of the company or association, and is an ordinary feature of insurance book-keeping.

The separate funds of a mutual benefit association, when there are such, are made up in one or the other of two ways: first, by assessments levied and collected for the specified object; second, by a percentage of the general periodical assessments, collected without special mention of the fund to which it is to be applied. The general principles applicable to the duties and powers of directors and agents of private corporations control in this connection. The various provisions of the laws governing these matters are also part of the contract of membership, in the construction of which they must be observed and interpreted.<sup>1</sup>

**2. Guaranty and Reserve Funds—(a) Character and Purpose.**—In most of the States it is required by statute that all insurance companies, whether ordinary or mutual, shall provide in cash or premium notes, properly secured, or in both, a fund for the security of those taking risks. Independent of statute most mutual insurance companies provide such fund. It is sometimes called an absolute, sometimes a guaranty or safety, and at other times a reserve fund;<sup>2</sup> but however designated its object is to provide against unexpected casualties and losses resulting therefrom. Most frequently it consists of absolute promissory notes, payable within a fixed time. These are usually designated guaranty notes, and evidence a limited liability contingent upon the extent of losses to the company. They are usually given by members, but not necessarily. Interest may or may not be allowed to the makers, but whether it is or not their character is not altered.<sup>3</sup>

**(b) Procurement.**—Whatever any statutes on the subject require to constitute the fund must be procured, whether it be cash, municipal bonds, or the notes of solvent parties.

1. It is provided by § 3 of Mass. Stat. 1885, ch. 183, that all companies then existing for the purposes contemplated by that chapter may exercise the rights and powers conferred by the chapter as if reincorporated thereunder. *Harding v. Littlehale*, 150 Mass. 100.

Where the statute under which an association was organized provided that "no part of the funds collected for the payment of death benefits shall be applied for any other purpose," it was held that the "advance mortuary assessments" required of new members were funds designed for payment of death benefits, and that the use of such assessments for the payment of current expenses was a violation of law justifying dissolution. *Chicago Mut. L. Indem. Assoc. v. Hunt*, 127 Ill. 257.

2. Under *Starr & C. St. Ill.*, § 129,

ch. 73, the reserve fund of a mutual benefit association is a trust fund, to be used only for mortuary benefits, or otherwise applied as directed by the by-laws, and, when the association is not in a condition to pay the holders of death claims by a regular assessment, they have the first right to be paid out of such reserve, before a payment to the directors of an advance made by them in good faith to the association. *Wilber v. Torgerson*, 24 Ill. App. 119. See also *Supreme Council American Legion of Honor v. Smith*, 45 N. J. Eq. 466.

3. See *Bouwer v. Hill*, 1 Sandf. (N. Y.) 629; *Holbrook v. Bassett*, 5 Bosw. (N. Y.) 147; *Brookman v. Metcalf*, 5 Bosw. (N. Y.) 429; *Hope Mut. F. Ins. Co. v. Taylor*, 2 Rob. (N. Y.) 278, holding that statutes requiring a guar-

The task of obtaining a statutory guaranty fund usually devolves upon the incorporators and promoters, and precedes organization,<sup>1</sup> and is a condition precedent to the right to transact business,<sup>2</sup> though it is not a prerequisite to corporate existence.<sup>3</sup>

When notes are taken for the guaranty fund, they are deemed security for the payment of losses, and are not to be resorted to except upon the happening of the condition upon which the liability of the makers depends. The fund thus provided must be held, used, and applied as required by statute.<sup>4</sup> But such notes may be assessed if so provided in the by-laws, especially if such by-laws do not declare such notes to be absolute funds.<sup>5</sup> When such notes are not given for the double purpose of securing assessments to pay liabilities and to constitute the guaranty fund, but express an absolute liability, they are collectible to the full

antee fund and prescribing the duties of mutual insurance companies with respect thereto are valid and binding.

1. The statutes of Kansas divide mutual insurance companies into classes, and graduate the extent of their authority to do business according to the amount of the guarantee fund provided by them. The various acts on the subject were construed in *Kansas Home Ins. Co. v. Wilder*, 43 Kan. 731, and it was held under the circumstances that a mutual company which had provided no fund could not even do business beyond the limits of the State. Section 4 of chapter 130 of the Laws of 1885 provides that mutual fire insurance companies having a guarantee fund of \$100,000 may do business outside the State of Kansas.

The system embraces companies organized from residents of the State, whose business is divided into two classes, each of which is to be conducted separately and independently of the other. Laws 1885, ch. 132. When any such company has done business for a certain length of time, and to a sufficient amount, it may create a guarantee fund to the amount of \$25,000, and may then issue policies within certain limitations on property situate in the State of Kansas; Laws 1885, ch. 130, §§ 1-4. When such a company provides a guarantee fund of not less than \$50,000, it may advertise for and do business in that class of the system within certain other limitations. Laws 1889, ch. 160. And then when the company reaches the stage of having a guarantee fund of \$100,000, it may do business either in or out of

the State. Laws 1885, ch. 130, § 4. See also *Dwelling-house Ins. Co. v. Wilder*, 40 Kan. 561; s. c., 26 Am. & Eng. Corp. Cas. 1 n.; *State v. Fidelity etc. Ins. Co.*, 39 Minn. 538; s. c., 26 Am. & Eng. Corp. Cas. 11; *State v. Thomas* (Penn.), 12 S. W. Rep. 1034.

2. *Mor. Priv. Corp.* 29.

3. *Harrod v. Hamer*, 32 Wis. 162; *Mor. Priv. Corp.* 29. Compare *In re Schmitt*, 10 N. Y. Supp. 583. This case called for a construction of Laws N. Y. 1889, ch. 520, § 3, which provide, with reference to the preliminary organization of fraternal beneficiary societies, that when among other things a sworn statement has been filed that at least 200 persons have made application in writing for membership in such an association, the superintendent of insurance shall issue a licence, etc. The section further provides that when the licence has been filed, and when at least 200 persons have subscribed in writing to be beneficiary members, etc., such persons shall be constituted a body politic and corporate, etc. It was held that it was necessary, in order to become a body corporate under the law, not only for the prescribed 200 persons to make application for membership before the issuance of the preliminary licence, but they must subscribe in writing to be beneficiary members after the issuance of the licence.

4. *In re California Mut. L. Ins. Co.*, 81 Cal. 364.

5. *Citizens' Mut. F. Ins. Co. v. Sortwell*, 10 Allen (Mass.) 110; *Bell v. Shibley*, 33 Barb. (N. Y.) 610; *McIntire v. Preston*, 10 Ill. 48.



amount, without any assessment and without exhausting the remedies against others liable on such notes.<sup>1</sup>

(c) *Preservation*.—Directors hold the guaranty fund in a fiduciary capacity subject to statutory directions and provisions of the by-laws relating thereto. Where it consists in promissory notes they have no power to surrender such notes in prejudice to the rights of members, without a unanimous consent of the latter.<sup>2</sup> Certainly not in violation of a statute.

(d) *Disposition*.—The provisions of statutes, charters, and by-laws must be consulted for the powers of directors and other officers in the use and disposal of the guaranty fund.<sup>3</sup> When legally acquired it cannot be reached or made available for other objects than those authorized. When the object has failed or the fund is no longer needed or required to be kept intact, it may be disposed of as general assets.<sup>4</sup>

3. *Relief and Disability Fund*.—This is a fund set apart in anticipation of future requirements, to pay sick and disability benefits to those entitled to receive the same under the laws of the organization.<sup>5</sup>

4. *Mortuary Fund*.—This is an accumulation of assessments or dues to meet anticipated death losses.<sup>6</sup>

1. *Shawmut Mut. F. Ins. Co. v. Stevens*, 9 Allen (Mass.) 332; *Davenport F. Ins. Co. v. Moore*, 50 Iowa 619; *Maine Mut. M. Ins. Co. v. Swanton*, 49 Me. 448; *Union Ins. Co. v. Greenleaf*, 64 Me. 123; *Hope Mut. L. Ins. Co. v. Weed*, 28 Conn. 51; *Hope Mut. L. Ins. Co. v. Perkins*, 38 N. Y. 404. See OFFICERS OF PRIVATE CORPORATIONS.

2. See *Maine Mut. Marine Ins. Co. v. Pickering*, 66 Me. 130; *Brouwer v. Appleby*, 1 Sandf. (N. Y.) 158.

It is no defence to such notes that the makers never became members or policy holders. *Brouwer v. Appleby*, 1 Sandf. (N. Y.) 158. See *Mutual Ben. L. Ins. Co. v. Davis*, 12 N. Y. 569.

Like other promissory notes they are payable absolute, and may be collected for the purpose of applying the proceeds to the payment of losses and expenses accruing before the maker became a member. *Nashua F. Ins. Co. v. Moore*, 55 N. H. 48.

The Illinois statute concerning the security in the shape of a guarantee fund and its preservation provides that associations organized thereunder may provide for an accumulation of a surplus or guarantee fund, which shall belong to the association, and not to the officers, "and shall be used only for mortuary benefits, without assessment, or applied in payment of future assess-

ments, or otherwise used for the promotion of the object for which such funds are specially provided and set apart, and such use shall not be deemed or construed to mean a profit received by members." The directors having created a tontine reserve fund, by reserving 25 per cent. of the assessments for death benefits, for the apportionment of which fund the members were divided into classes, the surviving persistent members of each class to receive a distribution at the end of 10 years. It was held that such disposition of the reserve fund was a direct violation of the statute, justifying dissolution. *Chicago Mut. L. Indem. Assoc. v. Hunt*, 127 Ill. 257.

3. See OFFICERS OF PRIVATE CORPORATIONS.

4. See XI, 1, *infra*.

5. Where funds have been contributed to a relief fund under a law afterwards declared invalid, the sums previously paid should be refunded. *Murray v. Buckley*, 1 N. Y. Supp. 247.

6. The beneficiary of a certificate holder has such an interest in the mortuary or death fund that, after the liability of the association has arisen and an action been brought, he is entitled to show that the death fund amounts to the agreed sum; or, if it does not, what amount an assessment would

**5. Endowment Fund.**—This is a provision similar to a mortuary fund, except that it is to be applied to payment of future maturing endowment claims. These may consist either, first, of a lump sum payable upon the maturity of the certificate, or, second, of coupons attached to the certificates to become due in the future, upon due compliance by the holders with all the conditions and requirements of the contract.

**6. Expense Fund.**—This is sometimes called the general fund, and signifies all the revenues not required to pay losses and benefits, and is available for payment of salaries and other expenses of carrying on the corporate enterprise and accomplishing the objects of the organization.<sup>1</sup>

**VI. TITLE TO PROCEEDS OF CONTRACT.**—No question is likely to arise concerning the disposition of the money derived from a death loss upon a certificate of membership, where such disposition is specifically provided for in the certificate or by-laws, and the beneficiary named is a person belonging to a class contemplated in the laws and within the powers of the association. When classes are pointed out as recipients of the benefits and mortuary funds of the society as dependents, widows, orphans, relatives, etc., of members, they have a superior claim to that of administrators and executors, and it follows that creditors are excluded.<sup>2</sup>

realize, and may have an order for the examination of an officer of the association, before the trial, to ascertain whether he can testify to those facts. *Chaffey v. Equitable Reserve Fund Life Assoc.*, 2 N. Y. Supp. 481.

1. A provision in the certificates that, on a division of the fund, the association should retain reasonable charges for its management, does not cover the general expenses of the association, except so far as properly chargeable to the management of the fund. *Burdon v. Massachusetts Safety Fund Assoc.*, 147 Mass. 360.

Directors cannot appropriate funds set apart as a mortuary fund to the payment of current expenses. *Chicago Mut. L. Indem. Assoc. v. Hunt*, 127 Ill. 257.

**Expenses of Grand and Subordinate Lodges.**—Courts are frequently called upon to adjust the rights of superior and subordinate lodges growing out of funds derived from assessments. The affairs of mutual benefit societies, as has been seen, were often conducted by complex organizations, consisting of grand or supreme and subordinate lodges, by the conventional rules of which an obligation is imposed upon members to pay two kinds of contributions: first, assessments levied by the

superior authority to meet death benefits; second, an amount periodically for the support of the subordinate lodge. In other associations not consisting of local and grand lodges stated sums are to be paid annually or oftener to meet the expenses of the organization additional to the assessments on death claims. The latter contributions are usually designated as dues, and generally go to make up a fund for the payment of expenses. These matters are regulated in the constitutions and by-laws which, as has been seen, are binding on all members. See *INTERNAL MANAGEMENT AND POWERS*, II, 2, *d*, *supra*.

2. *Beckel v. Imperial Council of the Order of United Friends*, 11 N. Y. Supp. 321; *Supreme Council American Legion of Honor v. Perry*, 140 Mass. 580; *Skillings v. Massachusetts Ben. Assoc.*, 146 Mass. 217; *National Mut. Aid Assoc. v. Gonser*, 43 Ohio St. 1; *Daniels v. Pratt*, 143 Mass. 216.

In the second of these cases the court said: "If the fund were subject to testamentary bequest, then, upon the decease of the member, it might go into the hands of his executor, or the administrator of his estate and become assets thereof, liable to be swallowed

up by the creditors. If there were no creditors the member, by his will, could divert it from the three classes named in the statute. In either case, this would defeat the purpose for which the fund was raised and held, and would be in direct conflict with the object of the statute for which the association was formed, and would set aside the contract entered into between the member and the corporation." *Citing Johnson v. Ames*, 11 Pick. (Mass.) 173, 181; *Osgood v. Foster*, 5 Allen (Mass.) 560.

**Failure to Designate.**—Where the charter of an association provided that, upon the decease of any member, "the fund to which his family is entitled shall be paid as may be designated in the application for membership. This being rendered impossible, it shall go, first to the widow and infant children," and afterwards in the order named. A member having directed that the benefit should be paid as he might designate in his will, and having died intestate, leaving a widow but no infant children, it was held that the widow was entitled to the fund. *Whitehurst v. Whitehurst*, 83 Va. 153.

A mutual benefit certificate was payable to insured's wife E, or to such other person as might be entitled to the insurance. The by-laws of the association declared that its object was to afford financial aid to the widows, orphans and heirs of deceased members, or to such other person as might be designated by the insured member, and that on the death of a member his widow or designated heirs should receive the insurance. After the death of E, the insured married plaintiff, but made no change as to the beneficiary. It was held, on the death of insured, plaintiff and not the children of E was entitled to the insurance. *Riley v. Riley* (Wis.), 44 N. W. Rep. 112. See *Jewell v. Grand Lodge Ancient Order United Workmen*, 41 Minn. 405.

**Disqualified Beneficiary.**—Where the by-laws provided that "if all the beneficiaries die during the life of a member, and he shall have made no other directions, the benefit shall be paid to his heirs at law," the benefit will accrue to his heirs, though the beneficiary is still alive, where such beneficiary is one who, under the Missouri laws, is not within the class that may be made beneficiaries. *Keener v. Grand Lodge, Ancient Order United Workmen*, 38 Mo. App. 543.

**Death of Beneficiary.**—It being provided in a policy that, upon the death of the insured, the amount named should be paid "to L, heirs, administrators or assigns," and L, the wife of the insured, having died before the insured, it was held that, there being no children of the marriage, the heirs of the husband were entitled to the benefit of the policy, and not the heirs of the wife. *Michigan Mut. Ben. Assoc. v. Rolfe*, 76 Mich. 146.

**When a Trust Attaches to Fund.**—Money due on a beneficiary certificate, made payable to a third person for the purpose and with the understanding that it shall be applied in payment of the debts and funeral expenses of the assured, is impressed with a trust to that effect, which equity will enforce. *Boasberg v. Cronan*, 7 N. Y. Supp. 5.

**Meaning of "Heirs."**—Where a benefit certificate was payable to the "heirs" of deceased, who left a widow, but no children, the word "heirs" will be construed to mean those designated by the statute of distribution to take personal property (Mansf. Dig. Ark., § 2522); and, since the widow is thereunder entitled only after all the husband's kindred, she has no claim to the fund as against his brothers and sisters. *Johnson v. Supreme Lodge of Knights of Honor* (Ark.), 13 S. W. Rep. 794; *Addison v. New England Commercial Travellers' Assoc.*, 144 Mass. 591.

A divorced wife is entitled to no share of a benefit fund which, by the rules of the association, goes to the member's heirs, no beneficiary having been appointed by him. *Schonfeld v. Turner*, 75 Tex. 324.

Deceased held a certificate in a mutual life association. Below the names of its president and secretary was the unsigned statement that "all payments or benefits that may accrue or become due to the heirs of the person insured by virtue of this policy will be paid to ——— or lawful heirs." The by-laws of the association declare that "its object is to aid and benefit the families of deceased members of the brotherhood in a simple and substantial manner." Deceased designated by will his wife and children as beneficiaries. It was held that the word "heirs," in the above form, meant the widow and children of deceased, and that the will was a valid designation of the beneficiaries. *Hannigan v. Ingraham*, 8 N. Y. Supp. 232.

**Money Paid Under Void Policy Under a Statute.** (Laws Mich. 1887, Act No.

Under a statute limiting the beneficiaries to relations of members, a designation of his estate by a member is ineffectual.<sup>1</sup> The beneficiaries in such cases derive title to the fund directly from the association and not from or through the estate.<sup>2</sup>

187, § 16), providing that any contracts of insurance on lives of more than 65 years issued by co-operative and mutual benefit associations, "organized, existing or doing business in this State under or by virtue of" its provisions, "shall be void as to the beneficiary therein named, but the amount thereof shall be payable to the heirs of the member," it was held that the law does not apply to a policy issued prior to its passage, and the heirs of the assured have no claim upon money voluntarily paid to the beneficiary of a void policy. *Smith v. Pinch* (Mich.), 45 N. W. Rep. 183. See also *Whitmore v. Supreme Lodge Knights and Ladies of Honor*, 100 Mo. 36.

"Affianced Wife" as Beneficiary.—Under St. Mass. 1882, ch. 195 (Pub. St. ch. 115), which authorizes corporations to assist "the widows, orphans or other relations of deceased members, or any persons dependent upon deceased members," a certificate issued for the benefit of a member's "affianced wife," who was not dependent on him for support, is payable to the member's next of kin, on his dying before marriage. *Palmer v. Welch* (Ill.), 23 N. E. Rep. 412.

Meaning of "Family".—Where an applicant for membership in a mutual life insurance company designates his "family" as the beneficiary, and his family consists at that time of himself and his wife and daughter, the wife and daughter are the beneficiaries; but where the daughter dies before her father, and the wife is the only member of his family who survives him, she takes the whole fund, and the daughter's children take nothing. *Brooklyn Masonic Relief Assoc. v. Hanson*, 6 N. Y. Supp. 161.

Though the constitution of an association provides that certificates shall be payable only to the families or some one dependent on members, yet this question can only be raised by the association, and payment by them into court of the amount of the certificate waives the objection. *Knights of Honor v. Watson*, 64 N. H. 517.

Word "Children" Entitles a Single Child.—If a policy does not vest in

the children at the wife's death, it is payable to the children living at the husband's death, as a class, and would therefore go entirely to such as survived the husband, and, in either event, the children of a deceased child would have no interest in the fund. *United States Trust Co. v. Mutual Ben. L. Ins. Co.*, 115 N. Y. 152.

A certificate in a society which paid death benefits to the widows and orphans of members, and other persons shown to be dependent on members, was payable to the member's widow, "for the benefit of herself and the children of said member." They had one child, and the member also had two children by a former marriage, one of whom was married, and did not live at home at the member's death. It was held that the widow and each child were severally entitled to one-fourth of the amount each. *Jackman v. Nelson*, 147 Mass. 300.

A certificate as issued was payable to the member's children generally, without naming them. *Held*, that the certificate included children born after its issuance, it appearing that one of the main objects of the association was to provide a fund for the benefit of the entire family of a member, and not to restrict it to a portion, and that the charter contained no provision allowing an applicant to designate the beneficiary. *Thomas v. Leake*, 67 Tex. 469.

1. *Daniels v. Pratt*, 143 Mass. 516.

But where a certificate issued to a member himself as beneficiary matures at his death, as well as on his being totally disabled, or reaching 70 years of age, the heirs of such a member, who made no direction as to the payment of the certificate, are entitled to collect it, especially where such heirs belong to the class of persons to whom the member might have directed the certificate to be made payable. *Peet v. Great Camp Knights of Maccabees of the World* (Mich.), 47 N. W. Rep. 119.

2. *Swift v. San Francisco Stock and Exch. Board*, 67 Cal. 567; *Briggs v. Earl*, 139 Mass. 473; *Felix v. Grand Lodge A. O. U. W.*, 31 Kan. 81; s. c., 47 Am. Rep. 479; *Supreme Lodge Knights of Honor v. Nairn*, 60 Mich.

Courts are very much inclined to construe limitations to dependents and near relations as provisions in the nature of family settlements, and in many of the States are found statutory exemptions of policies of insurance, and a specified sum for the purpose of keeping premiums and assessments paid up from the demands of creditors.<sup>1</sup>

44; Supreme Council of the Catholic Mut. Ben. Assoc. v. Firnsne, 50 Mich. 82; Supreme Council of the Catholic Mut. Ben. Assoc. v. Priest, 46 Mich. 429; Durian v. Central Verein, 7 Daly (N. Y.) 168; Richmond v. Johnson, 28 Minn. 447; Fenn v. Lewis, 81 Mo. 259; 10 Mo. App. 478; Worley v. Northwestern Masonic Aid Assoc., 3 McCrary (U. S.) 53; 10 Fed. Rep. 227; Schmidt v. Grand Grove, 8 Mo. App. 601; Bown v. Catholic Mut. Ben. Assoc., 33 Hun (N. Y.) 263.

This rule does not, however, prevent a creditor from acquiring by contract a lien upon the fund for advances made by him to keep up the assessments, where there is no prohibition of such an arrangement in the contract or in the by-laws brought to the creditor's notice. *Levy v. Taylor*, 66 Tex. 652.

A creditor who takes out insurance certificates amounting to \$6,500 on the life of his debtor, who owes him \$1,000, the insurance being taken out in mutual aid associations, where the amount to be realized depends on the number and solvency of the members, and the creditor paying the mortuary dues and assessments, and actually realizing only \$2,124.82 on the certificates on the debtor's death, is entitled to retain the balance remaining after deducting the debt, interest and expenses. *Rittler v. Smith*, 70 Md. 261.

Where in a policy the corporation agrees to pay "to the executors or administrators of said member, in trust, however, for, and to be forthwith paid over to, his heirs at law," but in the application, which is expressly made part of the contract, the contract is stated to be for the benefit of the applicant himself, in the absence of anything else to show an intention to make the heirs beneficiaries, the proceeds of the policy must be administered as part of the estate of the insured. *Harding v. Littlehale* (Mass.), 22 N. E. Rep. 703.

**Estoppel as to Fund.**—One insured in the plaintiff association made a written request for a change in his certificate in favor of his father, in the form prescribed by the by-laws, stating that

the original certificate was in the hands of his aunt, the original beneficiary, and that he could not make an actual surrender of such certificate. Before the certificate was made out the insured died. The aunt had agreed to see that this change was made, but subsequently refused to do so. It was held that, plaintiff having filed a bill of interpleader and paid the money into the court, the aunt was estopped to claim that the change of beneficiary was invalid by reason of the nonsurrender of the original certificate, and the failure to issue a new one. *Supreme Conclave Royal Adelpheia v. Cappella*, 41 Fed. Rep. 1.

1. *People v. Phelps*, 78 Ill. 147; *Swift v. San Francisco Stock & Exch. Board*, 67 Cal. 567; *Rhode v. Bank*, 52 Iowa 375, holding that even where the policy was payable to the assured, "his executors, administrators and assigns," the wife was entitled to the entire fund free from the claims of creditors. The same conclusion was reached where the policy was payable to "heirs and assigns," the death of the insured having occurred before any assignment. *Mullins v. Thompson*, 51 Tex. 7. See also *Etna Nat. Bank v. United States L. Ins. Co.*, 24 Fed. Rep. 770; *Central Bank v. Hume*, 3 Mackey (D. C.) 360; s. c., 51 Am. Rep. 780; *Levy v. Taylor*, 66 Tex. 652; *Stigler v. Stigler*, 77 Va. 173; *Stone v. Knickerbocker L. Ins. Co.*, 52 Ala. 589; *Pence v. Makepeace*, 65 Ind. 345; *Pullis v. Robinson*, 73 Mo. 202; s. c., 5 Mo. App. 548; s. c., 39 Am. Rep. 497; *Thompson v. Cundiff*, 11 Bush (Ky.) 567; *Felrath v. Schonfield*, 76 Ala. 199; s. c., 52 Am. Rep. 319; *Cole v. Marple*, 98 Ill. 58; s. c., 38 Am. Dec. 83; *Mutual L. Ins. Co. v. Sandfelder*, 9 Mo. App. 285; *Connecticut Mut. L. Ins. Co. v. Ryan*, 8 Mo. App. 535.

In *Baron v. Brummer*, 100 N. Y. 372, it was held that creditors cannot compel an assignment, by a wife, of a policy of insurance upon her husband's life effected for her benefit.

**Where it was provided by statute that the beneficiary fund should not be liable**

In case of a policy on the life of one person payable to another, and the latter dying before the insured, the personal representatives of the insured are entitled to the insurance money.<sup>1</sup> However, the laws of the organization usually direct to whom the money shall be paid in the event of the beneficiary dying before the holder of the certificate, and without a substitution. In the absence of such provision and of a substitution there may be a lapse, so that the fund will revert to the society.<sup>2</sup> It has been held, however, that in such cases the administrator of the deceased member may sue for and recover the insurance money as part of his estate.<sup>3</sup>

Where the money has been paid to one not entitled to receive it because not having an insurable interest, the personal representatives of the deceased may sue for and recover it.<sup>4</sup>

**VII. ASSESSMENTS—1. Power and Duty of Officers in Making.**—Directors are frequently entrusted by statute with all the powers of the corporation, and even when not so authorized are subject to only such limitations as are imposed by the membership in the constitution and by-laws, provided always they must act impartially, justly, and in good faith.<sup>5</sup>

The power of directors of benefit societies to provide for the payment of benefits and death losses as they occur, and to exercise a reasonable discretion in providing for liabilities that are reasonably certain to mature in the future, is the same as in other corporations vested by their charters and articles with similar powers. The extent of the discretionary power of directors of benefit societies to accumulate funds has not been definitely fixed by the authorities.<sup>6</sup>

to be seized, taken or appropriated by any legal or equitable process to pay any debt of such deceased member, it was held that a member has no property interest in the beneficiary fund, and a designation of a beneficiary to receive the money and pay the member's debts is invalid. *Reversing* 7 N. Y. Supp. 5. *Boasberg v. Cronan*, 9 N. Y. Supp. 664.

Acts N. Y. 1840, §§ 1, 2, provide that a wife may insure her husband's life, and if she survives him the insurance shall be paid to her free from the claims of his representatives or creditors. In case of the death of the wife in the husband's life-time, the policy may be made payable after her death to her children and to their guardians if under age. *United States Trust Co. v. Mutual Ben. L. Ins. Co.*, 115 N. Y. 152.

1. Under a certificate naming two beneficiaries, and, "in case of death of either, full amount to go to the survivor if living, if not living to the heirs of said member," on the death of the member the shares of both beneficiaries vest in

them, and if one dies before payment of the benefit his share goes to his executor, not to the survivor. *Union Mut. Aid Assoc. v. Montgomery*, 70 Mich. 587.

2. *Eastman v. Provident Mut. Relief Assoc.*, 62 N. H. 555; *Bacon Ben. Soc. & L. Ins.*, 344.

3. *Rindge v. New England Mut. Aid Soc.*, 146 Mass. 286.

4. *Herkimer v. Rice*, 27 N. Y. 163.

See LIMITATIONS AND THEIR CONSTRUCTION, 4, *b*, herein; INSURANCE, 11 Am. & Eng. Encyc. of Law 278; LIFE INSURANCE, 13 Am. & Eng. Encyc. of Law 629; DESIGNATION, 4, *a*, herein; CHANGE OF BENEFICIARY, 4, *c*, herein.

5. See OFFICERS OF PRIVATE CORPORATIONS.

6. In *Kelly v. Troy Fire Ins. Co.*, 3 Wis. 254, it was held that directors have discretionary power to provide by assessments for anticipated losses.

Where the charter of a mutual insurance company provides that the deposit

Assessments must be made in strict conformity to the provisions of the by-laws, and cannot be enforced if made otherwise.<sup>1</sup>

The contract entered into by each member on becoming such is that he shall pay assessments only for the legitimate purposes

note shall be payable in part or in whole when the directors deem the same requisite for the "payment of losses or other expenses," and the remainder after deducting such payment to be relinquished to the signer; that every member "shall pay his proportion of all losses and expenses accruing in and to the class in which his property is embraced;" and that the policy shall create a lien upon the property insured for the security of the deposit note," and the cost which may accrue in collecting the same," an assessment of ninety-five per cent. additional to the actual losses in a certain class upon the premium notes in such class to "meet estimated had debts, interest, expenses, and costs of collection" is illegal. *York Co. Mut. F. Ins. Co. v. Bowden*, 57 Me. 286.

An assessment laid by a mutual fire insurance company whose by-laws authorize their directors to borrow money to meet losses, and to include the sums thus borrowed, the interest thereon, and all necessary incidental expenses in the next assessment, is not rendered invalid by including reasonable sums for interest on money borrowed, and probable losses from the failure of some of the assessed to pay their assessments and ten per cent. for collecting assessments. *Jones v. Sisson*, 6 Gray (Mass.) 288.

In an action to recover insurance assessments, *held*, that, if the assessments are not much in excess of the amount actually required for the payment of losses, the presumption is that the gross sum was properly laid in view of the costs attending the collection of numerous small amounts, and the probable insolvency of the makers of some of the notes. *Lehigh Valley F. Ins. Co. v. Dryfoos* (Pa.), 9 Atl. Rep. 262.

In *Rosenberger v. Washington Mut. F. Ins. Co.*, 87 Pa. St. 207, it was held that an assessment could not be made for anticipated losses in the absence of any provision in the laws of the society for such a call.

In other cases it is considered that their discretion is limited to an allowance for expenses and uncollectible as-

sessments in addition to a sufficient amount to cover liabilities. *Susquehanna Mut. F. Ins. Co. v. Gackenback*, 19 W. N. C. (Pa.) 287; *People's Equitable Mut. F. Ins. Co. v. Babbitt*, 7 Allen (Mass.) 235.

In *Crossman v. Massachusetts Ben. Soc.*, 143 Mass. 435, it was held that under the statute of 1880, ch. 106, section 3, providing that any beneficiary association may hold, as a death fund belonging to the beneficiaries of anticipated deceased members, an amount not exceeding one assessment, and that nothing in the section shall be held to restrict such death fund to less than \$10,000; that a beneficiary association holding such a fund, when a loss occurs, is not obliged to pay the loss out of the fund, but may make an assessment therefor; and the fact that it designates such fund as a reserve fund is immaterial. The court said: "The idea of holding money as a reserve fund imports permanency to some extent. The statute does not provide that losses by death shall be paid out of this fund as they occur. To do this would soon deplete and destroy the fund, and defeat the object of the statute. Nor does the statute, directly or by implication, provide that no assessment shall be laid so long as there is enough in the reserve fund to meet losses as they occur. The officers of the association might use a part of the fund to pay a loss; they are not compelled to do so, and it was within their discretion to lay an assessment." Of course, the power of the directors in making assessments extends no farther in case of any member or class of members than the liability of the latter. If the assessment can only be made on those who are members of a certain class, subject thereto at the time the resolution was adopted, the members of that class are not liable to assessments to pay losses of members in another class which occurred during the time they were such. *Miller v. Georgia Masonic etc. Co.*, 57 Ga. 221. See OFFICERS OF PRIVATE CORPORATIONS.

1. *Bates v. Detroit Mut. Ben. Assoc.*, 51 Mich. 587; *Passenger Conductors' L. Ins. Co. v. Birnbaum*, 116 Pa. St. 565; *Underwood v. Iowa Legion of*

of the society, and that these shall be made by the company in strict accordance with the requirements of its constitution and by-laws,<sup>1</sup> even though some other more equitable method might be adopted,<sup>2</sup> and by the authority named in the charter or designated in the by-laws.<sup>3</sup>

If some of the members liable to an assessment be intentionally omitted, the assessment is void as to the rest; although it be accompanied by a computation of the liability of those so omitted and there be an intention to assess them in the future.<sup>4</sup>

Where the making of assessments calls for an exercise of discretion, such discretion cannot be delegated.<sup>5</sup>

If the by-laws require that an assessment shall be signed, an unsigned assessment is invalid.<sup>6</sup>

It may be stated generally that rights of members are not affected by the nonpayment of assessments not made according to the constitution and by-laws.<sup>7</sup> But if the directors have power

Honor, 66 Iowa 134. See FORFEITURE AND SUSPENSION OF CONTRACT, VIII, herein.

1. Mutual Aid Soc. v. Helburn, 84 (Ky.) 1; Woodfin v. Asheville Mut. Ins. Co., 6 Jones L. (N. Car.) 558; Protection L. Ins. Co. v. Foote, 79 Ill. 362; Covenant Mut. Ben. Assoc. v. Spies, 114 Ill. 463.

The delay of a mutual fire insurance company, for a time not unreasonable, to make an assessment does not invalidate the assessment, notwithstanding the provision of Rev. Stat., ch. 37, § 31, that, "if any member shall have a just claim on the corporation, founded on a policy issued by them, exceeding the amount of their existing funds exclusive of the deposit notes given by the members, the directors shall forthwith" lay an assessment. Marblehead Mut. F. Ins. Co. v. Underwood, 3 Gray (Mass.) 210.

2. Slater Mut. Fire Ins. Co. v. Barstow, 8 R. I. 343.

3. Susquehanna Mut. Ins. Co. v. Tunkhannock Toy Co., 97 Pa. St. 424; s. c., 39 Am. Rep. 816; Agnew v. Ancient Order United Workmen, 17 Mo. App. 254; Bates v. Detroit Mut. Ben. Assoc., 51 Mich. 587.

A meeting of a mutual fire insurance company, called "for the purpose of making such alterations in the by-laws of said company as may be deemed necessary, and for the transaction of such other business as may come before them," cannot, after voting to increase the number of directors (which is not limited by the by-laws), elect the additional directors; and an assessment

or call made at a meeting of the board of directors, at which only the additional directors so chosen are present, is void. People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.) 440. Compare Currie v. Mutual Assoc., 4 Hen. & M. (Va.) 318; s. c., 4 Am. Dec. 517. 4. Marblehead Mut. F. Ins. Co. v. Hayward, 3 Gray (Mass.) 208; People's Equitable Mut. F. Ins. Co. v. Arthur, 7 Gray (Mass.) 1.

5. Farmers' Mut. F. Ins. Co. v. Chase, 56 N. H. 341.

6. Baker v. Citizens' Mut. F. Ins. Co., 51 Mich. 243.

7. American Mut. Aid Soc. v. Helburn, 8 Ky. L. Rep. 627; 2 S. W. Rep. 495; Underwood v. Iowa Legion of Honor, 66 Iowa 134; Passenger Conductors' L. Ins. Co. v. Birnbaum, 116 Pa. St. 565; Agnew v. Ancient Order United Workmen, 17 Mo. App. 254.

A by-law of a mutual insurance company provided that assessments should be made according to the following classification: First. All members whose policies were in force when the assessment was declared should be liable to assessment for all losses adjusted, unadjusted and unpaid, and all other liabilities then existing against the company, subject to abatement as thereafter specified. Second. All members whose policies had expired at the time of the assessment should, nevertheless, be liable to assessment for all unpaid losses and other liabilities which existed at the time of the expiration, *pro rata* with those then in force, the amount thus ascertained and levied to be deducted from



to fix the rate of assessment, prescribe the manner of making it, and authorize the president or committee to make it in accordance with the prescribed method, such an assessment is just and proper.<sup>1</sup>

A resolution by the directors levying a certain percentage on all premium notes need not mention the names of all the makers of such notes, nor the amount assessed on each.<sup>2</sup>

It is otherwise where the amount of the percentage is levied. In this case, without specific designation, the assessment is invalid as to all.<sup>3</sup>

Where several losses have occurred at the same time, or so nearly together that the same notes are liable to be assessed for the payment of them all, only one assessment is necessary.<sup>4</sup> But an assessment in which a former unpaid assessment is included, but not mentioned, is irregular,<sup>5</sup> as is an assessment which includes losses that have been paid by previous assessment.<sup>6</sup>

the gross amount of the liabilities for which such assessment was made, and balance of liabilities then remaining to be assessed on the policies then in force. *Held*, that the assessment should be laid in the first instance on the policies in force at the time of the loss, whether since expired or not, and that policies issued since the loss, and remaining in force at the time of the assessment should be assessed only for the balance if the first part of the assessment should be insufficient. *Susquehanna Mut. F. Ins. Co. v. Stauffer*, 125 Pa. St. 416; *New England Mut. Ins. Co. v. Belknap*, 9 Cush. (Mass.) 140; *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. (N. Y.) 605.

1. Where it was directed that the chairman of a committee should examine the proofs of losses as they should arrive, and instruct the secretary, if the proof were found correct, to issue notice of the assessment, such directions having been complied with by the chairman and approved by him, and an assessment made in good faith accordingly, it was held legal and not open to the objection that it was made by the chairman and not by the directors. *Passenger Conductors' L. Ins. Co. v. Birnbaum* (Pa.), 116 Pa. St. 565.

But assessments made by a committee of directors is not valid under general authority conferred upon directors. *Monmouth Mut. F. Ins. Co. v. Lowell*, 59 Me. 504; *Farmers' Mut. F. Ins. Co. v. Chase*, 56 N. H. 341.

The charter of a mutual fire insurance company provided that the directors shall settle and determine losses or

damages to be paid by the several members of the company as their respective proportions thereof. A majority of the directors voted to assess "a sum not exceeding \$18,000 to meet the losses and expenses incurred from October 14th, 1867, to October 14th, 1869," and appointed a minority thereof a committee to make the assessment, who thereupon made it in a less sum. *Held*, that the sum of the assessment, not having been fixed by a majority of the directors, was illegal. *Monmouth Mut. F. Ins. Co. v. Lowell*, 59 Me. 504.

Under by-laws providing that directors shall fix the amount, they cannot order that a sum "not exceeding" a certain amount be called. *Monmouth Mut. F. Ins. Co. v. Lowell*, 59 Me. 504.

2. *Lycoming F. Ins. Co. v. Rought*, 97 Pa. St. 415.

An assessment made by a mutual fire insurance company in good faith, upon correct principles and substantially correct, is binding, notwithstanding small errors, upon a member who is not affected to a perceptible amount by the errors. *Marblehead Mut. F. Ins. Co. v. Underwood*, 3 Gray (Mass.) 210.

3. *St. Lawrence Mut. Ins. Co. v. Paige*, 1 Hill. (N. Y.) 430.

4. In making the assessment, no discrimination is to be made between notes given when higher rates of insurance existed, and those made under reduced rates. *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. (N. Y.) 605.

5. *Campbell v. Adams*, 38 Barb. (N. Y.) 132.

6. *Cooper v. Shaver*, 41 Barb. (N. Y.) 151.

A provision that, in making assessments, the members shall be classified, is binding on the directors and must be observed.<sup>1</sup>

Directors have power to make an assessment after assignment for the benefit of creditors.<sup>2</sup>

Nice questions are often presented where superior lodges in one State attempt to raise money by assessments upon the members of subordinate lodges in another. The rule is that the superior or governing body of a benefit society, incorporated under the laws of the State where it does business, has no power to enforce assessments levied by order of a supreme lodge incorporated under the laws of another State.<sup>3</sup>

The deposit notes of a mutual insurance company are part of its capital, and the directors are bound to call in a sufficient amount on them to pay the insured, who are losers by fire.<sup>4</sup>

1. Atlantic Mut. F. Ins. Co. v. Moody, 74 Me. 385.

2. Schimpf v. Lehigh Valley etc. Ins. Co., 86 Pa. St. 373.

3. Lamphere v. Grand Lodge A. O. U. W., 47 Mich. 429.

The proceeding in this case was by mandamus to compel the recognition of relator as a member of one of the subordinate lodges of the order of which respondent was the supreme governing authority in the State of Michigan. As such member he stood insured by the respondent in the sum of \$2,000, payable on his death, or on his surviving for a specified term of years. Upon these facts, the court said: "He stands suspended by the respondent, and thereby loses his insurance for refusing to recognize and pay an assessment made under the orders of the supreme lodge of the order, which is a corporation existing under the laws of Kentucky, and not subject to this jurisdiction. The assessment was made to pay losses on risks taken by the order in other States and by other State grand lodges. The respondent is a Michigan corporation, existing under chapter 94 of the Compiled Laws of 1871. The relator is not liable to pay the assessment. It is not competent for the respondent to subject itself or its members to a foreign authority in this way. There is no law of the State permitting it, nor could there be any law of the State which would subject a corporation created and existing under the laws of this State to the jurisdiction and control of a body existing in another State, and in no manner under the control of our law. The attempt of the respondent to do this is an attempt to set aside and ignore the very law of its being. A mandamus

will therefore issue as prayed." See also Grand Lodge v. Stepp, 3 Pa. 45.

4. Rhinehart v. Allegheny Co. Mut. Ins. Co., 1 Pa. St. 359.

If the necessity exists, resort must be had to the entire fund of the company. White v. Ross, 15 Abb. Pr. (N. Y.) 66; Maine Mut. M. Ins. Co. v. Swanton, 49 Me. 448.

The mode of obtaining contributions from the makers of deposit notes is to assess each liable for the loss and expenses with a *pro rata* assessment of a just proportion, and require its payment on due notice. This amount is determined by the directory, and must be assessed ratably on the deposit notes of those whose policies were in existence at the date of the loss. Responsibility to contribute to a loss begins when the insurance has been effected, and terminates when the policy expires. Planters' Ins. Co. v. Comfort, 50 Miss. 662.

Where a loss by fire takes the entire funds of the company, the losers have an immediate vested interest in the effects of the corporation. If the notes are insufficient to pay all the losers, then the whole amount of the notes and effects of the company must be called in by the directors and divided *pro rata* among the losers. Rhinehart v. Allegheny Co. Mut. Ins. Co., 1 Pa. St. 359.

A mutual insurance company need not proceed, after every loss happening to it, to compute the assessment on its deposit notes requisite to meet such loss, but may adopt a rule of proceeding that will approximate as near as is practicable and reasonable to the above method. New England Mut. F. Ins. Co. v. Belknap, 9 Cush. (Mass.) 140.

A mutual insurance company, organ-

Under the law governing mutual insurance companies, the power to make assessments upon premium notes is limited by the amount of losses sustained and unpaid at the time of making the assessment.<sup>1</sup>

An assessment may be made notwithstanding the fact that a previous assessment upon a premium note for the same object remains unenforced.<sup>2</sup>

There are, undoubtedly, cases in which assessments may be made by a court of equity in a proceeding to wind up the affairs of an association, but such assessments cannot be made by the court, where the members are free, under the society's laws, to pay the assessments or not, and where the authority is conferred only upon the directors.<sup>3</sup>

**2. In Collecting.**—A valid assessment, having been regularly made, the most important duty of the officers connected with its collection is to give notice of the same, which must be according to the prescribed method. Until such notice is given, there is no liability on the part of a member to pay an assessment.<sup>4</sup>

ized under the General Insurance Companies act of April 10th, 1849, may divide its risks into classes, according to the degree of hazard, and assess the premium notes only for the payment of the losses happening in the class to which such notes belong. *White v. Ross*, 15 Abb. Pr. (N. Y.) 66. Overruling *Thomas v. Achilles*, 16 Barb. (N. Y.) 491.

An assessment which ignores a division into classes of the makers of premium notes required by the charter to be made is invalid. *Atlantic Mut. F. Ins. Co. v. Moody*, 74 Me. 385.

**Annual Interest Plan.**—A note on the "annual interest plan," not assessable to meet losses until other classes of notes have paid, in assessments, an amount equal to the interest paid on notes of its class, is subject, after interest has fallen due and remained wholly unpaid, to assessment, along with notes of other classes, proportionately on the losses sustained. *Crawford v. Susquehanna Mut. F. Ins. Co. (Pa.)*, 12 Atl. Rep. 844. See *Susquehanna Mut. F. Ins. Co. v. Leavy (Pa.)*, 20 Atl. Rep. 502, 505; holding also that the basis of the "schedule premium," which was found by multiplying the amount of insurance by the percentage or rate of the risk, was just and equitable.

1. *Sinnissippi Ins. Co. v. Taft*, 26 Ind. 240.

An assessment laid by a mutual fire insurance company is not rendered invalid by the fact that the proportion between the cash premiums and the

deposit notes taken by the company varied at different times, as against a member who suffered no damage thereby. *Marblehead Mut. F. Ins. Co. v. Underwood*, 3 Gray (Mass.) 210.

Where the by-laws of a mutual insurance society declared that all expired policies should be assessable *pro rata* for losses occurring at the time of such expiration, an assessment which does not include such expired policies is void. *Tolford v. Church*, 66 Mich. 431.

As to liability of assignee of policy to pay assessments, see *Francis v. Butler etc. Ins. Co.*, 7 R. I. 159.

2. *Sands v. Sweet*, 44 Barb. (N. Y.) 108; *Jackson v. Van Slyke*, 44 Barb. (N. Y.) 116 n.

Sums voluntarily paid to a mutual insurance company by its members, upon an assessment which is subsequently adjudged to be illegal, with interest thereon, may be treated by the company as just claims against it, within the meaning of Stat. 1863, ch. 249, and may be included as such in making a new assessment. *People's Mut. Equitable F. Ins. Co.*, petitioners, 9 Allen (Mass.) 319.

3. *In re Protection L. Ins. Co.*, 9 Biss. (U. S.) 188; *Duff v. Canadian etc. Ins. Co.*, 6 Ont. App. 238; *McDonald v. Ross-Lewin*, 29 Hun (N. Y.) 87; *Hill v. Merchants' etc. Ins. Co.*, 28 Grant Ch. (Up. Can.) 560.

4. *People v. Supreme Council Catholic Ben. Legion*, 10 N. Y. Supp. 248; *Payn v. Mut. Relief Soc.*, 17 Abb. N. C. (N. Y.) 53; *Sinking Springs Mut.*

Nor can good standing be lost for the nonpayment of an assessment, of which the proper notice is not given.<sup>1</sup>

The same principles applicable to corporations generally in the matter of making and giving notice of assessments, govern benefit associations, and the same strictness is required in complying with the provisions of constitutions and by-laws as in other business corporations organized and conducted for profit.<sup>2</sup>

That the parties may, by agreement, waive the prescribed formalities and manner of giving notice and contract for a different form of notice is well settled upon the authorities.<sup>3</sup>

The rule that insanity is no excuse for nonpayment of premiums or assessments of life insurance policies applies to the payment of assessments of benevolent societies.<sup>4</sup>

Where the requirement was that notice should be given by circular mailed to the party, or verbally, it was held that the mere mailing of a circular was insufficient, if it was not, in fact, received.<sup>5</sup>

*Ins. Co. v. Hoff*, 2 W. N. C. (Pa.) 41; *Columbia Ins. Co. v. Buckley*, 83 Pa. St. 298; s. c., 24 Am. Rep. 172; *Supreme Lodge Knights of Honor v. Johnson*, 78 Ind. 110; *Siebert v. Chosen Friends*, 23 Mo. App. 268.

1. *Hall v. Supreme Lodge Knights of Honor*, 24 Fed. Rep. 450.

Unless personal notice be required to be in writing, verbal notice is sufficient. *Jones v. Sisson*, 6 Gray (Mass.) 288; *York Co. Mut. F. Ins. Co. v. Knight*, 48 Me. 75.

2. As to contents of notice, see *Minor v. Michigan Mut. Ben. Assoc.*, 63 Mich. 338; *Siebert v. Chosen Friends*, 23 Mo. App. 268; *Bates v. Detroit Mut. Ben. Assoc.*, 51 Mich. 587; *Supreme Lodge Knights of Honor v. Johnson*, 78 Ind. 110; *Covenant Mut. Ben. Assoc. v. Spies*, 114 Ill. 463.

A notice of an assessment made by the receiver of an insurance company, on the premium notes, which was published before it was ascertained by carrying out on the extension book what amount each member was to pay, and consequently contained no information to each member of the amount he was to pay, is irregular and defective, and will not render members not paying the assessment liable to a suit for the amount of the premium note. *Bangs v. McIntosh*, 23 Barb. (N. Y.) 591.

Where the notice of an assessment made by a receiver of a mutual insurance company on the deposit notes specified different rates of assessment for small notes and large notes, but not

in any way showing to which class a given note belonged, there being no evidence of any rule on that subject in the charter or by-laws, the notice was held inoperative for uncertainty. *Bangs v. Duckinfield*, 18 N. Y. 592.

As to time of notice, see *Frey v. Wellington Mut. Ins. Co.*, 4 Ont. App. 293; *Haskins v. Kentucky Grangers' Mut. Ben. Soc.*, 7 Ky. L. Rep. 371. As to the proper authority for the notice, see *Payn v. Mut. Relief Soc.*, 17 Abb. N. C. (N. Y.) 53; *Shay v. National Ben. Soc.*, 7 N. Y. Supp. 287. As to service of notice, see *Borgraefe v. Supreme Lodge Knights of Honor*, 22 Mo. App. 127; *Epstein v. Mut. Aid & Ben. L. Ins. Assoc.*, 28 La. An. 938; *Weakley v. Northwestern Ben. & Mut. Aid Assoc.*, 19 Bradw. (Ill.) 327; *Greeley v. Iowa State Ins. Co.*, 50 Iowa 86; *Yoe v. B. C. Howard Masonic Ben. Assoc.*, 63 Md. 86.

A notice erroneous in statement of amount due, owing to a miscalculation, is not so defective as to prevent a recovery of the amount actually due. *Thropp v. Susquehanna Mut. F. Ins. Co.*, 125 Pa. St. 427.

3. *Epstein v. Mut. Aid & Ben. L. Ins. Assoc.*, 28 La. An. 938.

4. *Hawkshaw v. Supreme Lodge Knights of Honor*, 29 Fed. Rep. 770.

5. *Castner v. Farmers' Mut. F. Ins. Co.*, 50 Mich. 273.

Where the charter required the notice to be published, unless actual personal notice were given and received, no collection could be had on the assessment. *Castner v. Farmers' Mut. F. Ins. Co.*,

In the absence of any provision as to the manner of giving notice, the notice must be personal and actual.<sup>1</sup>

The time allowed for the payment of assessments runs from the date when notice is delivered or received and not the date written in the notice or the day it was mailed; and the day on which the notice was received will be excluded.<sup>2</sup>

50 Mich. 273; *Greely v. Iowa etc. Ins. Co.*, 50 Iowa 86; *Protection L. Ins. Co. v. Palmer*, 81 Ill. 88.

On the contrary, notice by publication, when required, is sufficient without actual notice. *Pennsylvania Training School v. Independent Mut. F. Ins. Co. (Pa.)*, 18 Atl. Rep. 392.

A member cannot take advantage of a want of notice after preventing such notice by change of residence. *Lothrop v. Greenfield Stock & Mut. F. Ins. Co.*, 2 Allen (Mass.) 82.

As to notice of assessment by mail, see *Jackson v. Roberts*, 31 N. Y. 304.

A member of an accident association, subject to all the requirements thereof and entitled to all the benefits as provided in the by-laws, is bound by a by-law that the secretary shall give notice of assessments and dues by "sending all such notices by mail to the last given postoffice address of each member, which shall be considered a legal notice," and is in default if he fail to respond to such a notice whether he ever received it or not. *Union Mut. Acc. Assoc. v. Miller*, 26 Ill. App. 230.

1. *Wachtel v. Noah Widows' & Orphans' Soc.*, 84 N. Y. 28; s. c., 38 Am. Rep. 478; *Siebert v. Chosen Friends*, 23 Mo. App. 268; *Borgreave v. Supreme Lodge Knights of Honor*, 22 Mo. App. 127; *Castner v. Farmers' Mut. F. Ins. Co.*, 50 Mich. 273; *Gunther v. New Orleans Cotton Exch. Mut. Aid Assoc.*, 45 La. An. 776.

Giving personal notice of an assessment laid by a mutual fire insurance company is a sufficient publication, within the meaning of a provision in their charter requiring an assessment to be paid "within thirty days after notice of said assessment shall have been published." *Jones v. Sisson*, 6 Gray (Mass.) 288.

A charter of a mutual insurance company made the nonpayment of assessments within a fixed period a cause of forfeiture. In a case in which this period had been exceeded and the assessment not paid, an affidavit of loss admitted that the notice of assessment had been received shortly after it was

sent. But the affidavit was filled out by the agent of the company, and the insured was not led to suppose that the company intended to rely on the provision for forfeiture, or that the date of receiving the notice was of any importance. *Held*, that in an action on the policy he was not estopped by the recital in his affidavit from showing that, although the notice was taken from the postoffice soon after it was sent, it had not been delivered to him until long afterward. *Castner v. Farmers' Mut. Ins. Co.*, 50 Mich. 273.

The charter of a mutual insurance company provided that members should be notified of assessments by circular or verbally, and that if they did not pay within a fixed time they would forfeit protection through their policy. *Held*, that such personal liability could not attach from merely mailing the notice, if it was not actually received. *Castner v. Farmers' Mut. F. Ins. Co.*, 50 Mich. 273.

2. *National Mut. Ben. Assoc. v. Miller*, 85 Ky. 88; *Protection L. Ins. Co. v. Palmer*, 81 Ill. 88; *Wetmore v. Mut. Aid & Ben. L. Ins. Assoc.*, 23 La. An. 770; *Pennsylvania Training School v. Independent Mut. F. Ins. Co. (Pa.)*, 18 Atl. Rep. 392; *Stanley v. Northwestern Life Assoc.*, 36 Fed. Rep. 75; *Taggart v. Phoenix Relief Assoc.*, 8 Pa. Co. Ct. Rep. 334.

Where the charter of a mutual benefit association provides that any member failing to pay his assessment in thirty days from the date of notice forfeits his membership, the time in which payment is to be made is not to be computed from actual date of notice, or from the day mailed, but from the time at which it would be received by the member in the regular mode of carrying the mail. *National Mut. Ben. Assoc. v. Miller*, 85 Ky. 88.

Where the by-laws of a mutual benefit company give it the right to forfeit a policy for non-payment of dues by the insured for thirty days, a custom of the company to allow an extra ten days before enforcing the forfeiture does not give the insured the

Where notice is required to be given by publication, the time runs from the last day on which the notice is published.<sup>1</sup>

The fact that the company owes the member a less sum than that due upon the assessment is no excuse for its nonpayment.<sup>2</sup> Nor is it any defence that enough was due the member from the society to offset the assessment, where the amount due belongs to a distinct fund of the lodge.<sup>3</sup>

The members of subordinate lodges are entitled to notice of assessments according to the laws of the order, and are not bound to pay without such notice.<sup>4</sup>

Payment of assessments not being necessarily a personal duty, neither insanity, absence, nor sickness constitute any excuse for nonpayment.<sup>5</sup>

Notice to the insured will be proper, although there has been an assignment of the policy of which no notice has been given to the company.<sup>6</sup>

right to claim the extra time in all cases when proved to be merely a matter of favor. *Jones v. National Mut. Ben. Assoc.* (Ky.), 2 S. W. Rep. 447.

1. *Wetmore v. Mut. Aid & Ben. L. Ins. Assoc.*, 23 La. An. 770.

But in this as in other matters respecting the giving of notice, the parties may provide otherwise by contract. *Weakly v. Northwestern Ben. & Mut. Aid Assoc.*, 19 Bradw. (Ill.) 327. Or waive the giving of any notice whatever. *Hollister v. Quincy Mut. F. Ins. Co.*, 118 Mass. 478.

2. *Hollister v. Quincy Mut. F. Ins. Co.*, 118 Mass. 478.

3. *Ancient Order United Workmen v. Moore*, 1 Ky. L. Rep. 93.

4. *Siebert v. Chosen Friends*, 23 Mo. App. 268; *Coyle v. Kentucky Grangers' Mut. Ben. Assoc.* (Ky.), 2 S. W. Rep. 676; *Agnew v. Ancient Order United Workmen*, 17 Mo. App. 254.

And it is held that personal knowledge derived otherwise than through a regular notice is not binding upon a member of such order. In the first case above cited, the court said: "There are many cases where a person must, at his peril, act upon the knowledge of a particular fact, however derived, or upon such information as should reasonably put him upon enquiry. But wherever the special law of the notice prescribes the form and manner in which it is to be given, especially when a forfeiture may result, the party to be affected will, as a general rule, not be bound by notice given in any form or manner. Thus, when a man's rights are to be adjudicated in a court of jus-

tice, he is entitled to just the form, manner and time of notice that are directed by the statute; otherwise he will not be bound by the proceedings, although bodily present in the court room, seeing and hearing all that may be done. The endorser of a promissory note may have a personal knowledge of the maker's intention not to pay, or of his failure to pay, at maturity. Yet the holder cannot subject him to any liability without a notice of the dishonor, given in the form, time and manner established by commercial law and usage. . . . That contract was visible in the printed laws of the association, and in her acceptance of them in her application for membership."

A similar case was that of *Covenant Mut. Ben. Assoc. v. Spies*, 114 Ill. 467, in which the court said: "It was competent for the contracting parties to fix their own terms in this respect, and, having fixed them, they must abide by them. Thirty days after the date of the notice, but not until then, the parties having contracted, if the money is not paid the certificate shall be void. There was, therefore, no obligation to make a tender, in the absence of a notice, for the purpose of preventing a forfeiture."

See also *Garretson v. Equitable Mut. L. Assoc.*, 74 Iowa 419.

5. *Carpenter v. Centennial Mut. L. Assoc.*, 68 Iowa 453; s. c., 56 Am. Rep. 855; *Hawkshaw v. Supreme Lodge Knights of Honor*, 29 Fed. Rep. 773; *Yoe v. B. C. Howard Masonic Mut. Ben. Assoc.*, 63 Md. 86.

6. *Branin v. Mercer Co. Mut. F. Ins. Co.*, 28 N. J. L. 92.

A release by a mutual fire company of its claims against its insolvent policy holders, on compromise, is no defence to an action against another policy holder for his delinquent assessments.<sup>1</sup> But after the assignee has become a member of the company, and assumed the responsibility of membership by giving a new premium note, or otherwise, the notice should be given to him.<sup>2</sup>

In the absence of provisions to the contrary, the company may accept in payment either money, or its equivalent in notes, checks, or other property.<sup>3</sup>

**3. Action On.**—The incorporated benefit society is not restricted to its remedy by forfeiture and suspension for nonpayment of dues and assessments, but may have its appropriate action upon the contract,<sup>4</sup> provided the contract or the constitution and by-

Defendant, having purchased insured property, took an assignment of the policy, and sent it to the secretary of the company to approve the transfer, which was done by endorsement on the policy and entry on the company's books; but, owing to a by-law requiring the execution of a premium note by the new owner before the delivery to him of the approved policy, it was retained for the execution of such note, which defendant informed the company he would make on the first convenient opportunity. This was neglected, and a loss occurred, on which defendant was assessed as a policy-holder, and, on refusal to pay, a bill was filed against him by the company. *Held*, that defendant's property was not insured, and the bill should be dismissed. *Cranberry Mut. F. Ins. Co. v. Hawk* (N. J.), 14 Atl. Rep. 745.

**1.** *Crawford v. Susquehanna Mut. F. Ins. Co.* (Pa.), 12 Atl. Rep. 844.

Where the constitution of a mutual benefit society provides that the financial reporter of a subordinate lodge shall receive all moneys due the lodge, and give a bond for the discharge of his duties, and authorizes no other person to receive or decline payment of assessments, and a notice of assessment states that assessments must be paid to the financial reporter only, a tender of payment to the secretary, an officer not under bond, and his refusal to accept it on the ground that the member is suspended, are ineffectual to bind the society, though it is customary for the secretary and other officers to receive such payments. *Lazensky v. Supreme Lodge Knights of Honor*, 3 N. Y. Supp. 52.

**2.** *Bowditch Mut. F. Ins. Co. v. Winslow*, 3 Gray (Mass.) 415.

**3.** *Missouri Valley L. Ins. Co. v. Dunklee*, 16 Kan. 158; *Protection L. Ins. Co. v. Foote*, 79 Ill. 361; *Lyon v. Travelers' Ins. Co.*, 55 Mich. 141; s. c., 54 Am. Rep. 354; *Kline v. National Ben. Assoc.*, 111 Ind. 462; s. c., 60 Am. Rep. 703.

As to the manner of making payment and the proper officer to receive payment, see *Manson v. Grand Lodge A. O. U. W.*, 30 Minn. 509.

**4.** *Planter's Ins. Co. v. Comfort*, 50 Miss. 662; *Mutual Ben. L. Ins. Co. v. French*, 2 Cinn. (Ohio) 321.

The action is strictly legal. *McCulloch v. Indiana Mut. F. Ins. Co.*, 8 Blackf. (Ind.) 50.

**Extent of Liability on Deposit Note.**—

"The whole amount of the deposit note," which the directors of insurance companies are by statute allowed to sue for and collect upon default made in the payment of an assessment, means only the whole amount of the note as it stood reduced by all payments of assessments which have at any previous time been made thereon, and without interest. *Bangs v. Bailey*, 37 Barb. (N. Y.) 630.

**Power of Assignee.**—He was held not to be by assignment for benefit of creditors vested with the judicial power of the directors to ascertain and apportion the amount to be paid on each premium note on account of losses by the company, nor can he maintain an action against the makers of such notes for assessments which he has levied on account of losses, and the expenses of levying the assessment. *Hurlburt v. Carter*, 21 Barb. (N. Y.) 221.

**Remedy of Foreign Company.**—A provision in the charter of a foreign mutual fire insurance company, that if any member shall neglect to pay any assess-

laws do not leave it optional with the member to remain such or to withdraw at pleasure.<sup>1</sup> To maintain such action the association must show strict compliance with all the provisions of its laws in making the assessment and giving notice thereof, and if the manner of notifying is not prescribed it must show personal notice.<sup>2</sup>

ment upon his deposit note, an action may be brought for the whole amount of the note, and the money thus collected shall remain in the treasury of the company, and the balance thereof, after contributing to the payment of losses and expenses, be repaid to the member at the expiration of his policy, is not a penal statute; and a member, neglecting to pay an assessment, is liable for the full amount of his note in an action brought in this commonwealth setting forth the note, the laying of the assessment, notice thereof to the defendant, his failure to pay the same, and his consequent liability to pay the whole note. *Jones v. Sisson*, 6 Gray (Mass.) 288.

**Evidence.**—In such action the record of losses kept by the company is *prima facie* evidence of such losses having occurred. *People's Mut. Ins. Co. v. Allen*, 10 Gray (Mass.) 297; *West Branch Ins. Co. v. Macklin*, 66 Pa. St. 34.

In an action by a mutual life insurance company against a member for assessments, where the defendant denies having the policy when called upon to produce it, the entries in the company's books, and the application for the policy after the signature thereto has been verified by the defendant, are competent evidence of membership. *New Era Life Assoc. v. Rossiter*, 132 Pa. St. 314.

Where the defendant files an affidavit under the Pennsylvania act of May 1st, 1876, § 56 (P. L. 53), the plaintiff is bound to prove its claim as if the statutory provision which makes an assessment certificate *prima facie* evidence of the validity of the assessment had not been enacted. *Susquehanna Mut. F. Ins. Co. v. Gackenbach*, 115 Pa. St. 492.

In an action by a mutual insurance company against one of its members, for an assessment made on a deposit note, where the note itself recites the receiving of a policy, such recital is *prima facie* evidence that a policy has been issued; and it is no ground for a new trial that only an abstract of the policy was introduced in evidence by

the company. *New England Mut. F. Ins. Co. v. Belknap*, 9 Cush. (Mass.) 140.

**Pleading—Demand.**—If the charter of a mutual insurance company require the directors to publish a notice of the assessments laid upon the premium notes, and that the members shall pay within thirty days after, or be liable in a suit for the whole of the note, it is not necessary in such suit specially to aver such notice and neglect; it is sufficient to say that the defendant, though often requested, refused, etc., and that the time limited by the by-laws is passed. *Missouri S. M. F. etc. Co. v. Spore*, 23 Mo. 26.

1. The right of election does not exist where the member is at liberty to either pay the assessment or terminate his membership by not paying it. *In re Protection L. Ins. Co.*, 9 Bliss. (U. S.) 188, holding that in such a case no action will lie.

2. **Demand and Notice.**—Although ch. 79, Me. Rev. Stat. 1841, requires a demand before a mutual insurance company can maintain an action for an assessment, yet if the charter subsequently enacted provides that such action may be brought after notice in a paper, the provisions of the charter control the statute. *York Co. Mut. F. Ins. Co. v. Knight*, 48 Me. 75.

**Pleading and Evidence.**—In an action by a mutual fire insurance company to recover an assessment upon a deposit note, an averment, in the declaration, that the directors "made, agreeably to their act of incorporation and by-laws, an assessment" on said note, is sufficiently answered, under St. 1852, ch. 312, § 14, by a denial "that any such assessment has been made as is set forth in the plaintiff's declaration," to authorize the defendant at the trial to deny the validity of the assessment. *People's Equitable Mut. F. Ins. Co. v. Arthur*, 7 Gray (Mass.) 267; holding also that the plaintiff could not maintain an action to recover an assessment laid upon one class only of holders of their policies without proving that they have adopted the Stat. of 1849, ch. 107, which author-



The defences to an action on an assessment are various. They are most frequently based upon some illegality in the assessment itself or irregularity in making it,<sup>1</sup> though there are many others which may be set up to defeat the action.<sup>2</sup>

ized them to divide their risks into classes.

**Presumptions.**—Where a promissory note, on its face, is payable at such time or times as the directors of a mutual insurance company may, agreeably to their charter and by-laws require, the presumption is that it was given and taken as and for a premium or deposit note, and no recovery can be had on such a note unless it has been duly assessed. *Sands v. St. John*, 36 Barb. (N. Y.) 628.

**Liability on Note.**—The plaintiff asked the court to instruct the jury that their verdict should be for the interest due on the note, the assessments claimed and interest thereon from the time they were severally payable. The court refused, and instructed the jury that the liability of defendants must be determined by them from the evidence. *Held*, that this was not erroneous, but it may be rebutted by showing fraud, illegality or gross mistake in making the assessments. The onus of rebutting it is on the defendant, and wide latitude should be allowed. *People's F. Ins. Co. v. Hartshorne*, 90 Pa. St. 465.

1. The directors of a mutual insurance company may divide the property insured by them into classes, under St. 1849, ch. 104, § 2, from time to time, as the policies are issued; and after the full amount of one hundred thousand dollars is subscribed to be insured in each class, the policies will take effect, and one who becomes insured thereafter cannot object, in an action to recover an assessment upon his deposit note, that the proceedings were irregular. *Citizens' Mut. F. Ins. Co. v. Sortwell*, 8 Allen (Mass.) 217.

2. **Valid Defences.**—That assessment was grossly excessive. *Lehigh Valley F. Ins. Co. v. Dryfoos* (Pa.), 9 Atl. Rep. 262. An unfulfilled parol agreement of the company to make a loan of money in consideration of his execution of the note and the damages resulting from a breach of such agreement, or that he has rescinded the contract by returning the policy and demanding the note. *Life Assoc. of America v. Cravens*, 60 Mo. 388. That a gross

mistake has been made or fraud, practiced in making the assessment. *People's F. Ins. Co. v. Hartshorne*, 90 Pa. St. 465. Or the illegality of the policy for noncompliance by a foreign company with the laws of the State regarding foreign corporations. *Lamb v. Lamb*, 6 Biss. (U. S.) 420. Or that the note was given for an amount prohibited by law. *Otis v. Harrison*, 36 Barb. (N. Y.) 210. That there has been a compromise of the claim by the directors and a cancellation of the policy and a surrender of the note. *Telford v. Church*, 66 Mich. 431; *Wadsworth v. Davis*, 13 Ohio St. 123; *York Co. Mut. F. Ins. Co. v. Turner*, 53 Me. 225; *Hyde v. Lynde*, 4 N. Y. 387; *Campbell v. Adams*, 38 Barb. (N. Y.) 132. And see *Miner v. Judson*, 2 Lans. (N. Y.) 300. That there is no law authorizing such companies to do business. *Barbor v. Boehm*, 21 Neb. 450. Or any other matter which brings in issue the validity of the contract under which such liability is claimed.

**Insufficient Defences.**—It is no defence to an action for an assessment either that the company has not accepted its charter or has not otherwise conformed to the law in respect to securing corporate existence and powers. *Traders' Mut. F. Ins. Co. v. Stone*, 9 Allen (Mass.) 483; *Appleton Mut. F. Ins. Co. v. Jesser*, 5 Allen (Mass.) 446; *Citizens' Mut. F. Ins. Co. v. Sortwell*, 8 Allen (Mass.) 217; *Sands v. Hill*, 42 Barb. (N. Y.) 651; *Cooper v. Shaver*, 41 Barb. (N. Y.) 151; *Brouwer v. Appleby*, 1 Sandf. (N. Y.) 158; *Currie v. Mutual Assoc. Soc.*, 4 Hen. & M. (Va.) 315; s. c., 4 Am. Dec. 517; *Nashua F. Ins. Co. v. Moore*, 55 N. H. 48; *Providence F. & M. Ins. Co. v. Murphy*, 8 R. I. 131; *Judah v. American L. S. Ins. Co.*, 4 Ind. 333; *Yard v. Pacific Mut. Ins. Co.*, 10 N. J. Eq. 430; s. c., 64 Am. Dec. 467; *Hope Mut. etc. Ins. Co. v. Beckmann*, 47 Mo. 93; *Fell v. McHenry*, 42 Pa. St. 41. Or that the company is insolvent. *Alliance Mut. Ins. Co. v. Swift*, 10 Cush. (Mass.) 433; *Sterling v. Mercantile Mut. Ins. Co.*, 32 Pa. St. 75; s. c., 72 Am. Dec. 773; *Conigliand v. Ins. Co.*, Phill. Eq. (N.

**VIII. FORFEITURE AND SUSPENSION OF CONTRACT—1. Distinguished from Expulsion.**—In addition to the actions for the recovery of benefits and losses, it often becomes necessary to apply to the courts for preventive relief. An injunction is the proper remedy to prevent illegal expulsion or deprivation of the benefits of membership. It will be shown that if the right to expel a member is based upon a violation of disciplinary or doctrinal rules the party must exhaust his remedies within the organization.<sup>1</sup> And that the only question which can be raised in such cases is whether the lodge or tribunal had jurisdiction, proceeded according to its own laws and regulations, and whether the by-laws establishing the offence and prescribing the punishment were valid. These questions will first be enquired into by a court, and if no irregularity or invalidity is found, it will not interfere.<sup>2</sup>

Courts do not exercise visitatorial powers over voluntary associations or their proceedings, except to prevent the violation of some law of the State, or to protect or enforce some right already acquired.<sup>3</sup>

Car.) 341; s. c., 98 Am. Dec. 89; Carey v. Nagel, 2 Biss. (U. S.) 244; Vanatta v. New Jersey Mut. L. Ins. Co., 31 N. J. Eq. 15. Or that a vote was cast for the cancellation of all its policies by the company, and that the insured did not assent to such cancellation. Alliance Mut. Ins. Co. v. Swift, 10 Cush. (Mass.) 433; Sterling v. Mercantile Mut. Ins. Co., 32 Pa. St. 75; s. c., 72 Am. Dec. 773; Conigland v. Insurance Co., Phill. Eq. (N. Car.) 341; s. c. 98 Am. Dec. 89. Or that there is a want of insurable interest. New England Mut. F. Ins. Co. v. Belknap, 9 Cush. (Mass.) 140; Com. v. Massachusetts Mut. F. Ins. Co., 112 Mass. 116; Boot & Shoe Mut. F. Ins. Co. v. Melrose etc. Congregational Soc., 117 Mass. 199; Cumings v. Sawyer, 117 Mass. 30; Columbia Ins. Co. v. Buckley, 83 Pa. St. 293, 298; s. c., 24 Am. Rep. 172.

When the charter of a mutual insurance company provides that, in an action for the recovery of assessments, the certificate of the secretary shall be *prima facie* evidence of the assessment and amount due. Or even, in the absence of such provision, if the plaintiff proves its claim without showing so large an excess in the assessment as in itself satisfies the jury of fraud or gross mistake, it is entitled to recover. The burden of showing fraud or misconduct is on the defendant when he relies on that as a defence. Susquehanna Mut. F. Ins. Co. v. Gackenbach, 115 Pa. St. 492.

Where such evidence is supplemented by proof that, while the defendant was insured, deaths occurred among the members, for which he was assessed, and notice thereof was given him, it is proper, in the absence of any contradictory testimony, to instruct the jury to find for the plaintiff. New Era L. Assoc. v. Rossiter, 132 Pa. St. 314.

1. In an action on a certificate issued by an order, it is not necessary, in order to set up a forfeiture, to show that assured was suspended or expelled from such order. Hogins v. Supreme Council of Champions of the Red Cross, 76 Cal. 109. See VIII, 2, herein.

2. Van Houten v. Pine, 36 N. J. Eq. 133; Fritz v. Muck, 62 How. Fr. (N. Y.) 69; Olery v. Brown, 51 How. Pr. (N. Y.) 92; Loubat v. LeRoy, 15 Abb. N. C. (N. Y.) 1; Sperry's Appeal, 116 Pa. St. 391; Riddell v. Harmony F. Co., 8 Phila. (Pa.) 310; Leech v. Harris, 2 Brewst. (Pa.) 571; Littleton v. Blackburne, 45 L. J. Ch. 219; 33 L. T. 641; Labouchere v. Wharncliffe (Earl), 13 Ch. Div. 346; 41 L. T. 638; 28 W. R. 367; Richardson-Gardner v. Freemantle, 24 L. T. 81; 19 W. R. 256; Hopkinson v. Exeter (Marquis), 5 L. R. Eq. 63; 37 L. J. Ch. 173; 16 W. R. 266; Dawkins v. Antrobus, 17 Ch. D. 615; 44 L. T. 557; 29 W. R. 511; Fisher v. Keane, 11 Ch. Div. 353; 49 L. J. Ch. 11; 41 L. T. 335.

3. Mayor v. Journeymen Stone Cutters' Assoc. (N. J.), 20 Atl. Rep. 492.

But if there is found injustice or capricious disregard of the members' rights, or any invalidity in the by-law, upon whose provisions the proceeding is based, an injunction will be granted to restrain the threatened injustice, even though no property rights are involved.

If the expulsion has already occurred without regard to a member's legal rights, a court of law will issue a writ of *mandamus* compelling the officers of an incorporated association to restore him.<sup>1</sup>

**2. Essentials.**—The well settled rule that the enforcement of by-laws and ordinances concerning discipline, qualification, and doctrine, although such enforcement results in the expulsion of members of other than business corporations and voluntary associations,<sup>2</sup> must always be distinguished from its corollary that courts do uniformly entertain jurisdiction where such expulsion amounts to a forfeiture of property interests.<sup>3</sup>

A suspension is in effect a conditional forfeiture, which leaves in the suspended member a right similar to that of a mortgagor of property to redeem pending foreclosure. A suspension only deprives the member of the benefits of membership. Some affirma-

In *Gregg v. Massachusetts Med. Soc.*, 111 Mass. 185; s. c., 15 Am. Rep. 24, it appeared that a medical society, incorporated under a charter empowering it to expel its members, summoned the plaintiffs, who were members, to appear before a board of trial, composed of members, to answer charges preferred by a committee that the plaintiffs had violated the by-laws of the society by conduct unworthy honorable physicians and members of the society, in practicing according to a certain exclusive theory or dogma, and belonging to an association whose purpose was at variance with the principles of the society and tended to disorganize it. The plaintiffs filed a bill in equity against the society, the board of trial and the committee preferring charges alleging that it was the defendants' intention to expel the plaintiffs only for practicing homeopathy; that the body to try them was wrongly constituted, and that the proceedings were irregular and void. It was held, on demurrer, that the court had no jurisdiction to interfere by injunction.

1. *Fuller v. Trustees of Academic School etc.*, 6 Conn. 532; *Green v. African M. E. Soc.*, 1 S. & R. (Pa.) 264; *Delacy v. Neuse River Nav. Co.*, 1 Hawks (N. Car.) 274; s. c., 9 Am. Dec. 636 (1820); *Medical & Surgical Soc. v. Weatherly*, 75 Ala. 248; *Com. v. Pennsylvania Benefit Inst.*, 2 S. & R. (Pa.)

141; *Roehler v. Mechanics' Aid Soc.*, 22 Mich. 86; *State v. Georgia Med. Soc.*, 38 Ga. 608; s. c., 95 Am. Dec. 408; *State v. Cartaret*, 40 N. J. L. 295; *State v. Adams*, 44 Mo. 570; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Manning v. San Antonio Club*, 63 Tex. 166; s. c., 51 Am. Rep. 639; *Doyle v. New York Ben. Soc.*, 3 Hun (N. Y.) 361.

But before the member will be entitled to the remedy by writ of *mandamus* he must exhaust the internal remedies provided by the association's constitution and by-laws. *Screwmen's Ben. Assoc. v. Benson*, 76 Tex. 552; s. c., 31 Am. & Eng. Corp. Cas. 239 n.; *German Reformed Church v. Com.*, 3 Pa. St. 282; *White v. Brownell*, 2 Daly (N. Y.) 329; *Olery v. Brown*, 51 How. Pr. (N. Y.) 92.

2. See EFFECT UPON CONTRACT OF CONSTITUTION AND BY-LAWS III, 7, *supra*, and the distinction between forfeiture and suspension of contract and expulsion just noticed.

3. *Otto v. Journeymen Tailors' P. & Ben. Union*, 75 Cal. 308; *Thompson v. Tammany Soc.*, 17 Hun (N. Y.) 305; *Mulroy v. Knights of Honor*, 28 Mo. App. 463; *Pulford v. Fire Department*, 31 Mich. 458; *Bauer v. Samson Lodge*, 102 Ind. 262; *Schmidt v. Abe Lincoln Lodge*, 84 Ky. 490; *Supreme Council of the Order of Chosen Friends v. Garigus*, 104 Ind. 133; s. c., 54 Am. Rep. 298; *Olery v. Brown*, 51 How. Pr. (N.

tive action by the society or lodge is necessary to a forfeiture, and the by-laws under whose operation the member is deprived of benefits are not self-executing to the extent of expelling the member and depriving him of all rights growing out of his connection as a member. Nor is the mere act of the secretary, in marking the member's account suspended, sufficient.<sup>1</sup>

But such by-law or provision in the contract may undoubtedly operate to deprive the delinquent member of the benefits of the contract of insurance contained in his contract of membership, without other action than the proper entry in the books of the society, and perhaps without the latter.<sup>2</sup>

Y.) 92; *Austin v. Searing*, 16 N. Y. 112; s. c., 69 Am. Dec. 665; *White v. Brownell*, 2 Daly (N. Y.) 329.

1. *Millard v. Supreme Council American Legion of Honor*, 81 Cal. 340; *People v. Theatrical Mechanical Assoc.*, 8 N. Y. Supp. 675; *Knights of Honor v. Wickser* (Tex.), 12 S. W. Rep. 175; *Columbia Ins. Co. v. Buckley*, 83 Pa. St. 293; s. c., 24 Am. Rep. 172; *Olmstead v. Farmers' Mut. F. Ins. Co.*, 50 Mich. 200; *Scheu v. Grand Lodge Independent Foresters*, 17 Fed. Rep. 214; *Suppel v. Iowa State Ins. Co.*, 58 Iowa 29.

In *Grand Lodge A. O. U. W. v. Brand* (Neb.), 46 N. W. Rep. 95, it was held that the fact that a member of a mutual benefit association was addicted to the use of intoxicating liquors, contrary to the rules of the order, cannot be set up after his death in defence to an action on the certificate issued to him, and conditioned to be void unless he complied with all the rules of the order, where no objection was made and no forfeiture declared on this account during his lifetime, though the members of the association knew or might easily have ascertained his habits; also that the fact that a motion was made to suspend a member of a mutual benefit association, when the presiding officer refused to put the motion to a vote, on the ground that it was contrary to the rules, did not constitute such a suspension as would defeat the right of recovery of the beneficiary in his certificate after his death.

2. *Rood v. Railway Passenger & Freight Conductors' Mut. Ben. Assoc.*, 31 Fed. Rep. 62; *Blanchard v. Atlantic Ins. Co.*, 33 N. H. 9.

Although a condition be attached to a policy, declaring it void on a failure to pay an assessment upon a premium note within a specified time, yet the

policy does not thereby become *ipso facto* void. The company may, at its option, declare the policy cancelled, and notify the delinquent, or may waive its right of avoidance. In the former case the premium note is not liable to assessment for the payment of future losses. In the latter the contract relation is not wholly dissolved, but the protection of the policy is suspended until the default of nonpayment is removed. *Columbia Ins. Co. v. Buckley*, 83 Pa. St. 293; s. c., 24 Am. Rep. 172; *Union Mut. F. Ins. Co. v. Spaulding*, 61 Mich. 77; *Akers v. Hite*, 94 Pa. St. 395; s. c., 39 Am. Dec. 792; *Sans v. Hill*, 55 N. Y. 18; *New Hampshire Ins. Co. v. Rand*, 24 N. H. 428. Though there may have been a total loss of property insured prior to the expiration of the term covered by the policy. *Swamscott Machine Co. v. Partridge*, 25 N. H. 369; *New Hampshire F. Ins. Co. v. Rand*, 24 N. H. 428; *Thropp v. Susquehanna Mut. F. Ins. Co.*, 125 Pa. St. 427; *Bangs v. Skidmore*, 21 N. Y. 136. See also *Mayer v. Attorney General*, 32 N. J. Eq. 815.

A policy of insurance provided that the insured should pay such sums as might be assessed by the directors of the company, and that upon failure to pay an assessment, after notice duly given, the directors might annul the policy. Notice of an assessment was mailed to plaintiff, who at that time was out of the country. Upon receipt of notice, however, plaintiff forwarded the amount, but the company refused to receive it, the policy having been previously annulled. *Held*, that upon the loss of the property by fire, plaintiff could not recover. *Greeley v. Iowa State Ins. Co.*, 50 Iowa 86.

**Violation of Temperance Pledge.**—Where the by-laws provided that "any member violating his pledge shall be by

As regards the mere matter of membership, a party must first exhaust the remedies provided by the organization itself, such as appealing from a subordinate to a superior body.<sup>1</sup>

But it is otherwise where the action of the society, if allowed to stand, would amount to a forfeiture of property rights, and it is immaterial whether such rights are evidenced by a distinct instrument, or are inseparably connected with the contract of membership. This observation is peculiarly applicable to a certificate of membership in a benefit society, entitling a member to pecuniary benefits and his family to insurance money at his death. These the courts will not allow to be forfeited for a mere infraction of a by-law regulating personal conduct, except in a very strong and clear case.<sup>2</sup>

In this respect there is no difference between incorporated and voluntary associations, and when in a case affecting the latter a court has acquired jurisdiction, it will follow, and enforce, as far as applicable, the rules applying to incorporated bodies of the same character.<sup>3</sup>

But even property rights may be lost as a result of expulsion, under and in accordance with rules that are reasonable, and in

the very act suspended," and that "the suspension shall work deprivation of all rights and claims of membership pending trial," and the application for membership contained a stipulation that suspension or expulsion should forfeit the rights to benefits, it was held that a violation of the pledge by a member; although not known to the society until after his death, of itself, and without trial on charges therefor, worked a forfeiture of the right of the beneficiaries under his certificate of membership to a payment agreed to be made on his death, provided he was at the time a member in good standing. *Smith v. Knights of Father Mathew*, 36 Mo. App. 184. See also *Supreme Council Royal Templars of Temperance v. Curd*, 111 Ill. 284. Compare *Supreme Lodge Ancient Order United Workmen v. Zuhlke*, 30 Ill. App. 98, affirmed; 129 Ill. 298, holding that notice will be required, although the rules of the society do not require notice.

**Expulsion by Directors.**—Where the charter of a club, incorporated for patriotic and social purposes, gives the power to expel members, "the causes which justify their expulsion, and the manner of effecting the same," to be regulated by the by-laws which the corporation is empowered to make, a by-law is valid which gives a board of directors the power to expel a member "for acts or conduct which they may

deem disorderly or injurious to the interests or hostile to the objects of" the club, with right of appeal to a meeting of the club. *Com. v. Union League of Philadelphia* (Pa.), 19 Atl. Rep. 1030.

1. *Lafond v. Deems*, 8 Abb. N. C. (N. Y.) 344; 81 N. Y. 508; *White v. Brownell*, 4 Abb. Pr., N. S. (N. Y.) 162; s. c., 2 Daly (N. Y.) 329; *Harrington v. Workmen's Ben. Assoc.*, 70 Ga. 340; *Carlen v. Drury*, 1 Ves. & B. 154; *Poultney v. Bachmann*, 31 Hun (N. Y.) 49; *Grosvenor v. United Society of Believers*, 118 Mass. 78; *Karcher v. Supreme Lodge Knights of Honor*, 137 Mass. 368; *Chamberlain v. Lincoln*, 129 Mass. 70; *Dolan v. Court Good Samaritan*, 128 Mass. 437.

2. *Supreme Council of the Order of Chosen Friends v. Garrigus*, 104 Ind. 133; s. c., 54 Am. Rep. 298; *Bauer v. Samson Lodge*, 102 Ind. 262; *Austin v. Searing*, 16 N. Y. 112; s. c., 69 Am. Dec. 665; *Pulford v. Fire Department*, 31 Mich. 457; *Mulroy v. Knights of Honor*, 28 Mo. App. 463; *Olery v. Brown*, 51 How. Pr. (N. Y.) 92.

As to the power of a new association succeeding an old one to enforce forfeiture for nonpayment of assessments made by the latter prior to its quitting business, see *Abe Lincoln Mut. L. & Acc. Soc. v. Miller*, 23 Ill. App. 341.

3. *Otto v. Journeymen Tailors' P. & Ben. Union*, 75 Cal. 308.

compliance with proper or prescribed rules of procedure, or by virtue of the express terms of a contract. Where time of payment of assessments is made of the essence of contracts, those made by a mutual insurance company with its members stand upon no better or different footing than those of other companies, and the adjudications upon the latter are applicable.<sup>1</sup> One who has become a member of such society is bound by a by-law making a transfer, by a mortgage or otherwise, avoid the policy, unless ratified by the directors.<sup>2</sup>

A verbal agreement at the time a policy was taken, that the date of payment of the premium should be extended beyond the time expressed, is of no avail in such a case.<sup>3</sup>

In most societies, however, it is provided in the by-laws forming a part of every contract, that the mere non-payment of an assessment or due shall operate to suspend or forfeit the contract. The parties have a right so to stipulate, and having done so in clear and express terms, the courts will give the contract due force and effect.<sup>4</sup>

1. See *Mobile L. Ins. Co. v. Pruett*, 74 Ala. 487; *Catoir v. American L. Ins. etc. Co.*, 33 N. J. L. 487; *Klein v. New York L. Ins. Co.*, 104 U. S. 88; *Shaw v. Berkshire L. Ins. Co.*, 103 Mass. 254; *Ayer v. New England Mut. L. Ins. Co.*, 109 Mass. 430; *Williams v. Washington L. Ins. Co.*, 31 Iowa 541; *Alabama Gold L. Ins. Co. v. Garmany*, 74 Ga. 51; *Security L. Ins. etc. Co. v. Gober*, 50 Ga. 404; *Gateman v. American L. Ins. Co.*, 1 Mo. App. 300; *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 380; *Akers v. Hite*, 94 Pa. St. 394; s. c., 39 Am. Dec. 792.

2. *Pfister v. Gerwig*, 122 Ind. 567.

A provision that, upon failure to pay an assessment within 30 days from notice, the certificate shall be void, in the absence of any qualifying expressions, cannot be construed to render the policy only voidable at the option of the association. *Bosworth v. Western Mut. Aid Soc.*, 75 Iowa 582.

3. *Mutual L. Ins. Co. v. Girard L. Ins. Co.*, 100 Pa. St. 172.

4. *Rood v. Railway Passenger & Freight Conductors' Mut. Ben. Assoc.*, 31 Fed. Rep. 62; *Borgraefe v. Supreme Lodge Knights of Honor*, 22 Mo. App. 127, 142.

In the second case, the court said: "There is, in view of this provision, a plain distinction between this case and cases which have arisen under the constituting instruments of mutual insurance companies, and other benevolent orders of this character, where the gov-

erning statute recites that for the non-payment of dues, or other named delinquency, the member may be suspended by the lodge or other judicatory. Here the member is not suspended until the lodge or other designated judicatory exercises the power of suspension. The reason is that, whatever right the lodge or the order may have against the member for an infraction of its rules, must be sought in conformity with the laws and rules of the order. The remedy therein prescribed must be exhausted before resort can be had to the judicial courts. But where, as in this case, the suspension attaches by operation of law upon an event named and the member dies before the suspension has been set aside in conformity with the rules of the order, there can be no recovery upon his benefit certificate."

See also *Olmstead v. Farmers' Mut. F. Ins. Co.*, 50 Mich. 200; *Chamberlain v. Lincoln*, 129 Mass. 70; *Yoe v. B. C. Howard Masonic Mut. Ben. Assoc.*, 63 Md. 86; *Madeira v. Merchants' Exchange Mut. Ben. Soc.*, 16 Fed. Rep. 749; 5 *McCrary (U. S.)* 258; *Rood v. Railway Passengers' & Freight Conductors' Mut. Ben. Assoc.*, 31 Fed. Rep. 62; *Illinois Masons' Ben. Soc. v. Baldwin*, 86 Ill. 479; *McDonald v. Ross-Lewin*, 29 Hun (N. Y.) 87; *American Mut. Aid Soc. v. Kilburn*, 7 Ky. L. Rep. 750; *Blanchard v. Atlantic Ins. Co.*, 33 N. H. 9.

It is sometimes provided in the rules

It is well settled that no forfeiture can be established, except for a violation of the precise conditions laid down.<sup>1</sup>

If the constitution and by-laws of the lodge give the member the right of appeal, and some affirmative proceeding resulting in his expulsion or suspension has been consummated, he must exercise his right of appeal before resorting for redress to the courts, but it must appear that the lodge or society had jurisdiction, and had given notice and proceeded in a regular manner.<sup>2</sup>

Where the forfeiture is claimed under by-laws and proceedings under their provisions, they must appear reasonable, and the proceedings of the society must be in strict accordance with them,

and regulations governing the relative rights and duties of grand and subordinate lodges, that the latter shall become suspended from the enjoyment of benefits for neglect to pay dues and assessments. In case of suspension under such provisions, the members of the subordinate lodge become reinstated without act or proceeding on their part upon the restoration of their lodge to its former right and charter. If, during such suspension, a member died, the right of the beneficiary to recover the insurance money is not lost but restored with the restoration of the lodge. *Supreme Lodge Knights of Honor v. Abbott*, 82 Ind. 1.

And such a power reserved to the directors in the by-laws is equally binding and enforceable.

*Coles v. Iowa State Mut. Ins. Co.*, 18 Iowa 425.

1. *Bates v. Detroit Mut. Ben. Assoc.*, 51 Mich. 587.

A member expelled or suspended without notice or trial, has a cause of action against the association. *Ludowski v. Polish Roman Catholic etc. Ben. Soc.*, 29 Mo. App. 337.

2. *Chamberlain v. Lincoln*, 129 Mass. 70; *Mulroy v. Knights of Honor*, 28 Mo. App. 463; *Karcher v. Supreme Lodge Knights of Honor*, 137 Mass. 368.

When an assessment is not made in accordance with the charter upon a deposit note, the failure to pay such an assessment does not work a forfeiture of the policy under the charter. *Planters' Ins. Co. v. Comfort*, 50 Miss. 662.

A vote by a company that, if the assessments upon its premium notes should not be punctually paid, the insurances previously made should be suspended, is of no validity, unless assented to by the insured. *New England Mut. F. Ins. Co. v. Butler*, 34 Me.

451; *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray (Mass.) 543; *Rosenberger v. Washington Mut. F. Ins. Co.*, 87 Pa. St. 207; *Bradford v. Union etc. Ins. Co. (C. C. P. Pa.)*, 10 Ins. L. J. 551; *Van Slyke v. Trampealeau Co. Farmers' Mut. F. Ins. Co.*, 48 Wis. 683; *Great Falls Mut. F. Ins. Co. v. Harvey*, 45 N. H. 292.

A refusal to pay an illegal assessment for thirty days after demand will not render void a policy of insurance issued by a mutual insurance company, or defeat a subsequent assessment upon the same, although the by-laws authorize the directors to terminate the same in case of a refusal to pay assessments, and the directors, when making the assessments, voted that any policy, the holder of which should refuse to pay any assessment for thirty days after a demand on him, shall be void. *Peoples' Mut. Equitable F. Ins. Co. Petitioners*, 9 Allen (Mass.) 319.

Evidence that the delinquent was absent at the time the notice was mailed to his residence rebuts the presumption of its receipt by him which would ordinarily arise from the mailing of a notice to his place of residence. *People v. Theatrical Mechanical Assoc.*, 8 N. Y. S. 675.

Where the constitution of a mutual benefit association provided that when an assessment was made the secretary should at once notify the members, and each member should pay the same within thirty days from the date of the notice under penalty of forfeiture, the omission to pay an assessment levied thirty-four days before the member's death was held to be no cause for forfeiture when the notice was not given until thirteen days after levy of the assessment. *Knight v. Supreme Council Order of Chosen Friends*, 6 N. Y. Supp. 427.

upon due notice to the accused, and an opportunity on his part to defend and explain his conduct.<sup>1</sup>

Without these, the attempt of a lodge or its officers to suspend a member or a lodge of members, is a usurpation which cannot affect the rights or legal status of any one.<sup>2</sup>

It is evident that, after the liability under a contract of membership to pay insurance money has become fixed and executed by the death of the member, the right of forfeiture is at an end.<sup>3</sup>

A certificate is not forfeited by failure to pay the monthly dues for expenses after the association has stopped business.<sup>4</sup> Provisions providing for forfeitures and penalties are construed strictly.<sup>5</sup>

**3. Waiver.**—Just what acts and circumstances will in all cases be construed as a waiver of the right to declare the rights of membership in a benefit society forfeited or suspended, has not been, and, in the nature of the case, cannot be definitely declared. It is, however, a generally recognized principle, that whatever clearly indicates an intention on the part of the society, acting through its duly appointed agents, not to take an advantage of a member's default, or amounts to a recognition of his claim to the continuing rights of membership, will bind the company and relieve the member from the consequences of his default. The receipt of payment of premiums or assessments, after breach of conditions, is the most common form of waiver, and will ordinarily be held to estop the insurer from alleging such breach as a ground of

1. *Mullen v. Dorchester Mut. F. Ins. Co.*, 121 Mass. 171; *Grand Lodge Ancient Order United Workmen v. Brand* (Neb.), 46 N. W. 95; *Bacon Ben. Soc. & L. Ins. Co.*, § 116.

Where a certificate provided that assessments should be payable within thirty days of the date of notice, payment within such thirty days was held sufficient to keep the certificate in force, though made by the beneficiary after the death of the member. *Bankers' & Merchants' Mut. L. Assoc. v. Stapp*, 77 Tex. 517.

Under by-laws providing that notice shall be given of assessment due before there shall be a forfeiture, notice to a member put in the mail, directed to him, but not shown to have reached him, is insufficient to support a forfeiture. *McCorkle v. Texas Ben. Assoc.*, 71 Tex. 149.

Without a provision in the by-laws for the purpose of expiration or suspension for nonpayment of dues, it must be upon trial and after due notice. *Com. v. Pennsylvania Beneficial Inst.*, 2 S. & R. (Pa.) 141; *Com. v. German Soc.*, 15 Pa. St. 251; *Borgraefe v. Supreme*

*Lodge Knights of Honor*, 22 Mo. App. 127; *Diligent Fire Co. v. Com.*, 75 Pa. St. 291; *Wachtel v. Noah Widows and Orphans' Soc.*, 84 N. Y. 28; s. c., 9 Daly (N. Y.) 476; s. c., 38 Am. Rep. 478.

2. *Hall v. Supreme Lodge Knights of Honor*, 24 Fed. Rep. 450.

3. *Olmstead v. Farmers' Mut. F. Ins. Co.*, 50 Mich. 200. And if by the terms of the certificate itself a member's rights stand suspended by nonpayment of dues, he cannot be reinstated to his rights by his beneficiary.

A member failed to pay certain dues required by the rules, and was accordingly suspended. After his death, the beneficiary paid the dues to the collector of the local society, but the receipt thereof was not authorized by the society itself. It was held that the society was not liable on said certificate. *Brown v. Grand Council Northwestern Legion of Honor (Iowa)*, 46 N. W. 1086.

4. *Burdon v. Massachusetts Safety Fund Assoc.*, 147 Mass. 360.

5. *American Mut. Aid. Soc. v. Helburn*, 85 Ky. 1; *Mandego v. Centennial Mut. L. Assoc.*, 64 Iowa 134.



forfeiture.<sup>1</sup> It is in most cases a question of fact for the jury.<sup>2</sup> This presumption of waiver may be abutted.<sup>3</sup>

A long continued habit of receiving overdue assessments without question, may, in some cases, estop a company from insisting upon a forfeiture for nonpayment at a specified time.<sup>4</sup>

1. *Mershon v. National Ins. Co.*, 34 Iowa 87; *Lasher v. Northwestern Nat. Ins. Co.*, 55 How. Pr. (N. Y.) 318; *McDonald v. Supreme Council, Order of Chosen Friends*, 78 Cal. 49; *Martin v. New Jersey Ins. Co.*, 44 N. J. L. 273; *Phoenix Ins. Co. v. Lansing*, 15 Neb. 494; *Pomeroy v. Rocky Mountain Ins. & Sar. Inst.*, 9 Colo. 295; s. c., 59 Am. Rep. 144; *Viele v. Germania Ins. Co.*, 26 Iowa 55; s. c., 96 Am. Dec. 83; *Tobin v. Western Mut. Aid. Soc.*, 72 Iowa 261; *Kline v. National Ben. Assoc.*, 111 Ind. 462; s. c., 60 Am. Rep. 703.

It has been held sufficient to estop the society from insisting upon a forfeiture, if it received assessments after the death of a member. *Millard v. Supreme Council American Legion of Honor*, 81 Cal. 340.

In *Erdmann v. Mutual Ins. Co.*, 44 Wis. 376, the assessments had been received by a local lodge, and it was held that the retention of them by the supreme court lodge, with knowledge of the facts, waived the forfeiture. See also *Illinois Masons' Ben. Soc. v. Baldwin*, 86 Ill. 479.

If after a first notice the right accrues to the company to consider the policy forfeited, the forfeiture will be waived by giving a second notice. *Shay v. National Ben. Soc.*, 7 N. Y. S. Nat. Rep. 287.

An assessment by defendant on the premium notes of persons to whom it has issued policies, being payable absolutely, whether such policies have been forfeited or not, an acceptance of such a payment after a loss of which the company has notice, is not a waiver of any forfeiture. *Joliffe v. Madison Mut. Ins. Co.*, 39 Wis. 111; s. c., 20 Am. Rep. 35.

In the same case it was held that in the absence of a stipulation making the whole premium due on default as above described, acceptance of the whole after default, with notice of a loss which occurred during the default, is a waiver of the condition, and makes the insurer liable, such acceptance being inconsistent with any claim that the risk was suspended when the loss occurred.

But the court remarked: "If such condition had further provided that in case of default the whole cash premium should be considered earned, acceptance of the whole amount by the insurer after a loss would not be a waiver of the condition, or make the insurer liable for such loss; although such payment during the life of the policy would revive the risk from the date of the payment as to all of the insured property then remaining."

2. *Kenyon v. Knights Templar etc. M. Mut. Aid Assoc. (N. Y.)*, 25 N. E. Rep. 299; *United Brethren Mut. Aid Soc. v. Swartz (Pa.)*, 13 Atl. Rep. 769.

In *Bosworth v. Western Mut. Aid Soc.*, 75 Iowa 582, the court having found that no general custom existed of waiving such defaults by accepting assessments after the prescribed time, and it not appearing that deceased had any knowledge of such custom, if any, except that it had been waived in a few instances as to himself, refused to disturb the finding that there had been a waiver as against the evidence.

In an action on a policy, the plaintiffs contended that this assessment was invalid, and that their policy was not forfeited nor suspended by their neglect to pay it. The court took an opposite view, and directed a verdict for the defendants. *Held*, that this was an error. *Rosenberger v. Washington Mut. F. Ins. Co.*, 87 Pa. St. 207.

3. As where the company expressly asserted its right to insist upon the forfeiture. *Northwestern Mut. L. Ins. Co. v. Amerman*, 119 Ill. 329.

4. *Stylow v. Wisconsin Odd Fellows' Mut. L. Ins. Co.*, 69 Wis. 224, where the right had been waived in sixty three previous similar instances.

A certificate issued by a mutual benefit association provided that it should be void unless assessments were paid within ten days after receiving notice but it appeared that it was the habit of the association to receive payments from the assured if made within sixty days from the time of notice, and the certificate remained uncanceled at the death of the insured. The association was held estopped to claim a forfeiture.

But to make out a case based upon such a usage, it must be shown not only that assessments were habitually received when overdue, which would be a waiver in each case, but also that the insurer intended to waive the future prompt payment of assessments as one of the conditions of the contract, or that the assured had reasonable ground for believing, and did believe, that the condition had been waived.<sup>1</sup> There is some question as to the authority of a subordinate lodge to waive the positive requirements of the by-laws of the order.<sup>2</sup> The receipt of an assessment through mistake is no waiver.<sup>3</sup> Nor does the receipt of an assessment constitute a waiver where the insurer had no knowledge of the breach of the condition.<sup>4</sup>

The same is true where, at the time of the receipt of the premium or assessment, it is stated that it is received on condition

because the assessments were not paid within the ten days. *Odd Fellows' Mut. Aid Assoc. v. Sweetser* (Ind.), 19 N. E. Rep. 722\*.

1. *Crossman v. Massachusetts Ben. Assoc.*, 143 Mass. 435.

Where a mutual insurance company imposes forfeiture in case a loss occurs while its assessments are still unpaid, but its local agent receives past due assessments with knowledge of a loss and forwards them to the company, without notifying them of it, and they receive them, and two or three weeks afterward order the loss to be paid when adjusted, they cannot afterward refuse payment on the ground of the delay in paying the assessments, since they have waived that by receiving them when overdue and ordering payment. *Farmers' Mut. F. Ins. Co. v. Bowen*, 40 Mich. 147; *Sands v. Hill*, 42 Barb. (N. Y.) 651; *Viall v. Genessee Mut. Ins. Co.*, 19 Barb. (N. Y.) 440; *Insurance Co. v. Slockbower*, 26 Pa. St. 199; *Tuttle v. Robinson*, 33 N. H. 104.

But in *Diehl v. Adams Co. Mut. Ins. Co.*, 58 Pa. St. 443; s. c., 98 Am. Dec. 302, after a policy had been forfeited by alterations in violation of the by-laws, the company passed a resolution directing an assessment on all policies "in force at this date;" the treasurer assessed the forfeited policy, and the assured paid the assessment. It was held not a waiver of the forfeiture.

2. *Swett v. Citizens' Mut. R. Soc.*, 78 Me. 541; *Miller v. Hillsborough Mut. F. Assoc.*, 42 N. J. Eq. 458; *Borgraefe v. Supreme Lodge Knights of Honor*, 22 Mo. App. 127; 26 Mo. App. 218. But see *Manning v. Ancient Order United Workmen*, 86 Ky. 136; *Erd-*

*mann v. Wisconsin etc. Ins. Co.*, 44 Wis. 376; *Splawn v. Chew*, 60 Tex. 532.

In *Hoffman v. Supreme Council of American Legion of Honor*, 35 Fed. Rep. 252, defendant having, through its duly appointed officers, after deceased had been suspended for delinquency in his assessments, continued to make calls on him for subsequent dues, and to receive the amounts called for, and the local council having, on full hearing of deceased's application for reinstatement, though not acting in all respects in conformity with the rules of the institution, granted such application, defendant was held estopped to deny that deceased was a member in good standing.

3. *Elliott v. Lycoming etc. Ins. Co.*, 66 Pa. St. 22; s. c., 5 Am. Rep. 323.

Nor will the omission to pay an assessment work a forfeiture when the association has received from the member on assessments for losses occurring before he joined the association more than the amount of such unpaid assessment. *Knight v. Supreme Council Order of Chosen Friends*, 6 N. Y. Supp. 427.

4. *Robertson v. Metropolitan L. Ins. Co.*, 88 N. Y. 541; *Gilbert v. North American F. Ins. Co.*, 23 Wend. (N. Y.) 43; s. c., 35 Am. Dec. 543.

Where the custom of the company has been to receive overdue premiums only with the understanding that the insured was in good health, the receipt of an assessment, when he was not in good health, without knowledge of the fact, has been held not to amount to a waiver. *Lewis v. Phoenix Mut. L. Ins. Co.*, 44 Conn. 73.

that the insured is in good health.<sup>1</sup> But a waiver may be established in such case, if further assessments and dues are paid and accepted, without any enquiry into the condition of the member's health.<sup>2</sup>

While it is true that a waiver will sometimes be presumed from an habitual usage or habit of receiving overdue assessments, yet one instance of the kind in the case of another member cannot be set up to bind the company in the particular case.<sup>3</sup>

It is not always necessary, to constitute a waiver of the forfeiture, that an assessment be actually paid. If, after a default, it recognizes the continued existence of the policy by notifying the assured that he is liable to suspension unless he at once pays, a waiver may be inferred.<sup>4</sup> But the mere sending of assessment notices to members who have been suspended for nonpayment of assessments, for the purpose of inviting reinstatement, will not of itself amount to a waiver of the forfeiture.<sup>5</sup>

A clause in a certificate denying to agents the power to make, alter, or discharge contracts, waive forfeitures, or extend credits,

In case overdue assessments have been received by the company in ignorance of facts which, if known, would void the policy, the company may, upon discovering the facts, tender a return of the money and insist upon the forfeiture. *Diboll v. Aetna L. Ins. Co.*, 32 La. An. 179; *Union Mut. L. Ins. Co. v. McMillen*, 24 Ohio St. 67.

But a forfeiture may be waived in such case by failure to offer to return the unpaid premium note, as required by the contract, although notice of the forfeiture was given. *Johnson v. Southern Mut. L. Ins. Co.*, 79 Ky. 403.

1. *Crossman v. Massachusetts Ben. Assoc.*, 143 Mass. 435; *Rockwell v. Mutual L. Ins. Co.*, 27 Wis. 372; 20 Wis. 335; 21 Wis. 548; *Unsell v. Hartford L. & A. Ins. Co.*, 32 Fed. Rep. 443.

2. *Rice v. New England Mut. Aid Soc.*, 146 Mass. 248.

3. *Mobile L. Ins. Co. v. Pruett*, 74 Ala. 487; *Mutual L. Ins. Co. v. Girard L. Ins. Co.*, 100 Pa. St. 172; *Marston v. Massachusetts L. Ins. Co.*, 59 N. H. 92; *Thompson v. Knickerbocker L. Ins. Co.*, 2 Woods (U. S.) 547; 104 U. S. 252.

4. *Olmstead v. Farmers' Mut. Ins. Co.*, 50 Mich. 200.

5. *Mutual Protection L. Ins. Co. v. Laury*, 84 Pa. St. 43.

If the amount of the premium is subject to reduction, by the allowance of dividends, and the company has

been in the habit of notifying the assured of the amount of these dividends and of the balance to be paid in cash, and fails to give the customary notice, it is estopped from claiming forfeiture for nonpayment. *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156; s. c., 58 Am. Rep. 806; *Phoenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30.

The receipt of many assessments overdue, where the member was required at the time of payment to furnish certificates of health which were not furnished, does not amount to a waiver, or if the payment be extended as an act of kindness to a certain time, and be not made within that time. To constitute a waiver the insured must be induced by the company to do or omit to do some act which he would not otherwise have done or omitted. *Illinois Masons' Ben. Soc. v. Baldwin*, 86 Ill. 479. See also generally, *Equitable Ins. Co. v. McCrea*, 8 Lea (Tenn.) 541; *Steele v. St. Louis etc. L. Ins. Co.*, 3 Mo. App. 207; *Washoe Tool Mfg. Co. v. Hibernia F. Ins. Co.*, 66 N. Y. 613; 7 Hun (N. Y.) 74; *Fowler v. Metropolitan L. Ins. Co.*, 41 Hun (N. Y.) 357; *Appleton v. Phoenix Mut. L. Ins. Co.*, 59 N. H. 541; s. c., 147 Am. Rep. 220; *Protection L. Ins. Co. v. Foote*, 79 Ill. 361; *Southern L. Ins. Co. v. McCain*, 96 U. S. 84; *Insurance Co. v. Tullidge*, 39 Ohio St. 240; *Home L. Ins. Co. v. Pierce*, 75 Ill. 426; *Piedmont etc. Ins. Co. v. Fitzgerald, W. & W.* (Tex.) 784.

does not apply to the secretary and general manager of the company.<sup>1</sup>

**4. Payment of Arrearages and Reinstatement.**—Under provisions for the reinstatement of suspended members, the acts required being done, no proceeding or further recognition is necessary on the part of the society. The performance of the acts required is in itself effective for that purpose.<sup>2</sup>

The decision of the officers of a society on the sufficiency of an excuse for neglect to pay assessments is not conclusive. It is reviewable in the courts.<sup>3</sup>

It is immaterial that the restoration of a member's name to the list of members was not made until after his death.<sup>4</sup> Unless it is provided that the mere fact of being in arrears shall operate to suspend a member, some action on the part of the society is neces-

1. *Bankers & Merchants' Mut. L. Assoc. v. Stapp*, 77 Tex. 517.

In *Odd Fellows' Mut. Aid Assoc. v. Sweitzer* (Ind.), 19 N. E. Rep. 722, the assured made several payments about a month after the assessments were due, and paid the last assessment about two months after due at the home office of the association, when he was informed by the general manager that he was delinquent in still another assessment, and that an assessment would fall due on the following day, but no forfeiture was suggested. It appeared that notices of assessments stated that the agents were not authorized to extend the time of payment of assessments, and that any delay beyond the stipulated time would be at the risk of the member. The assured died about twenty days after his last payment, leaving two assessments unpaid, and the policy remaining uncanceled. It was held that it was for the jury to say whether there had not been a waiver of any forfeiture.

The statement of the secretary of a mutual benefit association to the insured that he need not pay his dues until certain charges then pending against him, which, if true, made the policy forfeitable, were disposed of, is not *ultra vires*, but binds the company. *Jones v. National Mut. Ben. Assoc.* (Ky.), 2 S. W. Rep. 447.

Where a member, relying on the promise of the manager to draw on him for assessments, and, being misled by the fact that such drafts have been twice made on him, is suspended for nonpayment of an assessment for which no draft was made, and cannot be reinstated because his health has be-

come impaired, the association is estopped to insist on a forfeiture. *McCorkle v. Texas Ben. Assoc.*, 71 Tex. 149.

2. *Manson v. Grand Lodge Ancient Order United Workmen*, 30 Minn. 509.

A by-law of defendant, that if a member is in arrears when taken sick he shall not be entitled, by paying up such arrearages, to benefits during such sickness, is not waived by the acceptance of arrearages from a member, he being in arrears at beginning of sickness. *Nagel v. Glasburger*, 10 N. Y. Supp. 503.

3. *Dennis v. Massachusetts Ben. Assoc.*, 120 N. Y. 496.

4. *Connelly v. Masonic Mut. Ben. Assoc.* (Conn.), 20 Atl. Rep. 671; *Dennis v. Massachusetts Ben. Assoc.*, 120 N. Y. 496.

In the first case it appeared that the power of a local lodge of Masons to suspend a member for nonpayment of dues was given by the constitution of the district lodge, which provided that certain notice should be given the delinquent member, and gave the district deputy grand master power to determine when a member alleged to have been illegally suspended should be restored. It was held that the decision of such deputy, affirmed by the grand master, that the notice given was not proper, and that the member should be restored, followed by a vote of the local lodge restoring his name as of the date of the alleged suspension, when made in good faith, bound the association, membership in which being contingent on continued membership in a local lodge.

sary.<sup>1</sup> A member may have paid all arrearages, and may still stand suspended for noncompliance with other provisions of the by-laws.<sup>2</sup> Where the constitution and by-laws give a member the right to appeal from the order of suspension for nonpayment of assessments, he is not required to pay such assessments until an order of reversal is actually made.<sup>3</sup>

**IX. REMEDIES AND DEFENCES ON CERTIFICATES.**—The certificates of membership differ greatly in form, but being in effect policies of life insurance, the fundamental principles of practice and pleadings which govern actions upon other insurance policies are applicable.<sup>4</sup>

The federal courts have jurisdiction of actions upon contracts between benefit societies and their members, as in other cases, and the same circumstances of residence, etc., will warrant the parties in removing a case brought in a State court to the federal courts.<sup>5</sup>

Where the policy issued by a mutual insurance company provides that the only action maintainable on the policy shall be to compel the association to levy the assessments agreed upon, and where its conditions are such that if a levy were ordered by the court, the association will only be liable for the sum collected, and the only mode of enforcing the policy in the first instance is by a suit in equity, such a provision in the policy is valid.<sup>6</sup>

In many States a different rule prevails; and although a suit in equity may be maintained to compel the company to levy an assessment and pay the proceeds to the beneficiary, still it is not necessary for the policy holder to resort to it, for, when the insurance company refuses to make an assessment, it violates its

1. *McDonald v. Supreme Council Order of Chosen Friends*, 78 Cal. 49.

In this case the by-laws of a mutual benefit society provided that a member, failing to pay an assessment in thirty days, should be suspended by the society at its next meeting. By the relief laws, any member so delinquent should forfeit all rights to benefits under the relief fund laws, and should be reported suspended from the "beneficiary membership," and should be declared suspended by the society, and should stand suspended until payment of arrearages and compliance with the other laws governing reinstatements. It was held that compliance with "the other laws governing reinstatements, which required a new certificate of the medical officer, and a re-election, was not necessary where no suspension had been declared by the society.

As to the status of parties and the nature of their title to a fund made up of advance dues and assessments, where

the enterprise was abandoned before any risks were taken or business done, see *Brown v. Stoerkel*, 74 Mich. 267.

2. *Crossman v. Massachusetts Ben. Assoc.*, 143 Mass. 435.

3. *Vivar v. Supreme Lodge of Knights of Pythias (N. J.)*, 20 Atl. Rep. 36.

4. *Elkhart Mut. Aid etc. Assoc. v. Houghton*, 98 Ind. 149; s. c., 53 Am. Rep. 514.

5. *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445.

6. *Eggleston v. Centennial Mut. L. Assoc. of Iowa*, 19 Fed. Rep. 201; distinguishing *Lueder v. Hartford L. & A. Ins. Co.*, 12 Fed. Rep. 465.

In the case of *Eggleston v. Centennial Mut. L. Assoc. of Iowa*, 19 Fed. Rep. 201, the policy sued on contained the following clause: "The only action maintainable on this policy shall be to compel the association to levy the assessments herein agreed upon, and if a levy is ordered by the court, the asso-

contract, and becomes liable to the beneficiary for damages caused by such violation. Such damages, like all damages for breaches of contract, can be recovered by an action at law.<sup>1</sup>

ciation shall be liable under this policy only for the sum collected under an assessment so made." The court said: "It is not for the court to comment on the wisdom or folly of such contracts. If parties choose to enter into them they are bound by their terms, in the absence of fraud, unless they are *contra bonos mores*. There is nothing to void the agreement the parties voluntarily entered into, and hence this court adheres to the decision heretofore made in this case—viz., that redress must be sought in equity alone."

An action at law upon a certificate of mutual insurance cannot reach questions outside of such certificate, so as to enable the plaintiff to recover benefits otherwise than as specified in the certificate. *Bailey v. Mut. Ben. Assoc.* (Iowa), 27 N. W. Rep. 770; *Tobin v. Western Mut. Aid Soc.*, 72 Iowa 261; *Ranis Barger v. Union Mut. Aid Assoc.*, 72 Iowa 191. If the recovery desired is outside the contract contained in the certificate, in an action at law, only nominal damages can be recovered. *Newman v. Covenant Mut. Ben. Assoc.* (Iowa), 33 N. W. Rep. 662.

In *Nerskin v. Northwestern Endowment Assoc. of Minn.* 30 Minn. 406, the court said: "In view of the well known character of the contracts of many of these so-called mutual protection associations, it is possible that if the articles of association and by-laws of defendant were set out, it might appear that this was the extent of the benefits of membership. But these articles and by-laws are neither set out in the pleadings nor introduced in evidence. Hence, we are left to construe this language of the certificate of membership by itself. There is nothing in it suggestive of the idea that defendant's liability is dependent upon collections received from an assessment. Upon its face we think it amounts to an absolute undertaking to pay a sum of money, the amount of which is to be determined by the number of contributing members. Hence, we think the complaint states a cause of action, although it neither alleges the actual receipt of money upon an assessment to meet the loss nor a neglect to make such assessment." See also *Harl v. Pottawatomie Co. Mut. Fire Ins. Co.*, 74 Iowa 39.

**Against Voluntary Association.**—Where the by-laws of an unincorporated association provide for the payment of death losses out of the treasury, or, if the fund therein be insufficient, by special assessment against the members, the beneficiaries of any member who dies have no claims as such against the surviving members, but are only entitled to enforce the means of payment provided by the by-laws. *Hammerstein v. Parsons*, 38 Mo. App. 332.

1. *O'Brien v. Home Ben. Soc.*, 117 N. Y. 318; s. c., 4 N. Y. Supp. 275; *Peck v. Equitable Acc. Assoc.*, 5 N. Y. Supp. 215; *Freeman v. National Ben. Soc.*, 42 Hun (N. Y.) 252; *Cumming v. Mayor of Brooklyn*, 11 Paige (N. Y.) 596, 602; *Fulmer v. Fitzgerald Equitable Acc. Assoc.*, 5 N. Y. Supp. 837; *Lueder v. Insurance Co.*, 12 Fed. Rep. 465; *Earnshaw v. Sun Mut. Aid Soc.*, 68 Md. 465; *Jackson v. Northwestern Mut. Relief Union*, 73 Wis. 507; *Burland v. Northwestern Mut. Ben. Assoc.*, 47 Mich. 424; *Taylor v. National Temperance Relief Union*, 94 Mo. 35; *Kansas Protective Union v. Whitt*, 36 Kan. 760; s. c., 59 Am. Rep. 607; *Kansas L. Assoc. v. Lemke*, 40 Kan. 142; *Excelsior Mut. Aid. Assoc. v. Riddle*, 91 Ind. 84; *Hankinson v. Page*, 12 Civ. Proc. Repts. (N. Y.) 279, 288; *Union Mut. Acc. Assoc. v. Frohard*, 25 N. E. Rep. 642.

An omission of the officers of the company to make an assessment, which, if made, would produce a fund equal to or greater than, the claim, would create an obligation against the society the same as if it had funds on hand from which to make the payment. The company cannot lie by and omit to put in operation the means possessed by it to obtain the fund and omit payment because of its own neglected duty. This would be to take advantage of its own wrong, and it would operate as a fraud on the beneficiary under the certificate. *Freeman v. Society*, 42 Hun (N. Y.) 252.

In *Earnshaw v. Sun Mut. Aid Soc.*, 68 Md. 465, the court said: "In fact, we have neither found nor been referred to any case in which it has been expressly decided that no action at law will lie against the corporation before an assessment had been made. In *Essender v. Mut. Endowment Assessment Assoc.*,

The recovery should be for the maximum amount insured, unless the defendant shows by pleadings and proof that such sum should be reduced.<sup>1</sup>

Plaintiff cannot recover for benefits accruing after the commencement of his action.<sup>2</sup>

59 Md. 463, and *Yoe v. B. C. Howard*, Masonic Mut. Ben. Soc., 63 Md. 86, the certificates were of the same character as in this case and the actions were at law, but no objection was made to them on that ground. In *Eggleston v. Centennial Mut. L. Assoc.*, 18 Fed. Rep. 17; 19 Fed. Rep. 201, the instrument contained a clause that "the only action maintainable upon this policy shall be to compel the association to levy the assessments herein agreed upon," and the decisions were based exclusively on that clause. And in *Smith v. Covenant Mut. Ben. Assoc.*, 24 Fed. Rep. 685, the opinion as we read it, concedes that an action at law would lie if it was grounded upon a refusal by the company to make the assessment." The court has made a mistake as to the effect of *Smith's Case*, cited *supra*. That case holds that "to maintain this action (at law) it must appear that the association has in its hands the money collected by assessment, which it ought to pay to the plaintiffs as the beneficiaries entitled to the same. If the association has failed to make the required assessment, or, having made an assessment, has failed to collect the same, the plaintiffs' remedy is in some other form of action or proceeding."

1. *Lawler v. Murphy* (Conn.), 20 Atl. Rep. 457; *Kaw Life Assoc. v. Lemke*, 40 Kan. 142; *Lueder v. Hartford L. & A. Ins. Co.*, 4 McCrary (U. S.) 149; s. c., 12 Fed. Rep. 465; *Elkhart Mut. Aid & Relief Assoc. v. Houghton*, 103 Ind. 286; s. c., 53 Am. Rep. 514; *Excelsior Mut. Aid Assoc. v. Riddle*, 91 Ind. 84.

Where a by-law provides that on the death of a member, when there is not enough money in the treasury to pay the claim, there shall be an assessment on the members, from which, if it is sufficient, the claim shall be paid in full, and it appears that on the death of a member the corporation wrongfully refused to make such assessment, and that, if made at the proper time, the assessment would have paid the claim in full, it is proper, when afterwards decreeing that such an assessment should be made, to direct that, if the assessment prove insufficient to pay the claim in full, the association shall make

up the deficiency. *Union Mut. Acc. Assoc. v. Frohard* (Ill.), 25 N. E. Rep. 642.

A declaration containing no allegation of neglect to make the assessment provided for, and assigning no breach, except of a promise to pay the face value of the policy, is fatally defective, and is not cured by the verdict. *Curtis v. Mutual Ben. Life Co.*, 48 Conn. 98.

In *Elkhart Mut. Aid Assoc. v. Houghton*, 103 Ind. 286, a complaint was held sufficient which did not state the number of members of the association against whom assessments might be made to raise the money with which to pay in full or in part the amounts named in the certificate.

**Contra.**—To recover in an action at law, it is necessary to show what is the amount realized from one assessment. It may be more or less than the face of the policy. In the absence of evidence there can be no presumption that it will equal the face of such policy, for that sum is specified as the greatest sum payable, thus clearly implying that it may be less. *O'Brien v. Home Ben. Soc.*, 117 N. Y. 318.

The complaint and proof should show the sum which would have been realized on an assessment, or that an assessment would have yielded returns. *Martin v. Equitable Acc. Assoc. of Binghamton*, 9 N. Y. Supp. (Sup. Ct.) 16; *Freeman v. Society*, 42 Hun 253.

In *Peck v. Equitable Acc. Assoc. of Binghamton*, 5 N. Y. 215, it was found by the trial court that if an assessment had been levied as provided by the policy, it would have produced at least a sum equal to the face of the policy, and the court awarded the plaintiff the full amount of the policy with interest and cost.

**Demand.**—Where the contract stipulates that proofs of death shall be furnished to the secretary of the association, the complaint is sufficient if it show that such proofs were furnished to the association, and it is not necessary to aver therein a demand before suit brought. *Excelsior Mut. Aid Assoc. v. Riddle*, 91 Ind. 84.

2. *Baltimore etc. Employes' Relief Assoc. v. Post*, 122 Pa. St. 579.

If an action at law would result in only nominal damages, or would for other reasons furnish no remedy, or one that is inadequate, a party may sue in equity for a specific performance of the contract in the form of a decree, compelling an assessment to be levied.<sup>1</sup>

Where an ordinary civil action affords an adequate and specific legal remedy, the beneficiary cannot resort to a proceeding by *mandamus*.<sup>2</sup>

1. *Covenant Mut. Ben. Assoc. v. Sears*, 114 Ill. 108; *Van Houten v. Pine*, 36 N. J. Eq. 133. In the first case the court gave as a reason that, as the corporation is not organized for pecuniary profit, has no surplus, and relies entirely upon the mortuary assessments made upon each death for the payment of benefits to the beneficiaries of a decedent, it would be difficult to realize anything by execution; and the association stands as a trustee of a fund in the hands of its numerous members, but belonging to the beneficiaries, which can be called in by assessment for their use.

**Estoppel.**—A mutual company which, after the death of the assured, assesses his administrator upon the policy, and receives payment from him, is estopped, in a suit on the policy by the administrator, from denying its liability. *Harl v. Pottawattamie Co. Mut. F. Ins. Co.*, 74 Iowa 39.

**Change from Legal to Equitable Action.**—Under Code Iowa, §§ 2514, 2689, providing that an error of plaintiff in the kind of proceedings adopted shall not cause an abatement or dismissal, but merely a change into proper proceedings, and a transfer to the proper docket, and that, in furtherance of justice, pleadings may be amended by the insertion of material allegations, and other statutes relative to amendments, a petition at law for damages, on a mutual benefit certificate, may, after reversal of judgment thereon, be changed to one in equity by amendment praying that defendant be compelled to levy an assessment on its members to pay the certificate, and such amendment does not introduce a new cause of action. *Newman v. Covenant Mut. Ben. Assoc.*, 76 Iowa 56.

In *Harl v. Pottawattamie Co. Mut. Fire Ins. Co.*, 74 Iowa 39, the plaintiff was allowed, in an action on the policy, to amend his petition so as to ask for a levy by *mandamus*.

2. *Excelsior Mut. Aid. Assoc. v. Riddle*, 91 Ind. 84. See also *MANDAMUS*, vol. 14, p. 95.

"*Mandamus* does not purport to adjudge or decide any right. It is rather in the nature of an award of execution than of judgment. It is the mode of compelling the performance of acknowledged duty or enforcing an existing right rather than deciding what that right or duty is. The award is non-finality. It concludes nothing. If the writ is denied, the relator cannot have error, and if granted, the award could not be pleaded in law." *Burland v. Mutual Ben. Assoc.*, 47 Mich. 427.

So where a loss had been adjusted by the proper officers, and sixty days had elapsed after such adjustment before the commencement of the action at law, and the company had neglected and refused to make any assessment to pay the loss, *mandamus* was held to be a proper remedy to compel the levy of such an assessment. *Harl v. Pottawattamie Co. Mut. Fire Ins. Co. (Iowa)*, 36 N. W. Rep. 880.

In *Miner v. Michigan Mut. Ben. Assoc. (Mich.)*, 31 N. W. Rep. 763, *mandamus* was asked for to compel the company to make an assessment upon the members of the association sufficient to pay the judgment, and the company in defence set up that they had made an assessment and were proceeding in good faith to collect it. *Held*, that plaintiff having judgment, and the execution returned *unsatisfied*, no further proceeding could be taken at law, and the *mandamus* must be refused. Such further proceedings, if any are proper, must be had under *How. St. Mich.*, § 8153, providing that when a judgment shall be obtained against a corporation and the execution thereon shall be returned *unsatisfied*, the circuit court may sequester the property of such corporation.

**Execution.**—After a general judgment on a benefit certificate execution cannot be limited to a particular fund. *Seitzinger v. New Era L. Assoc.*, 111 Pa. St. 557; *McKnight v. Mutual L. Assoc.*, 15 W. N. C. 400.

The assessments paid into the treas-



It follows that the rights growing out of such contract of insurance may be enforced like external contracts growing out of the dealings of the organization with third parties; and the insured may recover benefits or his beneficiary a death loss by action at law where a legal remedy is otherwise adequate and appropriate, notwithstanding the fact of membership.

Where the liability of the society is contingent upon the performance of a condition by the insured or his beneficiary, substantial performance, or performance according to the terms of the contract or provisions of the constitution and by-laws, must be shown,<sup>1</sup>

ury of a benefit society by its members become the property of the society and the members have no further claim or right to it. *Swett v. Citizens' M. Relief Soc.*, 78 Me. 541; *York Co. Mut. Aid Assoc. v. Myers*, 11 W. N. C. 541; *Brown v. Orr*, 112 Pa. St. 233. And a member of the association, having no interest in the fund, cannot maintain a suit to enjoin its payment. *Elsley v. Odd Fellows' M. R. Soc.*, 142 Mass. 224; 7 N. E. Rep. 844; 2 N. Eng. Rep. 667.

1. In *Bishop v. Empire Order of Mut. Aid*, 43 Hun 472, the defence set up was the failure of the deceased member to designate a beneficiary. The charter provided for a beneficiary fund, to be maintained by the order for this object, which should be under the control of the grand lodge, and from which a specified sum should be paid over to the families, heirs or legal representatives of deceased or disabled members, or to such person or persons as such deceased member may, while living, have directed, and also that the manner and time of payment, and the persons to whom payment was to be made, should be regulated by the rules and by-laws of said grand lodge. The issue of a certificate was also provided for which it was required should set forth the name of the person to whom the benefit should be paid. No certificate having ever been issued, the court held the defendant not liable, and considered the making of such designation a condition precedent to the defendant's liability. See also *Order Mut. Companions v. Griest*, 76 Cal. 494.

**Payment of Advance Fee.**—Where the defence was nonpayment of fee required as a condition precedent to membership, it appeared that the certificates had been forwarded to the deceased who was one of its agents; that the accounts between him and the com-

pany were confused; that on one occasion they had returned to him part of a remittance sent by him on the ground that it was an overpayment; that they had published his name in the list of members and had levied a mortuary assessment on him as if he were a member. It was held that this evidence warranted the jury in finding that the fee had either been paid or its payment waived as a condition precedent. *Bankers' & Merchants' Mut. L. Assoc. v. Stapp*, 77 Tex. 517.

**Proofs of Loss.**—A benefit society may enforce a by-law requiring an appeal to be taken before suit brought on the membership certificate from a subordinate to a superior council or lodge, but such by-law is void in so far as it declares the decision of the appellate tribunal final so as to bar a resort to the courts. *Supreme Council of Order of Chosen Friends v. Forsinger* (Ind.), 25 N. E. 129.

**Proofs of Disability.**—The by-laws of a benefit society may require the approval of proofs of a member's disability to be satisfactory to the subordinate council, but such subordinate council has no power to finally reject a claim. *Albert v. Order of Chosen Friends*, 34 Fed. Rep. 721.

**Knowledge of By-laws.**—As the by-laws form part of the contract, a repudiation alleging ignorance of the same, and the contracting of debts and expenditures of money through mistake constitutes no cause of action, and a complaint setting up these facts as a basis for recovery is demurrable. *Gray v. Supreme Lodge Knights of Honor*, 118 Ind. 293.

**Good Standing.**—In an action by the beneficiary on a certificate of mutual benefit insurance, it appeared that deceased on the day he was notified of his suspension for nonpayment of a de-

unless a waiver of such conditions is proven.<sup>1</sup>

If a member has paid assessments as demanded, and complied with all the requirements of the constitution and by-laws, the fact that no certificate has been issued to him, and that he has not designated a beneficiary, cannot be set up to defeat his action.<sup>2</sup>

A provision in a certificate that "no question as to the validity of an application or certificate of membership shall be raised, unless such question be raised within the first two years from and after the date of such certificate of membership, and during the life of the member therein named," embraces the defence of fraud of the insured and beneficiary in obtaining the certificate.<sup>3</sup>

linquent assessment of which he had had no notice, paid the same and all prior assessments due, and a subsequent one which had not yet become delinquent; that therefore when all assessments had been paid and accepted by the association decedent gave notice of the substitution of the plaintiff for the original beneficiary in the regular manner; that after decedent's suspension, when one meeting having taken place and no action having been taken in reference thereto, he was not reinstated into full membership until shortly after this notice and shortly before his death; it was held that there was a sufficient finding that decedent was "a member in good standing" at the time of his notice. *Millard v. Supreme Council American Legion of Honor*, 81 Cal. 340.

**Resort to Internal Remedy.**—A beneficiary is entitled to recover on a valid claim, though he did not exhaust the remedies known to the society for the recovery of claims, as required by its laws before bringing suit, where he is prevented from doing so by the wilful refusal of the proper officer to certify to his sickness, from which refusal no appeal is given by the laws of the society. *Supreme Sitting Order of the Iron Hall v. Stein*, 120 Ind. 270.

**Disability—Meaning of.**—Where the agreement is to pay benefits to "every member who, through sickness or other disability, is unable to follow his usual business," must pay benefits to a member who becomes a lunatic. *McCullough v. Expressman's Mut. Ben. Assoc. (Pa.)*, 19 Atl. Rep. 355.

Where the object of an association was to relieve its members while they are unable to work by reason of sickness or injury, total inability to labor,

provided for by the constitution, was held not to mean inability to labor at the same occupation, but if the member is able to work at other employments the benefits do not accrue. *Baltimore & Ohio Employees' Relief Assoc. v. Post*, 122 Pa. St. 579.

The constitution of a relief fund association provided that a member "permanently disabled from following his or her usual or other occupation" was entitled to a benefit; and in another section defined such disability as one which should "permanently prevent the member from following any occupation whereby he or she can obtain a livelihood." *Held*, that one who, disabled from his own profession, had been working at another totally dissimilar one, was not entitled to a benefit. *Albert v. Order of Chosen Friends*, 34 Fed. Rep. 721.

1. A policy required all insured to make out within thirty days a statement under oath, etc., of the loss. C, within the required time, notified the company of his loss. The company replied to this, repudiating all liability on the ground of nonpayment of assessment. *Held*, that such an act was a waiver by the company of any further proof of loss by C. *Planters Ins. Co. v. Comfort*, 50 Miss. 662.

An insured declared for a loss. The company pleaded that he had altered the buildings, which he traversed by his replication. *Held*, that under the pleadings evidence of waiver by the company was inadmissible. *Diehl v. Adams Co. Mut. Ins. Co.*, 58 Pa. St. 443; s. c., 98 Am. Dec. 302.

2. *Bishop v. Grand Lodge*, 112 N. Y. 627.

3. *Wright v. Mutual Ben. L. Assoc.*, 118 N. Y. 237; *Vivar v. Supreme Lodge*

Payment to the trustee of the beneficiary designated in the policy, and having the same in possession, constitutes a defence,<sup>1</sup> as does a forfeiture or assignment of the contract by the insured during his lifetime.<sup>2</sup> But when a forfeiture is relied upon it must be clearly established according to the contract or by-laws.<sup>3</sup>

Whether assessments were made according to the constitution and by-laws of a benefit society is a question of law, which, being left by the court to the decision of a jury, constitutes error.<sup>4</sup>

Where the action is by an assignee, the fact that he has no insurable interest in the life of the insured does not bar his recovery, where it is shown that the insured himself procured the insurance and paid the premiums.<sup>5</sup>

The defences are as various and numerous as in other actions on contract, and the general rules governing liability and discharge therefrom must be consulted.<sup>6</sup>

of Knights of Pythias (N. J.), 20 Atl. Rep. 36.

Where the constitution and regulations provided that, on examination of an applicant and approval of the application by the supreme lodge, and the signing of the certificate of membership, and the forwarding of it to the subordinate lodge, the contract should be complete, it was held that the certificate having been forwarded to the subordinate lodge, and retained on the ground of fraud in the application, the beneficiary might recover without producing it, no evidence of the fraud being given by the corporation. *Lorscher v. Supreme Lodge Knights of Honor*, 72 Mich. 316.

1. *Butler v. State Mut. L. Assurance Co.*, 8 N. Y. Supp. 411.

2. The assignment is not rendered void by the fact that the insured died insolvent, when it is not shown that he was insolvent at the date of the assignment. *Milner v. Bowman*, 119 Ind. 448.

3. *Stanley v. Northwestern L. Assoc.*, 36 Fed. Rep. 75.

Where the by-laws of a mutual benefit society require written notice of forfeiture of a policy, proof of any other notice is properly excluded in an action thereon. *Dial v. Valley Mut. L. Assoc.*, 29 S. Car. 560.

**Nonpayment of assessment after loss** does not defeat an action on the policy, where the nonpayment is of an assessment falling due after loss of the property insured. Such provision refers to the contract of indemnity. *Seyk v. Millers' Nat. Ins. Co.*, 74 Wis. 67;

*Knights of Honor v. Wickser* (Tex.), 12 S. W. Rep. 175.

4. *Bagley v. Grand Lodge Ancient Order United Workmen*, 131 Ind. 498.

5. *Milner v. Bowman*, 119 Ind. 448.

Where a certificate provided that the benefit should be payable to E. L. V., the wife of V., or to such other person or persons as he might subsequently direct, and a similar power was given to V. by the constitution of the endowment rank, it was held that the relationship of the payee was not material in the contemplation of the insurer, and that, as in New Jersey, it is not necessary that the payee should have an insurable interest in the life of the insured, the fact that V. knew his statement as to the relationship of E. L. V. to be false did not preclude a recovery on the certificates. *Vivar v. Supreme Lodge of Knights of Pythias* (N. J.), 20 Atl. Rep. 36.

**6. New Agreement.**—Where by the terms of the policy a member who had forfeited his certificate had a right to be restored upon certain conditions, it was held that a reinstatement upon compliance with these conditions, constituted no consideration for a stipulation exacted by the society from the beneficiary that it should be liable to pay him only a part of the amount to which he would be entitled under the terms of the policy. *Davidson v. Old People's Mut. Ben. Soc.*, 39 Minn. 303.

**Estoppel.**—A person is not estopped from claiming compensation from the railroad for an injury resulting from a collision by having been previously compensated by the relief association

for the injury which he then untruthfully alleged was caused by malaria, jaundice, constipation, etc., as the railroad and the association are separate corporations; and while the former guaranties all contracts of the latter, yet the association funds are sufficient to meet all liabilities likely to arise. *Owens v. Baltimore etc. R. Co.*, 35 Fed. Rep. 715.

**Double Liability.**—The by-law of a railroad relief association, requiring its members to release the railroad company from any claim for damages before applying to the association for relief, is not against public policy, as it simply puts a claimant to his election whether he will look to the railroad company or the relief association for compensation. *Owens v. Baltimore etc. R. Co.*, 35 Fed. Rep. 715. As to the defence of double insurance, see *Bock v. Ancient Order of United Workmen*, 75 Iowa 462. As to payment by levy of assessment under peculiar by-law provisions, see *Wadsworth v. Jewelers' etc. Co.*, 9 N. Y. Supp. 711.

**Expulsion of Insane Member.**—A member of a mutual benefit insurance association cannot be expelled from the association so as to deprive him of his right to mortuary benefits by proceedings had while he is insane, when no notice of the proceedings has been served upon him, and the expulsion is based mainly upon his admission of the matters charged against him, made to the tribunal by which he was tried. *Supreme Lodge Ancient Order United Workmen v. Zuhlke (Ill.)*, 21 N. E. Rep. 789.

**Violation of By-law—Drunkenness.**—Where, in an action on a certificate issued by a temperance order, it appeared that the member died from the excessive use of liquor; that he agreed in his written application to comply with all the requirements of the order as a condition precedent to his being entitled to the benefits; that the certificate contained a clause in substance and effect the same as the application, it was held that plaintiff could not recover. *Hogins v. Supreme Council of Champions of Red Cross*, 76 Cal. 109.

**Release.**—A member of a railroad relief association, whose constitution provided that the railroad's liability should be released before the benefit should be paid, had designated his mother as his beneficiary, and upon his death his wife and minor child, the persons legally entitled to damages, did

not release the railroad company, but brought suit, and recovered damages by a compromise. It was held that the mother had no right of action against the relief association for the benefits. *Fuller v. Baltimore etc. Employes Relief Assoc.*, 67 Md. 433. See also *State v. Baltimore etc. R. Co.*, 36 Fed. Rep. 655.

**No Signature to Application.**—An application for a membership in a mutual insurance company, made a part of the certificate of membership, stated that it "must be signed by the applicant, or the certificate, if issued, will be void." An application was made by a husband for the wife, at her direction, and was signed by him with the knowledge and consent of the agent of the company. The action of the husband was afterwards approved by the wife. *Held*, that the signature to the application became in law the signature of the wife, and is binding upon the insurance company. *Somers v. Kansas Protective Union*, 42 Kan. 619.

**Limitations—Injunction.**—Where the certificate provides that all suits to recover claims under it are to be begun within six months after death of the assured, and the beneficiary is enjoined from receiving payment until the six months have expired, suit may be brought after the removal of the injunction at any time within the statute of limitations. *Earnshaw v. Sun Mut. Aid Soc.*, 68 Md. 465.

**Same—Part Payment.**—See *Kentucky Mut. Security Fund Co. v. Turner (Ky.)*, 13 S. W. Rep. 104.

Under a clause in a policy limiting the right of action to a period of "six months after the happening of the death on account of which the action is brought," the limitation does not begin to run until the cause of action matures, following *McConnell v. Iowa Mut. Aid Assoc. (Iowa)*, 43 N. W. Rep. 188; *Matt v. Iowa Mut. Aid Assoc. (Iowa)*, 46 N. W. Rep. 857.

**Ultra Vires.**—A religious society, formed under the auspices of a church, which includes a mutual life insurance scheme as one of its features, cannot defend against a suit on one of its policies upon the plea of *ultra vires*, when it has been receiving the assessments on the policy. *Matt v. Roman Cath. Mut. Protective Soc.*, 70 Iowa 455.

But, a charter of a fire insurance company authorizing its members to take out insurance on their property, and to provide for a lien on the same

**Against Officers.**—Under some circumstances the officers and agents of benefit societies, like directors of ordinary business corporations, incur personal liability to persons who have contracted with them in a common name assumed by them, whether they hold out such name as that of a corporation or of a purely voluntary association.<sup>1</sup>

Fraud is the usual basis of personal liability in such cases, but this is not always the case.<sup>2</sup>

to secure assessments, does not authorize a husband to take out such policy on separate property of his wife. It is void in its inception as *ultra vires*, and cannot be validated by an assignment to the wife. *Froehly v. North St. Louis Mut. F. Ins. Co.*, 32 Mo. App. 302.

**Withdrawal of Member.**—Where the by-laws of a life insurance association provided that a member may at any time withdraw from this association by giving notice in writing of such intention to do so, and paying all assessments and dues to date, it was held in an action on his certificate after his death, that a notice of withdrawal by decedent was a bar to the action, though the company had not assented or dissented thereto, nor erased his name. *Cramer v. Masonic L. Assoc.*, 9 N. Y. Supp. 356.

**Misrepresentations in Application.**—The benefits of Rev. Stat. Mo. 1879, §§ 5976, 5977, which declare that in certain instances misrepresentations shall not be a defence, do not apply to this class of insurance. *Whitmore v. Supreme Lodge Knights & Ladies of Honor*, 100 Mo. 36.

Where the rules of a mutual aid association forbade the insurance of any person over 50 years old, and the agent thereof and the insured, both knowing of this restriction, conspired together to falsely represent that the applicant was under 50 years, the company was held not bound by the agent's acts. *Hanf v. Northwestern Masonic Aid Assoc.* (Wis.), 45 N. W. Rep. 315.

1. The authorities are conflicting on this point, it having been held in numerous early cases that such liability does not attach to directors unless they are either actual partners or actually assumed a personal responsibility. See *Morawetz Priv. Corp.*, §§ 748, 749, and cases cited. But several recent well considered cases have gone very far to establish the doctrine that pretended directors and officers of private corporations should be held to a joint and

several liability in all cases where they have assumed to act as such for a corporation which does not in fact exist, and contracted in the assumed common or corporate name, unless they act in good faith and upon an honest belief that a corporation has been actually formed and that no estoppel exists in their favor against persons who have dealt and contracted with them in such common name. See next note; also **OFFICERS OF PRIVATE CORPORATIONS.**

2. In *Lawler v. Murphy* (Conn.), 20 Atl. Rep. 457, it was held that where a certificate recited a contract between the member and the State Insurance Fund A. O. H., and being signed by its officers, the liability of the latter was sufficiently shown by a complaint which alleged that they were jointly engaged in carrying on a life insurance business, and that they entered into the contract under the said name, the court said: "The defendants assign for further cause for demurrer, that it appears from the contract declared on that the defendants made no personal agreement upon which they were personally liable, but that the contract was signed by them only as officers of the organization mentioned therein. This issue is raised, not as a question of fact, but as a question of law upon the pleadings. As a matter of law, does the contract upon its face show that the defendants made no personal contract upon which they were personally liable? The complaint alleges that they were jointly engaged in carrying on a life insurance business, under the name of the Connecticut State Insurance Fund, and that they entered into the contract sued upon. If the facts are so, should they not be held liable? Does the contract, as a matter of law, preclude that state of facts? If they had simply been sued as individuals, upon a contract headed with the name of the association, and signed by them, respectively, as president, secretary and treasurer, as ap-

Directors of incorporated associations are liable personally to a member or beneficiary of a matured claim to the extent of all

appears to have been the case in *Hitchcock v. Buchman*, 105 U. S. 416, cited by the defendants, and the complaint had contained no allegation that they were carrying on the insurance business under a certain name, and made the contract with Thomas Lawler, the question would be a difficult one, especially if it appeared that the association was incorporated. . . . It seems clear, without pursuing the subject matter further, that this cause for demurrer cannot be sustained. Individual members of an unincorporated association are liable for contracts made in the name of the association, without regard to the question whether they so intended or so understood the law, and even if the other party contracted in form with the association and was ignorant of the names of the individual members composing it. And the individual members of such an association do not acquire any immunity from individual liability by force of the statutes, which provide that any number of persons associated and known by some distinguishing name may sue and be sued, plead and be impleaded, by such name; and that the individual property of the members shall not be liable to attachment or levy of execution in a suit brought against the association."

In *Davison v. Holden*, 55 Conn. —, under a similar state of facts, the court held, "As a matter of law the plaintiff, in giving credit to the associate name; gave credit to the individuals who, upon enquiry, should be found to stand behind it." See also *Hitchcock v. Buchanan*, 105 U. S. 416.

In *Grayson v. Willoughby*, 78 Iowa 83, defendants were the directors of the association, and dissolved the corporation by consolidating it with another, to which it attempted to turn over its insurance. The latter corporation refused to issue a policy to plaintiff in lieu of the one held by her, alleging that she had contracted a disease rendering her uninsurable. Code Iowa, §§ 1071, 1072, provides that intentional fraud by persons having the management of a corporation, such as the diversion of the assets from their proper uses, whereby insufficient funds remain to meet its liabilities, will constitute a cause of action

in favor of any person injured thereby. The court held that under said statute plaintiff could recover for the damages sustained by reason of the consolidation, which would be measured by the amount she had paid into the association. Also that the application for insurance to the company with which the defunct corporation was consolidated would not amount to a ratification of the act of consolidation, so as to bar her action for damages.

In disposing of the first point the court said: "It is charged in the petition that 'defendants herein, as officers and directors of the said association, abstracted and received therefrom large sums of money, the exact amounts of which these plaintiffs are unable to state, and that the said transfer of the said Cosmopolitan Mutual Benefit Association to and consolidation with the said Mutual Benefit Association was fraudulent, and without any authority of law, and that by reason thereof, and as a consideration thereof, these defendants received further large sums of money, the exact amounts of which the plaintiffs are unable to state, all of which was and is in gross fraud and violation of the rights of these plaintiffs.' At the first reading of the abstract in this case some of us were of the opinion that the plaintiff was not entitled to recover more than nominal damages. But if it be true that the plaintiff has paid \$100, and has lost her insurance by the acts of the defendants, and the defendants received large sums of money by reason of the consolidation, their act was a gross fraud, and the plaintiff ought at least to recover of them the amount she had paid, and which now appears to be wholly lost to her."

On the second point, the objection of plaintiff's estoppel, the court was equally explicit, saying: "It is set forth as ground of demurrer that the plaintiff is not entitled to recover damages because she ratified the action of the defendants by applying to the Mutual Benefit Association for membership in that corporation. Her application was no ratification, such as to estop her from now asserting any claim she may have against the defendants for fraud. We think the demurrer should have been overruled."

misappropriations and misapplications of assets whereby the association is rendered insolvent.<sup>1</sup>

A receiver appointed after insolvency may maintain such action.<sup>2</sup>

The action lies in favor of the beneficiaries of an unincorporated association for any deficiency they may be unable to collect by enforcement of the by-laws, where the funds have been misappropriated by the directors.<sup>3</sup> See also OFFICERS OF PRIVATE CORPORATIONS.

**X. MATTERS OF PRACTICE—1. Parties.**—The statutory provisions governing parties to civil actions will, to a great extent, be found applicable to actions on certificates, whereon members of benefit societies are entitled to benefits and their beneficiaries to death losses. The latter have, after the death of a member on whose life the insurance was held, a vested interest within the meaning of statutes requiring actions to be brought in the name of the real party in interest, as has often been recognized in actions on regular policies, and the principle is applied to benefit certificates,<sup>4</sup> although the beneficiary be not privy to the contract.<sup>5</sup>

The administrator and the heirs cannot join in an action on a policy of insurance for a loss occurring after the death of the assured.<sup>6</sup>

But where the policy is payable to the assured, "his executors, administrators or assigns" for the benefit of wife and children, the personal representative is held to be the proper party plaintiff.<sup>7</sup>

1. *Stewart v. Lee Mut. F. Ins. Assoc.*, 64 Miss. 499. In this case the funds in the hands of the company arising from dues and advance assessments had been appropriated by the directors to the payment of its privilege, taxes and attorney's fees, stripping it of its assets and rendering it insolvent.

2. *Appeal of McCarty*, 110 Pa. St. 379.

3. *Hammerstein v. Parsons*, 29 Mo. App. 509.

4. *York County Mut. Aid Assoc. v. Myers*, 11 W. N. C. (Pa.) 541.

5. *Beardslee v. Morgner*, 4 Mo. App. 139; *Barbaro v. Occidental Grove No. 16*, 4 Mo. App. 429.

6. *Pfister v. Gerwig*, 122 Ind. 567.

An administrator of the insured may maintain an action on such certificate though his petition needlessly aver that the action is for the benefit of the creditor. *Rindge v. New England Mut. Aid Soc.*, 146 Mass. 286.

7. *Fairchild v. Northeastern Mut. L. Assoc.*, 51 Vt. 613; *Grattan v. National L. Ins. Co.*, 15 Hun 74; *Massachusetts Mut. L. Ins. Co. v. Robinson*, 98

Ill. 324; *Connecticut L. Ins. v. Lucha*, 108 U. S. 498; *Catland v. Hoyt*, 78 Me. 355; *Stowe v. Phinney*, 78 Me. 244; s. c., 57 Am. Rep. 796.

The bringing of an action in the name of the administrator of a deceased member of a mutual benefit association on a certificate of membership payable to the member's heirs, is a harmless error, where the administrator is also the sole heir of such deceased member. *Peet v. Great Camp Knights of Maccabees of the World* (Mich.), 47 N. W. Rep. 119.

**Statutory Provisions.**—The provisions of Stat. Mass., 1877, ch. 204 (Pub. Stat., ch. 115, § 8), that beneficiary corporations may establish by assessment a fund "to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto," and the similar language of Stat. 1882, ch. 195, § 2, which increased the number of those for whose benefit such corporations could insure, do not give a right of action on the certificate to the persons for whose benefit the contract is expressed to be made. Upon the death

If, however, a certificate provide for the payment of different sums to different parties, they cannot join in one suit, but must bring separate actions, each for his individual share.<sup>1</sup>

Whether, if the amount of the insurance be payable to certain persons equally, they may join in one action, seems not to be settled.<sup>2</sup> Upon principle it would seem that they might and thus avoid a multiplicity of suits.

**2. Pleading.**—The complaint on a benefit certificate must allege due performance of whatever conditions are, in the contract or by-laws, or both, made conditions precedent to the society's liability. Proofs of death of the insured are generally required to be furnished to the officers within a specified time. In the absence of a good and sufficient cause excusing it, compliance with this requirement must be alleged and shown.<sup>3</sup>

The requisites of a declaration on an ordinary insurance policy are entirely applicable to certificates of membership.<sup>4</sup>

of a member intestate, such action is properly brought by the administrator. *Flynn v. Massachusetts Ben. Assoc.* (Mass.), 25 N. E. Rep. 716.

1. *Emmeluth v. Home Ben. Assoc.* (N. Y.), 25 N. E. Rep. 234; *Frazer v. Phoenix M. L. Ins. Co.*, 36 Up. Can., Q. B. 422; *Keary v. Mutual Reserve Fund L. Assoc.*, 30 Fed. Rep. 359; *Campbell v. National L. Assoc. Co.*, 34 Up. Can., Q. B. 35.

2. *Covenant Ben. Mut. Assoc. v. Hoffman*, 110 Ill. 603.

3. *Fire Ins. Co. v. Felrath*, 77 Ala. 194; s. c., 54 Am. Rep. 58, holding also that such stipulations are binding on the parties. It is an essential of such by-laws as of all others that they be reasonable and not retroactive. In *Universal F. Ins. Co. v. Block*, 109 Pa. St. 535, it was held that a condition in a fire policy requiring a certificate or affidavit from the nearest magistrate, or a fire marshal, stating certain facts, is unreasonable and therefore void. See also *Shannon v. Hastings Mut. F. Ins. Co.*, 26 U. C. C. P. 380, and where it is provided or the member has contracted that proofs of death should be "satisfactory to the directors," they cannot capriciously demand unreasonable proof. *Braunstein v. Accidental Death Ins. Co.*, 1 B. & S. 782; 8 Jur., N. S. 506; 31 L. J., Q. B. 17; 5 L. J., N. S. 550.

4. The essential parts of the declaration are stated in *Brooklyn L. Ins. Co. v. Bledsoe*, 52 Ala. 538. The court said: "The contract or policy of insurance must be declared on, in *hac verba*, or according to its legal effect; the plain-

tiff's interest in the subject of insurance; the payment of the premium; the inception of the risk; the performance of any precedent condition or warranty contained in the policy, and the loss, or happening of the event, on which, within the terms and meaning of the policy, the liability of the insurer attaches, must be alleged. The general rule applicable to all executory contracts is, that if the defendant's performance depended upon a condition precedent, the plaintiff must aver the fulfilment of such condition, whether it is affirmative or negative, or to be performed or observed by him, or the defendant, or a mere stranger to the contract, or must show an excuse for non-performance. If nonperformance is excused, the matter of excuse must be distinctly averred."

A declaration, which names no sum for which defendant became liable under the terms of the certificate, and which does not make the certificate a part thereof, is fatally defective, and the omission is not cured by the verdict. *Abe Lincoln Mut. L. & Acc. Soc. v. Miller*, 23 Ill. App. 341.

**Assumption of Liability by New Corporation.**—A petition on a certificate against a mutual benefit association, alleging that defendant was the legal successor of another such association which had issued the certificate, having received all its assets and effects and assumed to pay all its liabilities, and to fulfil all its obligations and engagements, including the demand sued on, sufficiently states that the first association no longer exists, and that defend-



Where the liability of the society is limited to the proceeds of an assessment upon the members, the complaint should aver that the assessment has been made and collected, or that the company had refused to make the assessment;<sup>1</sup> and a petition which does not aver that defendant failed, or refused to lay any such assessment, or that, having laid one and collected it, failed and refused to pay the same to plaintiff, is demurrable.<sup>2</sup>

A complaint, in an action on such a certificate, need not aver the number of members of the rank to which the deceased belonged at the time of his death, that fact being peculiarly within the knowledge of the defendant.<sup>3</sup>

To maintain an action at law upon such certificate for the maximum sum therein, it must be alleged and shown that the company has levied an assessment upon certificate holders to pay the death claim, has collected the amount of such assessment, and has failed to pay to the beneficiary the sum so collected.<sup>4</sup>

The rules of pleading at common law have been modified, and to some extent abrogated, by the statutory provisions in the various States. These need not be discussed in this connection. The general averment that plaintiff has "fulfilled all the conditions" is not a sufficient averment that proofs of loss have been made in the way specifically required in the by-laws or contract.<sup>5</sup>

Where plaintiff claims under the by-laws of a benefit society, it is not sufficient to allege generally that there was a rule or by-law under which he was or became entitled, etc.<sup>6</sup> The rule or its

ant is its legal successor. *Stanley v. Northwestern L. Assoc.*, 36 Fed. Rep. 75.

**When Assignment Must be Alleged.**—Under act Pa., April 15, 1868, § 1 (P. L. 103), providing that all policies of life insurance taken out for the benefit of the insured's wife shall be vested in such wife clear from the claims of the insured's creditors, a declaration in an action on a benefit certificate by an administrator, which shows that the certificate was taken out in the name of plaintiff's decedent, and was made payable to his wife, and shows no transfer of title from the wife to decedent, is demurrable, though it also avers that the certificate is part of decedent's estate, and that such estate is insolvent. *McNeil v. Supreme Commandery*, 131 Pa. St. 339.

1. *Fitzgerald v. Equitable Reserve Fund L. Assoc.*, 5 N. Y. Supp. 837; *Taylor v. National Temperance Relief Union*, 94 Mo. 35.

2. *Taylor v. National Temperance Relief Union*, 94 Mo. 35.

3. *Supreme Lodge Knights of Pythias v. Knight*, 117 Ind. 489.

4. *Smith v. Covenant Mut. Ben. Assoc.*, 24 Fed. Rep. 685.

Where the declaration alleged in two of the special counts that the membership was sufficient to make the amount named in the certificate by the payment of two dollars each, it was held on demurrer, that these allegations reduced to certainty that which would without them have been uncertain. *Gossett v. Union Mut. Acc. Assoc.*, 27 Ill. App. 266.

5. *Dolbier v. Agricultural Ins. Co.*, 67 Me. 180; *Crescent Ins. Co. v. Camp*, 64 Tex. 521; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507; *Royal Ins. Co. v. Smith*, 8 Ky. Law R. 521; *Fayerweather v. Phoenix Ins. Co.*, 7 N. Y. St. Rep. 25; *Edgerly v. Farmers' Ins. Co.*, 43 Iowa 587. But see *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13; *Sun Mut. Ins. Co. v. Holland*, 2 Wills. (Tex.) 391; *Schobacker v. Germantown Farmers' Mut. Ins. Co.*, 59 Wis. 86.

6. *Irish Catholic Ben. Assoc. v. O'Shaughnessy*, 76 Ind. 191.

So in an action for sick benefits to recover a balance alleged to be due at the rate of \$3 per week, the mere state-

substance, as well as compliance with its provisions, must be stated.<sup>1</sup>

Where the original beneficiary brings an action upon a changed certificate, and any proper regulation of the society has been violated by such change, he must aver and prove the same.<sup>2</sup>

In *California* it has been held that plaintiff must set out in his complaint and prove performance of conditions contained in the application for membership, and the truth of statements and declarations therein contained.<sup>3</sup> But the weight of authority is opposed to this view.<sup>4</sup>

With regard to answers in actions upon certificates of membership, it need only be said that they must conform to the general rules of good pleading as in other actions.<sup>5</sup>

ment that such an amount is "the sum paid to the sick of said society," is not sufficiently specific, and states no cause of action. *Beneficial Society v. White*, 30 N. J. L. 313.

1. *Taylor v. National Temperance Relief Union*, 94 Mo. 35.

This rule is changed by statute in *Indiana* where, in pleading the performance of condition precedent in a contract, it is sufficient to allege generally that the party performed the condition on his part. *National Ben. Assoc. v. Bowman*, 110 Ind. 355.

2. *Masonic Mut. Ben. Soc. v. Burkhardt*, 110 Ind. 189.

3. *Bidwell v. Connecticut L. Ins. Co.*, 3 Sawyer (U. S.) 261; *Gilmore v. Lycoming F. Ins. Co.*, 55 Cal. 123. See also *Bobbitt v. Liverpool L. & G. Ins. Co.*, 66 N. Car. 70; s. c., 8 Am. Rep. 494.

4. See *Redman v. Aetna Ins. Co.*, 49 Wis. 431; *Continental L. Ins. Co. v. Kessler*, 84 Ind. 310; *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352; *Mutual Ben. L. Ins. Co. v. Cannon*, 48 Ind. 264; *Forbes v. American Mut. L. Ins. Co.*, 15 Gray (Mass.) 249; s. c., 77 Am. Dec. 360; *Herron v. Peoria M. & F. Ins. Co.*, 28 Ill. 235; s. c., 81 Am. Dec. 272; *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459; s. c., 21 Am. Dec. 186; *Union Ins. Co. v. McGookey*, 33 Ohio St. 555; *Penn. Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92; *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35; s. c., 22 Am. Rep. 180.

In *May v. Buckeye Ins. Co.*, 25 Wis. 291; s. c., 3 Am. Rep. 76, after stating what the application must contain, and that any false description by the assured, or omission to make known any fact material to the risk, shall render it void, the policy added, "but the company will be responsible for the accuracy of sur-

veys made by its agents," it was held that the word "survey" must here be construed to include the whole application, when made out by the agent, and the company is thus expressly precluded from taking advantage of his inaccuracy or omission in drawing the same, where the facts have been fully stated to him by the assured. It was said by the court that it would be intolerable in an action on an insurance policy to require the plaintiff to prove affirmatively in the first instance the truth of every statement usually contained in an application for insurance.

5. **Due Performance.**—The charter of a mutual benefit insurance company provides that the board of directors may appoint a committee to make assessments, and that a member in default for 30 days forfeits his membership. It was held that before an assessment is due, or forfeiture can occur, it must affirmatively appear that the assessment was legally made, viz, by the board, or by the committee appointed by the board; and an allegation by the company that the assessment was "duly made," is not sufficient. *American Mut. Aid Soc. v. Helburn*, 84 Ky. 1.

**Waiver—Admission.**—Where the defendant set up that the member insured had failed to pay his assessments during a certain year and plaintiff, by reply, denied such failure, and alleged that defendant had subsequently demanded, received, and retained annual payments, and had thereby waived the alleged prior breaches, it was held that the pleading of a waiver did not admit the failure to pay assessments, and was not inconsistent with the denial of such failure. *Tobin v. Western Mut. Aid Soc.*, 72 Iowa 261. See also *Gray v. National Ben. Assoc.*, 111 Ind. 531.

**3. Evidence.**—The law of evidence as applied to actions on insurance policies, and certificates of benefit societies, presents nothing peculiar. The rules excluding parol evidence to contradict a writing has seemed to receive important modification when applied to this form of contract. But if, under the supposed pressure of the equities of the case, or prevailing prejudice, new exceptions to the general rule have apparently been discovered or invented, "it has been to give effect to great principles of justice without too strict a regard to mere technicalities."<sup>1</sup>

**Suicide of Member.**—Where the plea was that a stipulation in the application excepting death by suicide from the risk was proposed by the member to induce defendant to issue the certificate, well knowing that he would not be received as a member unless he so stipulated; that the certificate would not have been issued if he had no stipulation, and that he committed suicide, it was held not obnoxious to a general demurrer. *Northwestern Ben. & Mut. Aid Assoc. v. Hand*, 29 Ill. App. 73.

**Champtuous Contract.**—The defendant cannot set up as a defence a champtuous contract for the collection of assessments made by the treasurer of the company with a person not a party to the suit. *Connecticut River Mut. F. Ins. Co. v. Way*, 62 N. H. 622.

**Conclusion as to Effect of By-law.**—Where the defence is that the certificate was issued in violation of the rules and by-laws of the association, a copy of such rules and by-laws should be set out in the answer. It is not sufficient for the pleader to give his own conclusions as to their effect. *Gray v. National Ben. Assoc.*, 118 Ind. 293.

**Want of "Legal Notice."**—An answer is not sufficient which sets out that deceased failed to pay his dues after "legal notice." The giving of notice being a condition precedent to a member's liability, the facts showing that the notice provided by the charter had been given should have been set out. *Coyle v. Kentucky Grangers' Mut. Ben. Soc. (Ky.)*, 2 S. W. Rep. 676.

**Nonpayment of Assessments.**—An answer stating that decedent failed to pay assessments within the time limited, after being duly notified, is not demurrable on the ground that it does not allege that the assessments were not in fact paid, as no person other than decedent was liable to pay the assessments. *Gray v. Supreme Lodge Knights of Honor*, 111 Ind. 531.

1. *Bacon Ben. Soc. & Life Ins.*, § 456.

**Admissible evidence of defendant's medical examiner** that plaintiff had never been examined as required by the rules. *Baltimore etc. Employees' Relief Assoc. v. Post*, 122 Pa. St. 428.

Of decedent's withdrawal, though not pleaded. *Cramer v. Masonic L. Assoc.*, 9 N. Y. S. 356.

Under a notice by defendant, under the plea of the general issue, that it will insist on its defence that the certificate was procured by false statements to the medical examiner, and the concealment of material facts concerning the health of the insured, is sufficient to let in evidence of a particular disease with which the insured was suffering. *Breissenmeister v. Supreme Lodge Knights of Pythias (Mich.)*, 45 N. W. Rep. 977.

**Inadmissible evidence of the number of policy holders in the State who paid the mortality assessment in question, and to whom notices and extra assessments had been sent, the evidence not bearing upon the question whether the policies sued on were forfeited.** *Dial v. Valley Mut. L. Assoc.*, 29 S. Car. 560.

In an action against a mutual insurance company to recover benefits accruing from plaintiff's inability to work, receipts of plaintiff for the benefits as a former member of the association. *Baltimore etc. Employees' Relief Assoc. v. Post (Pa.)*, 5 Atl. Rep. 885.

Holding also that the statements of an agent of a railroad company who has nothing to do with making out the pay-rolls, having no authority to deduct dues owed by an employee to the Employees' Relief Assoc., and his declarations that a deduction had been made without a previous showing that it had been officially notified that the employee was a member of the association were not admissible, plaintiff's inability to labor being the cause of action.

A statement made by the member

If the failure to pay assessments is relied upon, the burden of proving such failure is upon the defendant.<sup>1</sup> but where the allegation that the member was in good standing at the time of his death is denied by the answer, the burden of proving such good standing is on the plaintiff.<sup>2</sup>

Where the action is by the assignee of a member, the burden of proving that the assignment was made in accordance with the by-laws of the society is on the plaintiff.<sup>3</sup>

Where the policy is payable to a number of individuals, between whom the right of survivorship with relation to the contract exists, the burden of proving that any one of them survived the others, is upon the party asserting it.<sup>4</sup>

If the by-laws of the society require proofs of death to be furnished, and a presentation of such proofs is alleged, of course no further proof of that fact can be required; but, in the absence of any such provision, the fact of the death of the insured may be established as in other cases, and according to the general rules of evidence on the subject—such as the issuance of letters of administration, etc.,<sup>5</sup> or by circumstantial evidence, when direct evidence is not attainable, to the extent at least of raising a presumption of the party's death.<sup>6</sup>

The insured in a mutual insurance company, being a member,

that he was suspended for the nonpayment of an assessment is not competent evidence to prove that fact. *Lazensky v. Supreme Lodge Knights of Honor*, 31 Fed. Rep. 592.

In an action against a mutual benefit association letters written by officers of the association commenting on the merits of plaintiff's claim and discussing its validity. *Bagley v. Grand Lodge Ancient Order United Workmen*, 131 Ind. 498.

Where the issue was whether or not a forfeiture had occurred, evidence that the general manager of the association had told the assured that some of his assessments were overdue; that he had thereby lost his right to the certificate, and that he was delaying payment at his own risk and peril. *Odd Fellows' Mut. Aid Assoc. v. Sweetser (Ind.)*, 19 N. E. Rep. 722.

1. *Tobin v. Western Mut. Aid Soc.*, 72 Iowa 261.

2. *Siebert v. Chosen Friends*, 23 Mo. App. 268. Compare *Tobin v. Western Mut. Aid Soc.*, 72 Iowa 261.

3. *Henry v. Trustees of Grand Lodge I. O. M. A.*, 15 Bradw. (Ill.) 151.

4. *Fuller v. Linzee*, 135 Mass. 468.

5. *Millard v. Supreme Council American Legion of Honor*, 81 Cal.

340; *Lancaster v. Washington L. Ins. Co.*, 62 Mo. 121; *Tisdale v. Connecticut Mut. L. Ins. Co.*, 26 Iowa 170; s. c., 96 Am. Dec. 136; *Newman v. Jenkins*, 10 Pick. (Mass.) 515; *Cunningham v. Smith*, 70 Pa. St. 450; *Jeffers v. Radcliff*, 10 N. H. 242; *Munro v. Merchant*, 26 Barb. (N. Y.) 333; *McKimm v. Riddle*, 2 Dall. 100.

In an action for a benefit claimed on the death of a member, evidence that defendant's officers declined to receive proofs of death on the ground that the deceased member had been suspended, is not proof of actual suspension such as to require a nonsuit. *Stewart v. Supreme Council American Legion of Honor*, 36 Mo. App. 319.

6. *Travellers' Ins. Co. v. Sheppard (Ga.)*, 12 S. E. Rep. 18; *Boyd v. New England Mut. L. Ins. Co.*, 34 La. An. 848.

As to absence of party raising presumption of death, see *Lancaster v. Washington L. Ins. Co.*, 62 Mo. 121; *John Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich. 41; *Sensenderfer v. Pacific Mut. L. Ins. Co.*, 19 Fed. Rep. 68; *Whiteley v. Equitable L. Assurance Soc.*, 72 Wis. 170; *Hancock v. American L. Ins. Co.*, 62 Mo. 26; *Prudential Assurance Co. v. Edmonds*, L. R., 2 App. Cas. 487.

the books of the company are as much his as other members, and are evidence against him.<sup>1</sup>

Where a policy provides that the company will pay the beneficiary a percentage of the assessments collected, the beneficiary can recover without proving demand on the company to make assessments, or that assessments have been made, or the amount collected thereon.<sup>2</sup>

In an action by a receiver upon a premium note given to an insurance company, such evidence of general losses and of settlement and allowance of the same as would have concluded the company in its proper business, will suffice.<sup>3</sup>

1. Diehl v. Adams Co. Mut. Ins. Co., 58 Pa. St. 443; s. c., 98 Am. Dec. 302.

The question whether the books of a mutual fire insurance company furnish sufficient data for a correct assessment is a question for the jury. Marblehead Mut. F. Ins. Co. v. Underwood, 3 Gray (Mass.) 210.

**When Only Prima Facie Evidence.**—The entry of an order upon the minutes of a mutual association, suspending a member for nonpayment of an assessment, being only *prima facie* evidence of its legality, parol evidence is admissible to show that it was by order of an officer alone. Knights of Honor v. Wickser (Tex.), 12 S. W. Rep. 75; Lazensky v. Supreme Lodge Knights of Honor, 31 Fed. Rep. 592. Holding also that an application for reinstatement, made by the member, is not competent evidence to prove the fact of his suspension.

The record of a director's vote authorizing assessment is *prima facie* evidence of losses and assessments. Connecticut Mut. F. Ins. Co. v. Way, 62 N. H. 622.

**Mailing Notice.**—A finding that notice was not mailed to the insured will not be disturbed, such mailing being proved only by the general course of business of defendant. Garretson v. Equitable Mut. L. Endowment Assoc., 74 Iowa 419. As to proof of long continued usage of society to waive personal notice, and the admissibility of evidence on that point, see Stewart v. Supreme Council American Legion of Honor, 36 Mo. App. 319.

**Presumption of Proofs Furnished.**—Where it is the duty of the subordinate lodge to report the death of the member to the supreme lodge, it will be presumed that the requisite proofs of the death were furnished; especially where

defendant refuses to pay on the ground of the fraud in the application. Lorcher v. Supreme Lodge Knights of Honor, 72 Mich. 366.

**Of Good Standing.**—Where it was a condition of the certificate that the member should be in good standing at the time of his death, it was held that proof of a recognition of such membership by the defendant up to within a short time of the death of the member, in connection with the presumption that all persons follow such laws, rules and regulations as they are under, was sufficient evidence of the good standing of the member to maintain the action. Lazensky v. Supreme Lodge Knights of Honor, 31 Fed. Rep. 592.

**Of Extent of Liability.**—In an action on a certificate, in which plaintiff is entitled to the amount of one death assessment, not exceeding a given sum, he can recover nominal damages only, in the absence of the evidence of the amount realized by one assessment. Ball v. Granite State Mut. Aid Assoc., 64 N. H. 291; Newman v. Covenant Mut. Ben. Assoc., 72 Iowa 242.

**Priest as Witness—Neglect of Easter Duties.**—Where the constitution of the society provided that if the insured neglected his Easter duties he forfeited at once all his rights and interests in the society, testimony of the priest of the defendant's parish of a negative character to establish defendant's neglect of such duties is not sufficient. Matt v. Roman Catholic Mut. Protective Soc., 70 Iowa 455.

2. Kansas Protective Union v. Gardner, 41 Kan. 397.

3. Jackson v. Roberts, 31 N. Y. 304; Pacific Mut. Ins. Co. v. Guse, 49 Mo. 329; s. c., 8 Am. Rep. 132; Mutual Ben. L. Ins. Co. v. Jarvis, 22 Conn. 133; Long Pond Mut. F. Ins. Co. v. Houghton, 6 Gray (Mass.) 77; Com. v. Dor-

**XI. CONTRIBUTION AND DISTRIBUTION UPON WINDING UP—1. By Insolvency Proceedings.**—The peculiarity distinguishing the insolvency of a benefit society from that of ordinary corporations and copartnerships, consists in the fact that usually the only creditors, as well as the only distributees, are the members of which it is composed. A receiver appointed by the court to wind up its affairs should proceed in other respects to collect the assets and make distribution as in receiverships of other insurance companies.<sup>1</sup>

Upon winding up an insolvent mutual insurance company, claims founded upon policies which matured before the appointment of the receiver, are to be preferred to claims which were at that time unmatured. The status of the policy holder or his representative toward the company is changed by the maturity of the policy, and he then stands to the company in the same relation that a creditor holds to a firm—he is to be preferred to its members.<sup>2</sup> But a policy holder, whose loss occurred after an appointment of a receiver for the insolvent company, is not entitled to a share in the distribution of the assets.<sup>3</sup>

Death losses should be allowed in full, with a credit to the amount of any premium notes in the hands of the company.<sup>4</sup>

chester Mut. F. Ins. Co., 112 Mass. 142; Atlantic Mut. F. Ins. Co. v. Fitzpatrick, 2 Gray (Mass.) 279; Appleton Mut. F. Ins. Co. v. Jesser, 5 Allen (Mass.) 446; Nashua F. Ins. Co. v. Moore, 55 N. H. 48; Atlantic Mut. F. Ins. Co. v. Young, 38 N. H. 451; s. c., 75 Am. Dec. 200; Thomas v. Whallen, 31 Barb. (N. Y.) 172; Matter of Bangs, 15 Barb. (N. Y.) 264; Savage v. Medbury, 19 N. Y. 32; Bangs v. Duckinfield, 18 N. Y. 592; Herkimer Co. Mut. Ins. Co. v. Fuller, 14 Barb. (N. Y.) 373; Devendorf v. Beardsley, 23 Barb. (N. Y.) 656; American Ins. Co. v. Schmidt, 19 Iowa 502; Ohio Mut. Ins. Co. v. Marietta Woolen Factory, 3 Ohio St. 348.

1. Attorney General v. Guardian Mut. L. Ins. Co., 77 N. Y. 272.

Where the assessment made by a receiver was greatly in excess of the amount required to pay losses, it was held that in an action on a premium note by the assignee to recover the assessment due thereon, the burden is on him to show that such assessment was reasonably proper in view of all the circumstances. Lehigh Valley F. Ins. Co. v. Dryfoos (Pa.), 9 Atl. Rep. 262.

**Notice.**—If publication be required to be for a certain number of weeks, and the effects of the company go into the hands of a receiver after an assessment

is levied and before the notice by publication is completed, it is held that actual notice by the receiver is sufficient. Cooper v. Shaver, 41 Barb. (N. Y.) 151.

2. Vanatta v. New Jersey Mut. L. Ins. Co., 31 N. J. Eq. 15.

3. Doane v. Milville Mut. M. & F. Ins. Co., 43 N. J. Eq. 522, holding also that where the officers of a mutual company, with knowledge of its insolvency, but before it had been so declared, voluntarily cancelled the policy of one of its members, and executed a release from all liability thereunder, the policy holder was, nevertheless, still liable for all losses and expenses incurred during the life of the policy, and which actually existed at the time of cancellation.

4. People v. Security L. Ins. etc. Co., 78 N. Y. 114; s. c., 34 Am. Rep. 522.

Where no holders of death claims had applied to have an assessment ordered by the court, and as it was found expressly that an attempt to raise the money to pay them by an assessment would be futile, it was held that no assessment should be ordered. Burdon v. Massachusetts Safety Fund Assoc., 147 Mass. 368.

As such societies are either prohibited from accumulating funds or prop-

When such an institution becomes insolvent, the collapse is generally complete, as the obligation to pay assessments generally rests upon the will of the members without any personal promise to pay.<sup>1</sup>

The liability assumed in the contract of membership is not optional, but absolute and fixed; it is not released either by dissolution or insolvency.<sup>2</sup>

When a mutual fire insurance company has become insolvent, the previously accrued profits which have been credited to the policies do not belong to the policy holders, but are funds for the payment of losses.<sup>3</sup>

**2. By Dissolution or Abandonment.**—As regards the duties, rights, and liabilities of members, the effect of dissolution or abandonment differs but little from insolvency. In either case no further business can be transacted by the company as such, nor any additional risks taken. When a corporation, in the nature of a benefit society, ceases to do business because of some impediment—as, for example, being refused a licence by the State in which it was incorporated—it cannot organize a new company against the will of the old members, but, on application of such old members or parties insured, a court of equity will wind up the affairs of the old company and compel the distribution of such fund among those for whose benefit it was created.<sup>4</sup>

erty, and have no occasion to do so, it is rarely the case that any distribution is to be made to the members, except to those holding matured claims for benefits, who, as has been stated, are with respect to these not to be treated as members but as creditors. For liability of members to assessment to pay accrued losses upon insolvency, see **EXTENT AND NATURE OF LIABILITY**, III, 5, herein; **ASSESSMENTS**, VII, 1 and 2 herein.

1. *Bacon Ben. Soc. & Life Ins.*, § 479.

2. *North Carolina etc. Ins. Co. v. Powell*, 71 N. Car. 389. Or expiration of charter. *Huntley v. Beecher*, 30 Barb. (N. Y.) 580; *Huntley v. Merrill*, 32 Barb. (N. Y.) 626.

Where a portion of the business of an insurance company is transacted upon the stock plan, and a portion upon the mutual system, and the premiums received from persons obtaining insurance upon the former plan, by paying the whole premium in cash, have been expended in the payment of losses and expenses, and thus relieving former members from assessments upon their notes, and leaving others to be assessed for the payment of subsequent losses, there is no remedy for any injustice which may result from this mode of transacting the

business of the company; although the effect is to cast the greater burden upon those whose notes happen to be in force at the time the insolvency of the company occurs. *Shaughnessy v. The Rensselaer Ins. Co.*, 21 Barb. (N. Y.) 605.

Neither the insolvency of a mutual fire insurance company nor the cancellation of a policy, deprives the company of the right to assess upon the policy holder losses that accrued while he was a member of the company. *Commonwealth v. Massachusetts Mut. F. Ins. Co.*, 112 Mass. 116. It was also held in this case that when the losses by fire suffered by a mutual fire insurance company render it insolvent, and require an assessment to the full amount authorized by law, the holder of an unexpired policy, the cancellation of which has been rendered necessary by such insolvency, has no right of set-off or of recoupment, or claim for return of premium, or for damages on account of the unexpired term of his policy; but that the holder of such policy has a right, in case of the subsequent insolvency of the company and the distribution of its assets by receivers, to share in the assets.

3. *Com. v. Massachusetts Mut. F. Ins. Co.*, 112 Mass. 116.

4. *Bacon Ben. Soc. & Life Ins.*, § 479.

A voluntary association may be dissolved similarly, and with like effect as a copartnership, either by direct consent of the members, or such intent may be presumed from abandonment, as from a neglect to hold meetings for a protracted period.<sup>1</sup>

Where the objects of the organization are impracticable, illegal, or fraudulent,<sup>2</sup> or in case of violent dissensions and irreconcilable differences between the members, it will be dissolved by a court of equity and its funds distributed as on the winding up of a copartnership,<sup>3</sup> and under the general rules of equity jurisprudence applicable to copartnerships.<sup>4</sup>

When the society is incorporated its dissolution and the proceedings in the disposition of its property are governed by the rules applicable in the case of corporations generally.<sup>5</sup>

Where, upon dissolution, a *pro rata* distribution is proper in payment of losses, no notice should be taken of priority in their occurrence.<sup>6</sup> The ordinary rules governing the distribution of

In *Stamm v. Northwestern Mut. Ben. Assoc.*, 63 Mich. 317, the court said: "My opinion is that no assessments could legally be made by the board of trustees for the purpose of paying losses which occurred after licence to do business was refused. The inhibition of the statute extended to the exercise of corporate functions in Michigan. Its proceedings as a corporation were arrested, and, as no steps were taken by it to obtain the right to do business any longer, but, on the contrary, it abandoned the field, the proceedings to close up its affairs should date from that time." Such revocation of licence has the effect of a dissolution except for the purpose of administering the assets either through the directors under statutory authority or by a waiver. The members are entitled to their distributive share of any money on hand at the time, and if losses occurred prior to that time, the beneficiaries are entitled to precedence and payment of their policies in full from the fund. If members have died since, their representatives are entitled to the distributive shares of such members. See *Cramer v. Bird*, L. R., 6 Eq. 143; *Slee v. Bloom*, 19 Johns. (N. Y.) 456; s. c., 10 Am. Dec. 273; *Bradt v. Benedict*, 17 N. Y. 93; *Marr v. Bank of West Tennessee*, 4 Coldw. (Tenn.) 471; *In re Suburban Hotel Co.*, L. R., 2 Ch. App. 737.

1. *Strickland v. Prichard*, 37 Vt. 324; *Penfield v. Skinner*, 11 Vt. 296.

2. *Peltz v. Supreme Chamber of the Order of Financial Union* (N. J.), 19 Atl. Rep. 668; *Pearce v. Piper*, 17 Ves. 1; *Ellison v. Bignold*, 2 Jac. & Walk. 511;

*Reeve v. Parkins*, 2 Jac. & Walk. 390. *Beaumont v. Meredith*, 3 Ves. & Bea. 181; *Lowry v. Stotzer*, 7 Phila. (Pa.) 397; *Toram v. Howard Ben. Asso.*, 4 Pa. St. 519.

3. *Lafond v. Deems*, 52 How. Pr. (N. Y.) 41; 81 N. Y. 507. See *Fischer v. Raah*, 57 How. Pr. (N. Y.) 94; *Wells v. Gates*, 18 Barb. (N. Y.) 557; *Wait Insolvent Corp.* 391.

4. *Gorman v. Russell*, 14 Cal. 531.

5. See *Morawetz on Priv. Corp.*, §§ 1002, 1004.

At common law the funds of a corporation remaining after payment of its liabilities vested upon dissolution in the State. *Titcomb v. Kennebunk Mut. F. Ins. Co.*, 79 Me. 315.

The rule applies to incorporated mutual insurance companies in the absence of statutory provisions, preserving the rights of members and incorporators. *Titcomb v. Kennebunk Mut. F. Ins. Co.*, 79 Me. 315.

However, there is a strong inclination on the part of courts to look beyond the entity and preserve the rights of those composing the corporation, and it is probable that such a result would be prevented by a court of equity in most of the States even without a statutory provision on the subject. See *Carlton v. Southern Mut. Ins. Co.*, 72 Ga. 371; *Mor. Priv. Corp.*, § 1032; *CORPORATIONS*, 4 Am. & Eng. Encyc. of Law 306.

6. *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263.

The winding up and distribution of the assets of a mutual insurance company by mutual agreement of all the members, does not relieve them from



assets upon dissolution may be altered by contract or provisions previously made in the constitution and by-laws.<sup>1</sup>

**MUTUALITY OF CONTRACT**—(See also **CONTRACTS**).—Mutuality of contract means an obligation on each to do, or permit to be done, something in consideration of the act or promise of the other. It does not imply that every stipulation is absolute and unqualified.<sup>2</sup>

**MUTUAL MISTAKE**—(See also **MISTAKE**).—According to the real signification of the word "mutual" in such connection, and the ordinary acceptation and understanding of the term, "mutual mistake" would mean a mistake reciprocal and common to both parties, where each alike labored under the same misconception in respect to the terms of the written instrument.<sup>3</sup>

**MUTUANT—MUTUARY**.—These terms denote the lender and borrower respectively in a "Mutuum."<sup>4</sup>

**MUTUUM**—(See also **BAILMENTS**, 2 Am. & Eng. Encyc. of Law 40).—Mutuum is a loan of an article for consumption which is to be returned in kind, such as corn, oil, wine or money.<sup>5</sup>

**MY**.—If a testator refers to his possessing any particular and definite thing such as, "my estate," "my ring," or "my horse," it seems that the contrary intention referred to by the Wills act<sup>6</sup> is manifested, and the will as to such bequests speaks from its date and the gift is specific, but when the bequest is generic of

paying the premium notes in an action brought by the receiver. *Lawrence v. Nelson*, 4 Bosw. (N. Y.) 240.

The legal representatives of certificate holders who died without having incurred any forfeiture, and who had not had any benefit from an assessment, are to share equally with other holders of certificates in force.

But certificates which, at the time the bill for dissolution was filed, had not been in force for a year, within which time they were to make their first payment to the fund, are not to share in the fund unless it should appear that the payment had been made since that date within the year. *Burdon v. Massachusetts Safety Fund Assoc.*, 147 Mass. 360.

1. It may be provided that certificate holders who have suffered losses shall not be preferred, but share equally with other members. *Burdon v. Massachusetts Safety-Fund Assoc.*, 147 Mass. 360.

Rev. St. Mo. 1879, § 6046 provides that, in proceedings to dissolve insolvent fire insurance companies, the commissioner "shall ascertain the amount of premium unearned on each policy outstanding and in force at the time of the

decree dissolving the company, and the amount of losses outstanding at that time" to which are to be applied the assets of the company. It was held that the holder of a policy issued after the enactment of the statute was only entitled, where the loss occurred after the decree of dissolution, to the amount of the unearned premium, though he had no notice of the dissolution proceedings. *Relfe v. Commercial Ins. Co.*, 10 Mo. App. 393; *Carr v. Union Mut. F. Ins. Co.*, 28 Mo. App. 215.

**Cross-Bill by Holder of Death Claim**.—Upon the filing of a bill in equity to wind up a mutual benefit association and distribute its assets, the holder of a death claim against the association has an interest in the subject matter of the proceeding and may properly file a cross-bill to prevent the misappropriation of a trust fund. *Wilber v. Torgerson*, 24 Ill. App. 119.

2. *Spear v. Orendorf*, 26 Md. 37, 43.
3. *Botsford v. McLean*, 45 Barb. (N. Y.) 478. See **MISTAKE**.
4. *And. L. Dict.* 694.
5. *Story on Bailm.*, § 228.
6. 1 Vict. 26.

that which may be increased or diminished such as "consuls," the act requires something more to indicate such contrary intention than that the subject matter should be preceded by "my," and accordingly as to such a bequest the will would speak from the death of the testator.<sup>1</sup> But it has been stated that the use of the pronoun "my" in the description of the thing given is not sufficient evidence of an intention that the will shall not speak from the date of the death.<sup>2</sup>

1. *Goodlad v. Burnett*, 1 K. & J. 341; *Re Gibson*, L. R., 2 Eq. 669; s. c., 35 L. J. Ch. 596. See also *Jarm.* on Wills 329-332. And as to the old rule, see *Jarm.* on Wills 320-329.

2. *Dart*, 309. This statement is made on the authority of *Miles v. Miles*, L. R., 1 Eq. 462.

**My Arrival.**—In an instrument of bottomry the term "my arrival" was used in the following connection: "I bind myself, my ship and tackle, etc., to pay the sum borrowed with twelve per cent. bottomry premium in eight days after my arrival at the port of London. *Held*, that the words "my arrival" must be understood to mean *my arrival with the ship, or my ship's arrival*. The court, in discussing the question whether or not the borrower was personally bound by this clause or whether the lender took upon himself the peril of the voyage, says: "Now, if the words instead of *eight days after my arrival* had been *eight days after my ship's arrival*, there could have been no doubt that the lender took upon himself the perils of the voyage, if there be not, in some part of the instrument, some matter denoting a contrary intention. Now, the personal arrival of the master unconnected with the ship is a matter which it cannot be supposed either party contemplated; it cannot be supposed that the lenders looked to him personally or to his personal means, nor that he intended to pledge himself personally and absolutely for the payment without regard to the means he might be furnished by the ship and her freight. *Simonds v. Hodgson*, 3 B. & Ad. 50.

**My Books.**—A testator directed in his will "that any advancements made by me to or for the account of my said children or either of them, and evidenced either by entries in *my books* of account or by any written memorandum of acknowledgment signed by such child or children, shall be deducted from the amount or charged

upon the share," etc. The testator was the leading member of a firm and kept no private book account of his own, and there appeared from these books that the firm had advanced money to some of his children, and that these accounts were balanced and carried into the testator's private account. *Held*, that the term *my books* was to be regarded as meaning the books of the firm, as used in this clause of the will. *Lawrence v. Lindsay*, 68 N. Y. 108.

**My Brother's Son.**—A testator used the following expressions in his will: "I give, devise and bequeath unto Mathew Westlake, my brother, and to Simon Westlake, *my brother's son*, all that my fee simple," etc., in certain premises. It appeared in evidence that the testator had three brothers, Thomas, Richard and Mathew, and each of whom had a son of the name of "Simon." The defendant's counsel contended that these facts established a latent ambiguity in the will, and they tendered evidence of declarations of the testator to show that he had intended to bequeath his property to the defendant, Simon Westlake, who was the son of Richard Westlake. *Held*, that the fact of the three brothers of the testator having each a son of the name of "Simon" did not raise any ambiguity upon this will, and that in point of legal construction, where the testator is speaking of *his brother's son*, he must be taken to speak of the son of his brother who was then particularly in his mind. Mathew Westlake was then in the testator's mind, and consequently Simon Westlake, *his son*, must be the person intended. *Westlake v. Westlake*, 4 Barn. & Ald. 57.

**My Chambers for Which I Paid Six Hundred Guineas.**—A testator, in a codicil to his will, after making a special bequest in money to Hon. Thomas Stapleton, used the following expression: "And also bequeath to him my chambers in Albany, for which I paid six hundred guineas, with all my furniture,"

etc. The testator died seized in fee of the chambers in Albany, and of no other. Stapleton, under whom the defendant claimed, and who was a stranger in blood to the testator, entered into the possession of the chambers, and died about eleven years afterwards. The lessor of the plaintiff was the only surviving trustee under the will. *Held*, that the words which the testator used in this codicil are not sufficient to take the fee simple from the heirs at law. *Sewell v. Parrett*, 3 B. & Adol. 469.

**My Desire.**—A testatrix, in her will, gave all of her property to her daughter. It also contained the following clause: "My desire is that she allows to A G an annuity of £25 during her life." *Held*, that no trust or obligation to pay an annuity was imposed upon the daughter, but that there was only a request to the daughter, not binding her in law, to make that provision for A G. *In re Digges*; *Gregory v. Edmonds*, 39 Ch. D. 253.

**My Estate.**—The words "my estate," as used in the Cal. Civ. Code, § 1402, have been held to relate to what the testator owned and could dispose of. *Momford's Estate*, *Myrick's Probate*, p. 133.

**My House.**—In an application for insurance upon a house, it was described as "my house in which I reside," and in the policy as, "his two story frame dwelling house." The assured was in possession under a contract, and had partly paid for it, but had not received his deed. *Held*, that there was no misdescription in this case of the subject of insurance in the policy. Neither was there any misrepresentation or concealment of any fact on the part of the assured which was at all material to the risk, in the application for the insurance; and that it is a fact of public notoriety that, in common parlance, the person who is in possession of real property as owner, under a valid and subsisting contract for the purchase thereof, whether he has paid the whole of the purchase-money and gotten the legal title or not, is called the owner thereof, and the property is usually called his by others; and in equity it is in fact his, and the vendor has only a lien thereon for the security of his unpaid purchase money. *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385; s. c., 30 Am. Dec. 90.

**My Land.**—The words "my land" were used in a will, with an additional

description erroneously naming it as the south half of the north-east (instead of north-west) quarter of the section. The testator never owned the northeast quarter, but did own the northwest quarter. *Held*, that it was the intention of the testator to devise the southwest quarter of the section. *Cleveland v. Spilman*, 25 Ind. 94.

**My Plantation.**—A testator's will contained, among other things, the following devise: "My plantation on Stann's Island I devise to my cousin, William Smith." *Held*, that this passed the fee. *Peyton v. Smyth*, 4 McCord (S. Car.) 476; s. c., 17 Am. Dec. 758.

**My Property.**—A testator's will contained the following devise: "My property, after my debts are paid, I leave and bequeath to my beloved wife," etc. *Held*, that this passed the whole of the testator's property, both real and personal, in fee to his wife. In deciding this case, *SPENCER, CH. J.*, says: "The question turns upon the term 'my property,' whatever that was he devised to his wife. The deviser gave her all his property. There is nothing to limit the devise to any species of property or to any portion of it; all the testator's property must pass or none." *Jackson v. Housel*, 17 Johns. (N. Y.) 281.

A bequest of "all my property" will pass property subject to a general power of appointment. *Chandler v. Pocock*, 16 Ch. D. 648.

"My house," where there are two answering the description given. See *Gardiner v. Jewers*, W. N. (72) 35.

A devise of "my Bland Air estate, with all the slaves and their increase, which I derived from my uncle, T F, and all the personal property thereon, not slaves, and used with the same at the time of my death, unto my daughter," is a specific devise; and so is a devise of "all my books, historical and geographical, of Greece, of Rome, etc., to my son in law," etc. *Mayo v. Bland*, 4 Md. Ch. 484.

A will contained a bequest of "half my property at Rothschilds Bank." At the time of the making of the will, and at the time of his death the testator had at R.'s bank in Paris a cash balance and certificates of French shares, some inscribed and some of them transferable by delivery, which were deposited with the bankers, who received the dividends and carried them to the testator's credit. *Held*, by *CHITTY, J.*, that half of the property meant

**MY SON.**—When the object of a gift in a will is designated by the term "my son" of a particular name, it means the son of that name at the date of the will and him only.<sup>1</sup> And the same rule seems to apply when the legatee or devisee in a will is described as "my son;" it would relate to the son (if any) living at date of the will, and would exclude any after born son, although such after born son should, by reason of the death of the former son, happen to be the only person answering that description at the death of the testator.<sup>2</sup>

**MY WIFE.**—See note 3.

**MYSTERY.**—In statutes that require the addition to be given to the defendant, who is indicted, of his estate or degree, or "mystery," "mystery" in this connection means the defendant's trade, art or occupation, such as merchant, mercer, tailor, painter, clerk, schoolmaster, laborer, or the like. If a man has two trades, the degree of "mystery" must be stated as that to which the defendant was entitled at the time of the indictment.<sup>4</sup>

**MYSTIC WILL.**—In *Louisiana*, a mystic will is a will under seal.<sup>5</sup>

only half of the cash balance due the testator. But it was held on appeal that it meant half of both the cash balance and the shares. *In re Prater Designe v. Beare*, 37 Ch. D. 481.

**Myself.**—Where a promissory note was made payable "to the order of myself," and there being two names as payors to the note, held that parol evidence was admissible to show who were the parties meant by "myself." *Jenkins v. Bass*, 11 S. W. Rep. 293.

1. 1 Jarm. on Wills 323. Where an estate is given to a person described by relation either to the testator or to other devisees, on a contingency that may or may not happen, and a person is in being at the time of the execution of the will, to whom, on the happening of the contingency, the description would apply, it is a safe general rule to hold such person as intended to be the devisee. *Aushutz v. Miller*, 81 Pa. St. 212.

2. 1 Jarm. on Wills 323. Although this author lays this down to be the rule, yet he admits in a note that it is done with some diffidence because of the strong tendency of the courts to extend as much as possible gifts to children, and calls attention to the case of *Perkins v. Micklithwait*, 1 P. W. 275, where, as he states, "a legacy, originally designed for a son of the

testator who died after the execution of the will, was held to belong by effect of the codicil to a subsequently born son of the same name, but the express terms of the codicil appear to have warranted the construction, since it gave to the latter over and above what the testator had given him by his will." 1 Jarm. on Wills 200.

When a testator, in his will, made three bequests to his three sons, and in each bequest described them as follows: "My beloved son David Stewart," etc., "my beloved son Alexander Stewart," etc., "my beloved son Joseph Stewart," etc., these bequests were held to be good, although two of the sons mentioned were illegitimate. *Stewart v. Stewart*, 31 N. J. Eq. 398.

3. A testator, during his lifetime, separated from his wife, and a marriage ceremony took place between him and another woman, with whom he lived for many years as his wife. In his will he made this second wife his residuary legatee as "my wife." The first wife, being still alive, it was held that the second wife was the person intended in the will, and grant of probate was made to her as residuary legatee. *Howes Goods*, H. Ct. Prob. Div. 48; J. P. 743; s. c., Cent. L. J. 479.

4. *State v. Bishop*, 15 Me. 122.

5. *Hart v. Thompson*, 15 La. 88; *Stafford v. Villian*, 10 La. 319-328.

**NAKED.**—Nude; uncovered.<sup>1</sup>

**NAKED DEPOSIT.**—See also BAILMENT, 2 Am. & Eng. Encyc. of Law 40; DEPOSIT, 5 Am. & Eng. Encyc. of Law 570.

**NAKED POWER.**—(See also POWERS).—A power simply collateral and without interest or naked power is, when, to a mere stranger, authority is given of disposing of an interest in which he had not before, nor hath by the instrument any estate whatsoever.<sup>2</sup> It is a right or authority disconnected from any interest of the donee in the subject matter.<sup>3</sup>

**NAME.**—(See also ABATEMENT; ABBREVIATION; CORPORATIONS; CRIMINAL PROCEDURE; FOREIGN CORPORATIONS; INDICTMENT; JUDICIAL NOTICE; JUDGMENTS; TRADE MARKS; PARTNERSHIP).

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**I. DEFINITION.**—One or more words used to distinguish a particular individual; as, Socrates, Benjamin Franklin.<sup>4</sup>

1. Publishing photographs of girls bare to the waist will not support an indictment for publishing obscene pictures of "naked" girls. Com. v. Dejardin, 126 Mass. 47

**Naked Authority.**—See AUTHORITY; AGENCY

**Naked Confessions.**—A free and voluntary confession. See also CONFES-

SIONS, 3 Am. & Eng. Encyc. of Law 449.

**Naked Contract.**—See CONTRACT, 3 Am. & Eng. Encyc. of Law 825.

2. Bergen v. Bennett, 1 Cal. Cas. (N. Y.) 15.

3. Clark v. Hornthal, 47 Miss. 434-534.

4. Bouvier's Law Dict.. tit. Name.

**II. NAME HAS TWO MEMBERS.**—At common law, the name of an individual consists, presumptively, of one Christian, baptismal, or given name, and also one surname, family name, or patronymic.<sup>1</sup> But it has been held that the legal presumption that every person possesses both a Christian name and a surname, does not prevail in respect to the names of negroes in those States where, as slaves, they very frequently had no surname whatever.<sup>2</sup> It is held also in an early *Kentucky* case that whether a person has both a surname and a Christian name is entirely a question of fact; and that if a plaintiff sues by only one name, the court will not presume that he has any other.<sup>3</sup>

**III. CHRISTIAN NAME.**—The name usually conferred upon a person in infancy by his parents, referred to in the old books as "the name of baptism," and used to distinguish him from others having the same patronymic, which it precedes, is his "Christian name."<sup>4</sup>

There is no presumption of law that any name is used exclusively as a Christian name and not as a surname, or *vice versa*.<sup>5</sup>

Where a person has selected one of his Christian names other than the first, as the one by which he is to be known, he cannot

As applied to persons, it is a "discriminative appellation or designation of an individual." *People v. Ferguson*, 8 Cow. (N. Y.) 102.

For an interesting account of the origin and growth of names as applied to persons and families, see *Encyc. Brit.*, tit. Names.

1. *Vawter v. Gilliland*, 55 Ind. 278; *Frank v. Levie*, 5 Robt. (N. Y.) 509.

**Legal Name.**—"By the common law, since the time of William the Norman, a full name consists of one Christian or given name and one surname or patronymic, the two, using the Christian name first and the surname last, constitute the legal name of the person." *BIDDLE, J.*, in *Schofield v. Jennings*, 68 Ind. 233.

In 4 *Bacon's Abr.* 752, it is declared to be "repugnant to the rules of the Christian religion that there should be a Christian without a name of baptism."

2. In *Boyd v. State*, 7 Coldw. (Tenn.) 69, the court held that it would not take judicial notice that colored persons necessarily have a surname, and that an indictment charging the murder of "one William —, a man of color," was sufficient in the absence of evidence that the deceased had any other name.

3. *Brashears v. Stothard*, Lit. Sel. Cas. (Ky.) 209.

4. See also tit. **CHRISTIAN NAMES**, 3 *Am. & Eng. Encyc. of Law* 239.

16 C. of L.—8

**LORD COKE** is authority for the statement that "a man may have divers names at divers times, but not divers Christian names." Also that "regularly it is requisite that the person be named by the name of baptism, for that a man cannot have two names of baptism as he may have divers surnames." *Coke Lit.* 3a.

"If a man be baptized by one name and confirmed by another name, as if he be baptized by the name of Thomas and confirmed by the name of Francis, he shall be named in actions Francis, according to the confirmation, and not according to the Christian name." 15 *Viner's Abr.*, tit. Names, p. 595.

The name which a man "always went by," which he declared to be his name in a dying declaration, and by which his mother knew him, may be deemed his right name, notwithstanding he may have had a different name of baptism. *Binfield v. State*, 15 Neb. 484.

5. *State v. Bayonne*, 23 La. An. 78, in which case the court refused to hold that the name Ambrosio, as given in an indictment ("one Ambrosio") to designate the person alleged to have been murdered, referred to his Christian name.

The court cannot determine, without proof, whether the name Santa Anna is a Christian name, a surname, or both. *Gabe v. State*, 6 Ark. 519.

Defendant was sued by the name of

object to being sued or indicted by such name instead of by his first name.<sup>1</sup>

When a certificate of stock was filled out with the wrong Christian name of stockholder, parol evidence was admitted to show the mistake.<sup>2</sup>

**IV. MIDDLE NAME UNIMPORTANT.**—The common law recognizes but one Christian name; hence the middle name or names, or the middle initial letter or letters, of a person's name are not material, either in civil or criminal proceedings, and a variance between the pleading and proof in respect to such names or initials is, according to nearly all the authorities, harmless.<sup>3</sup>

Such names or initials may properly be omitted altogether.<sup>4</sup>

The middle name not being recognized in law, it is error to sue or indict a person by such name alone, unless it be made to appear that he commonly uses and is known by that name.<sup>5</sup>

"Jonathan, otherwise John Soans." It was held no ground of demurrer, for *non constat* that it was not all one Christian name. *Scott v. Evans*, 3 East 3.

1. *United States v. Winter*, 13 Blatchf. (U. S.) 276.

2. *Cleveland v. Burnham*, 64 Wis. 347; 10 Am. & Eng. Corp. Cas. 221. See also PAROL EVIDENCE.

3. *Bratton v. Seymour*, 4 Watts (Pa.) 329; *Paul v. Johnson*, 9 Phila. (Pa.) 32; *Dilts v. Kinney*, 15 N. J. L. 130; *Stewart v. Colter*, 31 Minn. 385; *Tucker v. People*, 122 Ill. 583; *Miller v. People*, 39 Ill. 457; *Langdon v. People* (Ill. 1890), 24 N. E. Rep. 874; *State v. Bowman*, 78 Iowa 519; *State v. Smith*, 12 Ark. 622; s. c., 56 Am. Dec. 287; *Rooks v. State*, 83 Ala. 79; *Pace v. State*, 69 Ala. 231; s. c., 44 Am. Rep. 513; *Edmundson v. State*, 17 Ala. 179; s. c., 52 Am. Dec. 169; *Choen v. State*, 52 Ind. 347; s. c., 21 Am. Rep. 179; *People v. Ferris*, 56 Cal. 442; *State v. Black*, 12 Mo. App. 531; *Hughes v. Sellers*, 34 Ind. 337; *Van Voorhis v. Budd*, 39 Barb. (N. Y.) 479; *Milk v. Christie*, 1 Hill (N. Y.) 102.

4. *Rooks v. State*, 83 Ala. 79; *Ross v. State*, 116 Ind. 495; *People v. Lake*, 110 N. Y. 61; *Roosevelt v. Gardinier*, 2 Cow. (N. Y.) 463; *Franklin v. Talmadge*, 5 Johns. (N. Y.) 84; *State v. Martin*, 10 Mo. 391; *Hart v. Lindsey*, 17 N. H. 235; *King v. Hutchins*, 28 N. H. 561; s. c., 43 Am. Dec. 597; *Keene v. Meade*, 3 Pet. (U. S.) 7; *Games v. Stiles*, 14 Pet. (U. S.) 322; *Harris v. Muskingum Mfg. Co.*, 4 Blackf. (Ind.) 267; s. c., 29 Am. Dec. 372; *Alexander v. Wilmoth*, 2 Aik. (Vt.) 413; *Isaacs v. Wiley*, 12 Vt. 674; *Walbridge v. Kibbee*, 20 Vt. 543; *Allen v. Taylor*, 26

Vt. 599; *McKay v. Speak*, 8 Tex. 376; *Sullivan v. State*, 6 Tex. App. 319; *Dodd v. State*, 2 Tex. App. 58; *Dixon v. State*, 2 Tex. App. 531; *Thompson v. Lee*, 21 Ill. 242; *Erskine v. Davis*, 25 Ill. 251; *Bletch v. Johnson*, 40 Ill. 116; *Hendershott v. Thompson*, 1 Morris (Iowa) 186; *Schofield v. Jennings*, 68 Ind. 232. But see *Bowen v. Mulford*, 10 N. J. L. 230, where a judgment for the plaintiff by default was set aside because his middle name was not given in the summons, but was inserted in the declaration.

**In Conveyances.**—The omission or insertion of, or even a mistake in, a person's middle name or initial in a conveyance is unimportant, as between the parties thereto. *Dunn v. Games*, 1 McLean (U. S.) 321; *Games v. Stiles*, 14 Pet. (U. S.) 322; *Banks v. Lee*, 73 Ga. 25. See also *Morgan v. Woods*, 33 Ind. 23. *Contra*, *Dutton v. Simmons*, 65 Me. 583; s. c., 20 Am. Rep. 729.

**Different Rule in England.**—The *English* cases seem to attach more importance to the middle name than do the American courts. Thus, in *Kinnersley v. Knott*, 7 Dowl. & L. 128; s. c., 7 Com. B. 980; 13 Jur. 568, where the defendant was sued as John M. Knott, a special demurrer to the declaration was sustained because the middle name was not given in full. A similar ruling was made in *Nash v. Collier*, 5 Dowl. & L. 341, where the defendant was sued as William Henry W. Collier. See also *Charter v. Charter*, L. R., 2 Prob. Div. 323. But in *Rex v. Newman*, 1 Ld. Raym. 562, an indictment was quashed because it gave the defendant two Christian names.

5. *State v. Martin*, 10 Mo. 391; *Diggs*

And it has been held proper to strike out of a summons and complaint, on motion, the middle initial of the defendant's name.<sup>1</sup> Some courts hold that while it is not necessary to give the middle name or initial, yet if either be given, a mistake therein is a fatal variance.<sup>2</sup> The doctrine in *Massachusetts* is that the middle name is an essential part of the name, particularly in indictments, and its omission a misnomer.<sup>3</sup>

**V. ABBREVIATIONS.**—Judicial notice will be taken of the ordinary and commonly used abbreviations and equivalents of Christian names; but it has been doubted whether this rule ought to be extended to surnames.<sup>4</sup>

*v. State*, 49 Ala. 311; *Jernigan v. Carter*, 60 Ga. 131.

1. *Griel v. Solomon*, 82 Ala. 85; 60 Am. Rep. 733.

2. *State v. Hughes*, 1 Swan (Tenn.) 261; *Rockwell v. State*, 12 Ohio St. 427; *Price v. State*, 19 Ohio 423; *State v. Homer*, 40 Me. 438; *State v. Dudley*, 7 Wis. 664; *Edmundson v. State*, 17 Ala. 179; s. c., 52 Am. Dec. 169; *Ersine v. Davis*, 25 Ill. 251; *Hart v. Lindsey*, 17 N. H. 235; s. c., 43 Am. Dec. 597; *Miller v. People*, 39 Ill. 457.

3. *Com. v. Perkins*, 1 Pick. (Mass.) 388; *Com. v. Hall*, 3 Pick. (Mass.) 262; *Com. v. Shearman*, 11 Cush. (Mass.) 546; *Com. v. McAvoy*, 16 Gray (Mass.) 235; *Terry v. Slason*, 125 Mass. 560.

4. *Fenton v. Perkins*, 3 Mo. 144, cited in *Jones' Estate*, 27 Pa. St. 338. See also title ABBREVIATIONS, 1 Am. & Eng. Encyc. of Law 15.

"The abbreviations of a man's given name are so common that, without any violence to the law of the land, the courts may take judicial notice of them." *TOMPKINS, J.*, in *Fenton v. Perkins*, 3 Mo. 144.

**Instances.**—In *Weaver v. McElhe-non*, 13 Mo. 89, the court judicially noticed that "Christy" or "Christ" was an abbreviation of Christopher. See also *Gordon v. Holiday*, 1 Wash. (U. S.) 285. "Jo" has been held to be equivalent to Joseph. *Com. v. O'Baldwin*, 103 Mass. 210. "Polly" equivalent to Mary. *Sowle v. Sowle*, 10 Pick. (Mass.) 376; *Com. v. Terry*, 114 Mass. 263. "Sally" equivalent to Sarah. *Shelburne v. Rochester*, 1 Pick. (Mass.) 470. "Th." equivalent to Thomas. *Ogden v. Gibbons*, 5 N. J. L. 518, 531. And "Jack" or "Jock" equivalent to John. *Walter v. State*, 105 Ind. 589. Jane and Joan, and Jean and John are given in 2 Roll. Abr. 155, as being well recognized equivalents.

**William and Wilhelm.**—But in *Becker v. German M. F. Ins. Co.*, 68 Ill. 412, the defendant was sued on a note as William Becker; the note was signed in German, Wilhelm Becker. The court held that the names were different both in spelling and in sound, and that the variance was fatal, notwithstanding the admitted fact that Wilhelm is the German equivalent of William.

**Ben.**—Where the defendant was indicted by the Christian name of "Ben," the court, on appeal, held that the trial court properly refused to quash the indictment, saying: "It seems to us that Ben may have been the true and full Christian name of the appellant. Ben is not necessarily a contraction of Benjamin, Benoni, Benedict, or any other name, and on the motion to quash, the court, we think, was right in assuming that Ben may have been the full Christian name of the appellant." *Burton v. State*, 75 Ind. 477. And see also *People v. Ferguson*, 8 Cow. (N. Y.) 120.

**Geo.**—Where the defendant was declared against as "Geo. Turner," it was held a good plea in abatement to allege that his Christian name was George, and not "Geo." *Wilson v. Shannon*, 6 Ark. 196.

**Mr.**—The court will not presume that the letters "Mr." placed before a person's surname constitute his Christian name. *Gatty v. Field*, 9 Ad. & El. N. S. 631.

**Mrs.**—In condemnation proceedings an award to "Mrs. Kearsley" was set aside, on the ground that "Mrs." was not a legal name. *Kearsley v. Gibbs*, 44 N. J. L. 169.

Though a statute permits the description of persons in indictments by one or more of the initials of the Christian name, and also permits the



**VI. CORRUPTIONS, DERIVATIVES AND PREFIXES.**—Where the derivation of two names is the same, or where one is merely a corruption of the other and both are by common usage recognized as identical, though they differ in sound, it is not a material misnomer to use one for the other.<sup>1</sup>

Where surnames having a prefix are ordinarily written with an abbreviation, it is sufficient to write them in the same manner in a pleading.<sup>2</sup>

**VII. PRESUMPTION THAT LETTER CONSTITUTES NAME.**—When a party or third person is designated in a pleading, warrant or indictment by a surname preceded by one or more capital letters only, the court, in the absence of evidence, will not presume that he has any Christian name other than such letter or letters.<sup>3</sup> It was formerly held that this presumption would be indulged only where the letter given was a vowel,<sup>4</sup> but under more recent decisions the rule seems to be established that a consonant, as well as a vowel, will be presumed to be an entire Christian name.<sup>5</sup>

use of either of two names by which a person is equally well known, yet it is error to rule as matter of law that a person is correctly described as "Mrs. C. Davis," because it is shown that her husband's name is C. Davis. The question whether she was well known by that name should have been submitted to the jury. *Davis v. State* (Tex. 1889), 11 S. W. Rep. 647.

**Name of Railroad Company.**—The court will not take judicial notice that the letters "C., B. & Q. R. R. Co." mean the Chicago, Burlington & Quincy Railroad Company. *Accolo v. Chicago etc. R. Co.*, 70 Iowa 185.

1. *Wilkerson v. State*, 13 Mo. 91; s. c., 53 Am. Rep. 137; *State v. Huston*, 15 Mo. 512; *Gordon v. Holiday*, 1 Wash. (U. S.) 285.

"If two names are in original derivation the same, and are taken promiscuously to be the same in common use, though they are different in sound, yet there is no variance—as, *Piers Griffith* brought an *audita querela*, and out-lawry was pleaded by the name of *Peter Griffith* and allowed." 15 *Viner's Abr.*, title *Misnomer*, p. 408.

2. *State v. Kean*, 10 N. H. 347; s. c., 34 Am. Dec. 162; *Moynahan v. People*, 3 Colo. 367; *People v. Tisdale*, 1 Dougl. (Mich.) 59.

To write a surname with an "M" as "M'Neal" instead of McNeal, is no variance. *Campbell v. Wolff*, 33 Mo. 459.

3. *State v. Webster*, 30 Ark. 166; *Burford v. McCue*, 53 Pa. St. 427;

*Dana v. Fielder*, 12 N. Y. 40; *Fewlass v. Abbott*, 28 Mich. 270; *Oakley v. Pegley* (Neb. 1890), 46 N. W. Rep. 920. But see *Frank v. Levie*, 5 Robt. (N. Y.) 599, where it is said that the law does not recognize a single letter as a name.

4. **Vowel Initials.**—Where a single vowel immediately precedes a surname, the court will understand such vowel to be the Christian name of the person referred to. *Kinnersley v. Knott*, 7 Com. B. 980; s. c., 13 Jur. 658; *Nash v. Collier*, 5 Dowl. & L. 341; *Lomax v. Landells*, 6 Com. B. 577; s. c., 6 Dowl. & L. 396. In the case last cited, *MAULE, J.*, said that "a vowel, which is in itself a word, and may be pronounced separately, may be a name; though a consonant, which is incapable of being pronounced without the addition of a vowel, cannot."

"I know no law, nor do I see any reason, why a man may not take the letters A W for his first name, or, as it is generally called, his Christian name; for as there is no union here between church and state, and no obligation on parents to baptize their children, this name may be as often changed as the patronymic." *COLCOCK, J.*, in *City Council v. King*, 4 McCord L. (S. Car.) 487.

Where the plaintiff sued as O. B. Abbott, and obtained judgment, it was held that it would not be presumed, for the purpose of invalidating the judgment, that he had any other Christian name. *Fewlass v. Abbott*, 28 Mich. 270.

5. **Consonants.**—*Tweedy v. Jarvis*, 27

**VIII. NAMES OF BASTARDS.**—Until he has acquired one by reputation or adoption, a bastard has no surname, not even that of his mother. Probably, however, less evidence would be required to show that he had adopted his mother's name than that he had acquired a different one.<sup>1</sup>

**IX. NAMES OF DIVORCED WOMEN.**—A woman at marriage loses her own surname and acquires that of her husband; and a subsequent divorce *a vinculo* does not restore to her her former name.<sup>2</sup>

But by statute in many of the States the court granting the divorce may, at her instance, give her back her maiden name, or authorize her to adopt another.<sup>3</sup>

**X. NAME OF MONTH.**—See note 4.

**XI. CHANGE OF NAME.**—1. **Power of Courts.**—In the *United States*, authority to change the names of persons or corporations has been very generally conferred upon courts of record.<sup>4</sup> It has been held that the exercise of such power is discretionary with the court to

Conn. 45, in which the court, per STORRS, C. J., said: "We see no sensible or rational ground for any distinction between a vowel and a consonant, and think that either of them may be a name; and that name is denoted by the sound by which it is called or pronounced when it is spoken or uttered audibly as a letter." To the same effect see Reg. v. Dale, 15 Jur. 657; s. c., 5 Eng. L. & Eq. 360, in which case LORD CAMPBELL remarked that he had been reliably informed that an individual had been baptized by the name of "T." And in *Kinnersley v. Knott*, 6 M. G. & S., a person was reported as having been christened "J."

In *Perkins v. McDowell* (Wyo. 1890), 23 Pac. Rep. 71, the plaintiff sued as "J. M. McDowell," and, on demurrer, the court, per VAN DEVANTER, C. J., said: "While it does not occur frequently, there are many instances where single letters constitute the only Christian name. We cannot, then, judicially know that the letters 'J. M.' are not a name, and, as the petition does not disclose that the letters 'J. M.' are not the Christian name of the plaintiff, it follows that there is no defect apparent on the face of the petition in this respect."

In *Breedlove v. Nicolet*, 7 Pet. (U. S.) 413, where the plaintiff's name as given in a pleading was "J. J. Sigg," and objection thereto was raised for the first time on writ of error, MR. CHIEF JUSTICE MARSHALL said: "He may have assumed the letters 'J. J.' as distinguishing him from other persons of the surname of Sigg. Objections to the

name of the plaintiff cannot be taken advantage of after judgment."

1. *Rex v. Clark*, Russ. & Ry. 358; *Rex v. Waters*, 1 Mood. C. C. 457; *Rex v. Smith*, 1 Mood. C. C. 295; s. c., 6 Car. & P. 151; *Rex v. Sheen*, 2 Car. & P. 634; *Reg. v. Evans*, 8 Car. & P. 765; *Wakefield v. Mackey*, 1 Phill. 133; *Shannon v. People*, 5 Mich. 71; *Wright v. Wright*, 2 Mass. 109; 1 Russ. Cr. (3rd Eng. ed.) 656; 1 Bishop Crim. Proc. (3rd ed.), § 686.

2. *Fendall v. Goldsmith*, 2 P. D. 263.

3. **Resumption of Maiden Name.**—The court has jurisdiction to decree a resumption by the wife of her former name in *Massachusetts, Vermont, Rhode Island, Connecticut, Ohio, Illinois, Kentucky, Texas, Washington and District of Columbia*. But in *Minnesota, Missouri, Arkansas and Nevada*, only in actions where the wife is plaintiff. In *Oregon*, if she is not in fault. *Stimson's Am. Stat. Law*, § 6242.

4. **February.**—In an indictment the name of the month was written, apparently, "February." A motion to quash on this ground was held properly overruled, as the court judicially knew that there was no month beginning with the letter T, and would presume that the letter was meant for an F. *Witten v. State*, 4 Tex. App. 70.

5. **Constitutional Provisions.**—Local or special laws changing the name of any person are forbidden in *Arkansas, California, Florida, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, Oregon, Pennsylvania, Tennessee,*

which application for the change is made, and that its decision is reviewable only in case of manifest abuse of discretion.<sup>1</sup>

**2. Effect of Change.**—A person by taking a new name under an act of parliament does not lose his original name; the grant is a permission, but not an obligation, to adopt and use the new name.<sup>2</sup>

**XII. RIGHT TO ADOPT ANY NAME.**—A person may legally name himself, or change his name, or acquire one by reputation, general usage or habit.<sup>3</sup> So, in the absence of fraud, a person may do business and execute contracts under any name he chooses to assume.<sup>4</sup>

**XIII. RIGHT TO NAME CHILD.**—It has been held that this right belongs to the father, and that it is of sufficient pecuniary value to furnish a valid consideration for a note given to the father by a third person for the privilege of conferring the maker's name upon the payee's child.<sup>5</sup>

**XIV. RIGHT OF PROPERTY IN NAMES.**<sup>6</sup>—At common law there is no property right in any person to the use of a particular name as a

*Texas, Virginia and Wisconsin.* Several States forbid special laws changing name of place: *California, Illinois, Missouri, Nebraska, Pennsylvania and Texas.* In *Tennessee* the legislature is prohibited from changing the names of persons, but is required to confer such power upon the courts. *Stimson's Am. Stat. Law*, §§ 395, 432.

**Facts Required to be Shown.**—The rule in the New York common pleas was stated to be to require a statement showing whether the applicant for the change is married or single, whether any judgments exist or actions are pending against him, whether there is any outstanding commercial paper in the name sought to be abandoned; and also showing the applicant's age and birthplace, and the names of his parents. *Matter of Hamilton*, 10 Abb. N. Cas. (N. Y.) 79. See also *Petition of John Snook*, 2 Hilt. (N. Y.) 566.

1. *In re United States Mercantile Reporting etc. Co.*, 115 N. Y. 176; *Petition of Snook*, 2 Hilt. (N. Y.) 566; *Matter of Hamilton*, 10 Abb. N. Cas. (N. Y.) 79.

2. *Leigh v. Leigh*, 15 Ves. 100.

3. *England v. New York Publishing Co.*, 8 Daly (N. Y.) 375; *City Council v. King*, 4 McCord L. (S. Car.) 487.

In *Doe v. Yates*, 5 Barn. & Ald. 544, *ABBOTT, C. J.*, said: "A name assumed by the voluntary act of a young man at his outset in life, adopted

by all who know him, and by which he is constantly called, becomes, for all the purposes that occur to my mind, as much and effectually *his* name as if he had obtained an act of parliament to confer it on him." See also *Matter of Snook*, 2 Hilt. (N. Y.) 566.

**Patronymic Not Binding.**—No person is bound to accept his patronymic as a surname, nor his Christian name as a given name, though the custom to do so is almost universal among English-speaking people who have inherited the common law." *BIDDLE, J.*, in *Schofield v. Jennings*, 68 Ind. 233. See also *City Council v. King*, 4 McCord. L. (S. Car.) 487.

4. *Bell v. Sun Printing Co.*, 42 N. Y. Super. Ct. 567; *petition of Snook*, 2 Hilt. (N. Y.) 566.

**Right to Sue Under Adopted Name.**—A girl who has been taken into a family and treated in all respects as a daughter, though not formally adopted, may use the family name as her own in a suit against the head of the family. *Watson v. Watson*, 49 Mich. 540.

As to unlawful assumption and use of names, see titles **FALSE PRETENCES**, 7 Am. & Eng. Encyc. of Law; **FORGERY**, 8 Am. & Eng. Encyc. of Law; **TRADE-MARKS**.

5. *Wolford v. Powers*, 85 Ind. 294; s. c., 44 Am. Rep. 16; *Parks v. Francis*, 50 Vt. 626; s. c., 28 Am. Rep. 517.

6. See title **CORPORATIONS**, 4 Am. & Eng. Encyc. of Law 206.

surname, to the extent of enabling him to prevent the assumption of the same name by another person.<sup>1</sup>

Nor is there any property right in a name given to a piece of real property or to a private dwelling, which would warrant an injunction against the use of such name by others, in connection with their own property.<sup>2</sup>

**XV. MARRIAGE UNDER FICTITIOUS NAME.**—The mere fact that the name under which a person assents to a formal contract of marriage is not his true name, does not affect the validity of the marriage, even though it was preceded by publication of banns.<sup>3</sup>

But if the fictitious name be used in furtherance of a fraudulent scheme, and for the purpose of deceiving as to identity, it may, together with the attendant circumstances, render the marriage voidable at the instance of the innocent party.<sup>4</sup>

**XVI. LAND OFFICE PROCEEDINGS.**—The commissioners may correct an error in a land certificate stating wrongly the Christian name of the owner; and may do this where a patent, since returned for cancellation, has issued in the wrong name.<sup>5</sup>

**XVII. IDENTITY.**—The presumption, subject to some exceptions, is that identity of name—by which is meant identity of both Christian name and surname—*prima facie* establishes identity of person, and casts upon the adverse party the burden of proving the contrary.<sup>6</sup>

1. *Du Boulay v. Du Boulay*, 2 L. R., P. C. 430; s. c., 17 W. R. 504; 6 Moore P. C. C., N. S. 31; 38 L. J., P. C. 35.

2. *Day v. Browning*, 10 Ch. Div. 294, 302; s. c., 48 L. J. Ch. 173; 39 L. T. 553, reversing the decision of the vice chancellor in 39 L. T. 226. This was a peculiar case, and probably the only one of its kind ever reported. The plaintiff was the proprietor of a certain residence property which had for many years been known and called by the name of "Ashford Lodge." The defendant owned an adjoining residence, which had for nearly an equally long period of time been called "Ashford Villa." In 1876 the defendant, for some reason which does not appear in the report of the case, changed the name of his residence to Ashford Lodge, the name so long used by the plaintiff, who brought an action to enjoin the use of those particular words as a designation or name for the defendant's residence, alleging irreparable damage, etc. The defendant interposed a general demurrer, which the vice chancellor, MALINS, overruled; but on appeal from that order, all the judges agreed that the defendant's conduct, however unneighborly or reprehensible from an ethical point of view, did not constitute an

infringement of any property right of the plaintiff; and that the demurrer should have been sustained.

As to property rights in trade names and trademarks, see title TRADEMARKS.

3. *Rex v. Inhabitants of Billingshurst*, 3 M. & S. 250; *Rex v. Inhabitants of Burton-upon-Trent*, 3 M. & S. 537.

4. *Rex v. Inhabitants Burton-upon-Trent*, 3 M. & S. 537; *Rex v. Wroxtton*, 4 B. & Ad. 640; s. c., 24 Eng. C. L. 131. See also consistory court decisions in *Frankland v. Nicholson*, and *Pougett v. Tomkyns*, cited in note to *Rex v. Inhabitants of Billingshurst*, 3 M. & S. 250.

5. *Bell v. Hearne*, 19 How. (U. S.) 252.

6. See title IDENTITY, 9 Am. & Eng. Encyc. of Law 863 *et seq.* *McConeghy v. Kirk*, 68 Pa. St. 200; *Clark v. Freeman*, 25 Pa. St. 133; *Stebbins v. Duncan*, 108 U. S. 32; *Jackson v. Cody*, 9 Cow. (N. Y.) 140; *Hatcher v. Rocheleau*, 18 N. Y. 86; *Jackson v. Christman*, 4 Wend. (N. Y.) 277; *State v. Moore*, 61 Mo. 276; *Cross v. Martin*, 46 Vt. 14; *Jackson v. King*, 5 Cow. (N. Y.) 237; s. c., 15 Am. Dec. 468; *Atchison v. McCulloch*, 5 Watts (Pa.) 13; *Douglass v. Dakin*, 46 Cal. 49; *Brown v. Metz*, 33 Ill. 339; *Cates v. Loftus*, 3 A. K. Marsh.

Identity will be presumed if the names sound alike, within the rule of *idem sonans*, even though there be slight differences in the spelling.<sup>1</sup>

(Ky.) 202; Hubbard v. Lees, L. R., 1 Ex. 255; Burns v. Hyatt, 1 Pa. L. J. 323; Bogue v. Bigelow, 29 Vt. 183; Fletcher v. Conly, 2 Greene (Iowa) 88. Compare Wilson v. Holt, 83 Ala. 528; Ward v. Dougherty, 75 Cal. 240; People v. Lake, 110 N. Y. 61.

Identity of person will not be presumed from identity of initials and surname. The People v. Smith, 3 Lans. (N. Y.) 298. See also People v. Ferguson, 8 Cow. (N. Y.) 102; Zeller v. State, 7 Ind. 659.

In Hatcher v. Rocheleau, 18 N. Y. 86, the court held that identity of name was *prima facie* evidence that a person sued in *New York* in 1857 was the same person who was sued by that name in *Mississippi* in 1841.

In Aultman v. Zimm, 93 Ind. 158, the court held that proof showing the liability of a person bearing the defendant's name, in the absence of countervailing evidence as to the identity of the person, is sufficient to establish the defendant's liability.

**Identity of Name Raises a Presumption of Identity of Person.**—Goodell v. Hibbard, 32 Mich. 47; Campbell v. Wallace, 46 Mich. 320; State v. Moore, 61 Mo. 276.

And where the identity is clearly established, the use of a different name by a party is not material where the question is one of identity merely. Boyce v. Dautz, 29 Mich. 146; Bothe v. Dayton etc. R. Co., 37 Ohio St. 147. If denied, the identity may be proved, and if the bill is taken as confessed the identity is admitted. Ramsdell v. Eaton, 12 Mich. 117.

**Return of a Commission Establishes Identity.**—A commission to take a deposition, directed to "Messrs. Swan & Moore, attorneys at law," of Ottawa, etc., was returned with a certificate of execution signed "J. J. Moore, C. J. Swan, commissioners." Held, That an objection to the reading of the deposition in evidence, on this ground, raises only a question of identity of persons, and is untenable where the return establishes such identity. Eaton v. Peck, 26 Mich. 57.

**Objection to Identity Cannot First be Raised in the Supreme Court.**—Objection to the identity of a person cannot be raised for the first time in the supreme

court, on account of the use of the initial letters of proper names in the assessment made by the commissioners in such proceedings. Houk v. Barthold, 73 Ind. 21.

**Presumption When Initials Only Are Used.**—A suit brought and judgment rendered in the name of the plaintiff by initials only for his given name, is not open to objection on that ground, in the absence of any showing that he had any other name; it will not be presumed for the sake of invalidating such judgment that the plaintiff has any other Christian name than the initials used in bringing the suit. Fewless v. Abbott, 28 Mich. 270.

**Proof of Identity of Names and Persons.**—See IDENTITY, 9 Am. & Eng. Encyc. of Law 866, 867.

See also Com. v. Gale, 11 Gray (Mass.) 320; Berber v. Kerzeinger, 23 Ill. 286; Jackson v. Goes, 13 Johns. (N. Y.) 518; s. c., 7 Am. Dec. 399; Jackson v. Stanley, 10 Johns. (N. Y.) 136; s. c., 6 Am. Dec. 319.

After a lapse of twenty-five years, identity of name is not sufficient evidence of personal identity. Sailor v. Hertzogg, 2 Pa. St. 182. See also Sitler v. Gehr, 105 Pa. St. 577; s. c., 51 Am. Rep. 207.

"The reason given for casting the onus on the party who denies [the identity] is that disproof can be readily had by calling the person whose identity is contested into court." Sailor v. Hertzogg, 2 Pa. St. 183, per Gibson, C. J.

But identity of name, without more, was held not sufficient to uphold attempted justification in libel. Regensperger v. Kiefer, 20 W. N. C. (Pa.) 97.

It is error to submit to the jury, without other proof, whether R. P. O'Neil, who executed a deed, is identical with Rev. Patrick O'Neil, the owner of the land. Burford v. McCue, 53 Pa. St. 427.

Where an instrument is signed "Adam Lautermilch," the identity of the assignor with one John Adam Lautermilch is for the jury, the writing agreeing in other respects with the presumption of identity. Lautermilch v. Kneagy, 3 S. & R. (Pa.) 200.

1. Kelly v. Valney (Pa.), 5 Pa. Law Jour. 300; s. c., 2 Am. Law Reg. 499; Jackson v. Cody, 9 Cow. (N. Y.) 140.

It will not be presumed, however, that a plaintiff and defendant,<sup>1</sup> or an obligor and obligee,<sup>2</sup> or a subscribing witness and a surety,<sup>3</sup> are, respectively, the same person merely because of identity of name.

If the surname in question be a very common one, and the Christian name not unusual, the courts have a disinclination to apply the rule.<sup>4</sup>

**XVIII. SEX.**—It would seem that the well known fact that a large number of Christian names are invariably conferred only upon persons of a particular sex would become a matter of judicial notice; but so far as the reported cases show, the courts are not disposed to indulge a presumption as to sex merely from the nature of the Christian name. Thus, it has been held that the name "Jo" does not designate the sex of the person referred to.<sup>5</sup> Nor will the court say, as a matter of judicial knowledge, that the Christian name, Lawrence, does not designate a female.<sup>6</sup>

**XIX. JUNIOR AND SENIOR.**—The word Junior, or Jr., or words of similar import, are ordinarily mere matter of description, and no part of a person's legal name; and to improperly add or omit them is harmless error, whether in civil or criminal proceedings.<sup>7</sup> So of the word Senior, or Sr.<sup>8</sup>

Where there are two persons residing in the same place, and having the same Christian name and surname, and one of them uses the addition Jr., or "the second," they will be presumed to be father and son.<sup>9</sup>

So, where father and son living in the same locality have the same Christian name and surname, it will be presumed, in the ab-

1. *Suttles v. Whitlock*, 4 T. B. Mon. (Ky.) 452.

2. *Allen v. Shadburne*, 1 Dana (Ky.) 69.

3. *Jones v. Chappell*, 5 T. B. Mon. (Ky.) 425; *Jackson v. Christman*, 4 Wend. (N. Y.) 277.

4. *Jones v. Jones*, 9 M. & W. 75; *Jackson v. Christman*, 4 Wend. (N. Y.) 277.

5. *Crawford v. Slye*, 4 Cranch C. C. (U. S.) 457. But see *Com. v. O'Baldwin*, 103 Mass. 210, which holds that "Jo." will be presumed to mean Joseph, a male.

6. *LaMotte v. Archer*, 4 E. D. Smith (N. Y.) 46.

7. *Hodgson's Case*, 1 Lewin C. C. 236; *Rex v. Bailey*, T. C. & P. 264; *Lepiot v. Browne*, 1 Salk. 7; *Geraghty v. State*, 110 Ind. 103; *Ross v. State*, 116 Ind. 495; *People v. Cook*, 14 Barb. (N. Y.) 259; *People v. Collins*, 7 Johns. (N. Y.) 549; *Padgett v. Lawrence*, 10 Paige (N. Y.) 170; s. c., 40 Am. Dec. 232; *Com. v. Perkins*, 1 Pick. (Mass.) 388; *Cobb v. Lucas*, 15 Pick. (Mass.)

7; *Kincaid v. Howe*, 10 Mass. 203; *State v. Grant*, 22 Me. 171; *Coit v. Starkweather*, 8 Conn. 293; *Fleet v. Youngs*, 11 Wend. (N. Y.) 522; *Prentiss v. Blake*, 34 Vt. 465; *Brainerd v. Stilphin*, 6 Vt. 9; s. c., 27 Am. Dec. 532; *Keith v. Ware*, 6 Vt. 680; *Blake v. Tucker*, 12 Vt. 39; *Jameson v. Isaacs*, 12 Vt. 611; *Isaacs v. Wiley*, 12 Vt. 677; *Johnson v. Ellison*, 4 T. B. Mon. (Ky.) 526; s. c., 16 Am. Dec. 163; *Headley v. Shaw*, 39 Ill. 354; *State v. Weare*, 38 N. H. 314.

**Second of that Name.**—Where the ownership of stolen goods was laid in W. R., "the second of that name," and the proof showed that he was generally known as W. R., Jr., it was held that there was no variance. *Com. v. Parmenter*, 101 Mass. 211.

8. *Neil v. Dillon*, 3 Mo. 59; *People v. Collins*, 7 Johns. (N. Y.) 549; *Fleet v. Youngs*, 11 Wend. (N. Y.) 522.

9. *Cross v. Martin*, 46 Vt. 14, where a deed from Elijah Gore, of Halifax, to Elijah Gore Jr., of Halifax, was presumed to be from father to son.

sence of some such addition as Junior, or "the younger," that process issued against a defendant of that name is intended for the father.<sup>1</sup>

**XX. DOCTRINE OF IDEM SONANS**—1. **Statement of the Rule.**—The absence of a set of definite rules for the spelling and pronunciation of the names of persons, and more especially of surnames, has led the courts to the adoption of a principle known as "the rule of *Idem Sonans*." This rule may be stated to be, that absolute accuracy in spelling names is not required in legal documents or proceedings, either civil or criminal; that if the name as spelled in the document, though different from the correct spelling thereof, conveys to the ear when pronounced according to commonly accepted methods, a sound practically identical with the sound of the correct name as commonly pronounced, the name as thus given is a sufficient designation of the individual referred to, and no advantage can be taken of the clerical error.<sup>2</sup> In other words,

1. Jarman v. Hooper, 6 M. & G. 827; s. c., 1 Dowl. & L. 769; 7 Scott, N. R. 663; Stebbing v. Spicer, 8 M. G. & S. 827; Bate v. Burr, 4 Harr. (Del.) 130; Brown v. Benight, 3 Blackf. (Ind.) 39; s. c., 23 Am. Dec. 373; Lepiot v. Brown, 1 Salk. 7; Singleton v. Johnson, 9 M. & W. 67. See also State v. Vitum, 9 N. H. 519; Cobb v. Lucas, 15 Pick. (Mass.) 1; State v. Grant, 22 Me. 171; Com. v. Beckley, 3 Metc. (Mass.) 330; Kincaid v. Howe, 10 Mass. 203; Com. v. Perkins, 1 Pick. (Mass.) 388; State v. Weare, 38 N. H. 314; People v. Collins, 7 Johns. (N. Y.) 549; Stevens v. West, 6 Jones L. (N. Car.) 49; Fleet v. Youngs, 11 Wend. (N. Y.) 522; Padgett v. Lawrence, 10 Paige (N. Y.) 170; s. c., 40 Am. Dec. 232; Allen v. State, 52 Ind. 486; Brainerd v. Stilphin, 6 Vt. 9; s. c., 27 Am. Dec. 532; Hadley v. Shaw, 30 Ill. 354.

It seems that where father and son of the same name reside in the same town, the omission of "Junior" in a writ against the son is good cause of abatement. Zuill v. Bradley, Quincy (Mass.) 6.

But in Simpson v. Dix, 131 Mass. 179, it was held that where a conveyance is made to a grantee of a certain name, and there are two persons, father and son, of that name, no presumption will be indulged in that the conveyance is to the father; and the evidence is admissible to show who was in fact intended as the grantee.

2. Leatherbarrow v. Ward, 5 Jur. 388.

**Definitions.**—"The proper rule in such cases is that if two names, accord-

ing to the ordinary rules of pronouncing the English language, may be sounded alike, without doing violence to the letters found in the variant orthography, then the variance is, *prima facie*, at least, immaterial, and may be so decided by the court. And in the pronunciation of proper names, greater latitude is indulged than in any other class of words." SOMERVILLE, J., in *Rooks v. State*, 83 Ala. 79.

"The law does not take notice of orthography; therefore, if a name is misspelled, no harm can come of this, provided the name as written in the indictment is *idem sonans*, as the books express it, with the true name. It is sometimes a nice matter to determine when the names are of the same sound; and the courts do not, in this matter, hold the rule of identity with a strict hand." 1 Bish. Crim. Proc., § 688.

"Courts are not fastidious in enforcing absolute precision in regard to orthography. Names admitting of the same pronunciation are often made up of very different letters. In these cases, a mistake of one mode of spelling for another is unimportant, even in an indictment. The public prosecutor is not bound to ascertain the particular letters used by the accused in writing his name, for this might often be impracticable." MASON, C. J., in *Donnel v. United States*, 1 Morris (Iowa) 141; s. c., 39 Am. Dec. 457.

"It matters not how two names are spelled, what their orthography is, they are *idem sonans* within the meaning of the books, if the attentive ear finds difficulty in distinguishing them

when pronounced, or common and long continued usage has by corruption or abbreviation made them identical in pronunciation." *Robson v. Thomas*, 55 Mo. 581.

"In the use of foreign names, courts should not pronounce that a variance, unless it be palpable, which may be only a misspelling or a mispronunciation." *Chiniquy v. Catholic Bishop*, 41 Ill. 148.

**Instances of *Idem Sonans*.**—In the following cases, the names in conjunction have been held to be within the rule of *idem sonans*, or to be immaterially variant in sound:

**A.**—Alessandro and Alexander (the English equivalent). *Alexander v. Com.*, 105 Pa. St. 1. *Anthron and Antrum. State v. Scurry*, 3 Rich. (S. Car.) 68. *Adamson and Adanson. James v. State*, 7 Blackf. (Ind.) 325. *Annie and Anny. State v. Upton*, 1 Dev. (N. Car.) 513. *Amel and Amiel. People v. Gosch* (Mich. 1890), 46 N. W. Rep. 101.

**B.**—Bobb and Bubb (local usage). *Myer v. Fegaly*, 39 Pa. St. 429; s. c., 80 Am. Dec. 534. *Booth and Boothe. Jackson v. State*, 74 Ala. 26. *Brearley and Brailey. People v. Gosch* (Mich. 1890), 46 N. W. Rep. 101. *Bert Samrud and Bernt Sannerud. State v. Sannerud*, 38 Minn. 229. *Barnabus and Barney. McGregor v. Balch*, 17 Vt. 562. *Beneux and Bennaux. Beneux v. State*, 20 Ark. 97. *Boge and Bogue. Bogue v. Bigelow*, 29 Vt. 179. *Beckwith and Beckworth. Stewart v. State*, 4 Blackf. (Ind.) 171. *Boyce and Bice* (as pronounced by foreigners). *Boyce v. Danz*, 29 Mich. 146. *Blankenship and Blackenship. State v. Blankenship*, 21 Mo. 504. *Bikerstoffe and Bickerstaffe. Heskett v. Lee*, 1 Vent. 73. *Benedetto and Beniditto. Abitbol v. Benedetto*, 2 Taunt. 401. *Burdet and Boudet or Boredet. Aaron v. State*, 37 Ala. 106; *Bryon and Bryan. Tyser v. Bryan*, 2 Dowl. 640.

**C.**—Chin Chan and Chin Chang. *Wells v. State*, 4 Tex. App. 20; *Conly and Conolly. Fletcher v. Conly*, 2 Greene (Iowa) 88. *Chatam and Chatham. Roth v. State*, 4 Tex. L. J. 393. *Chambles and Chambless. Ward v. State*, 28 Ala. 53. *Conkian and Conklin. Cutting v. Conklin*, 28 Ill. 506. *Cuffy and Cuffee or Cuff. State v. Farr*, 12 Rich. (S. Car.) 24. *Charlestown and Charleston. Alvord v. Moffat*, 10 Ind. 366. *Conn and Coen. Moore v. Anderson*, 8 Ind. 18. *Chicopee*

and *Chickopee. Com. v. Desmarteau*, 16 Gray (Mass.) 1; *Conaway and Conaway. Conaway v. Hays*, 7 Blackf. (Ind.) 159. *Che-gaw-go-quay and Che-gaw-ge-quay. Brown v. Quinland*, 75 Mich. 289. *Colburn and Coburn. Colburn v. Bancroft*, 23 Pick. (Mass.) 57.

**D.**—Danner and Dannaher. *Gahan v. People*, 58 Ill. 160. *Deadema and Diadema. State v. Patterson*, 2 Ired. (N. Car.) 346; s. c., 38 Am. Dec. 699. *Donly and Donnelly. Donnelly v. State*, 78 Ala. 453. *Doerges, Dierges, and Dierkes. Gorman v. Dierkes*, 37 Mo. 576; *Droun and Drown. Com. v. Woods*, 10 Gray (Mass.) 477. *Dixon and Dickson. Reading v. Waterman*, 46 Mich. 107. *Dillahunt, Dillahint, and Dillaunt. Dillahunt v. Davis* (Tex. 1889), 12 S. W. Rep. 55.

**E.**—Emonds, Emmons, and Emmens. *Lyon v. Kain*, 36 Ill. 362. *Edmundson and Edmindson. Edmundson v. State*, 17 Ala. 179; s. c., 52 Am. Dec. 169; *Elliott and Ellett. Robertson v. Winchester*, 85 Tenn. 171.

**F.**—Fain and Fanes. *State v. Hare*, 95 N. Car. 682. *Fauntleroy and Fontleroy. Wilkes v. State*, 27 Tex. App. 381. *February and Tebruary. Witten v. State*, 4 Tex. App. 70. *Forrest and Fournal* (as pronounced in French). *State v. Timmens*, 4 Minn. 325. *Finnegan and Finegan. People v. Mayworm*, 5 Mich. 146. *Fayelville and Fayetteville. United States v. Hinman*, 1 Bradw. (Ill.) 292. *Foster and Faster. Foster v. State*, 1 Tex. App. 533.

**G.**—George Rooks and George W. Rux. *Rooks v. State*, 83 Ala. 79. *Giddings, Gidings and Gidines. State v. Lincoln*, 17 Wis. 597. *Gardiner and Gardner. Rector v. Taylor*, 12 Ark. 128. *Geesler and Geissler. Cleaveland v. State*, 20 Ind. 444. *Girous and Geroux. Girous v. State*, 29 Ind. 93.

**H.**—Hearn and Hearne. *Coster v. Thomason*, 19 Ala. 717. *Hicks Nowells and Hix Nowels. Spoonmore v. State*, 25 Tex. App. 358. *Hinsdall and Hinsdale. Meredith v. Hinsdale*, 2 Cal. (N. Y.) 362. *Hereon and Hariman. State v. Bean*, 19 Vt. 530. *Hanley and Hanly. Irvin v. Sebastian*, 6 Ark. 33. *Haverly and Havelly. State v. Havelly*, 21 Mo. 498. *Hudson and Hutson. State v. Hutson*, 15 Mo. 512; *Cato v. Hutson*, 7 Mo. 142. *Joel D. Hubbard* (correct name), *J. D. Hubba, J. D. Huba and J. D. Hub* (names written on ballots). *Gumm v. Hubbard*, 97 Mo. 311.



I.—Isah and Isaiah. *Ellis v. Merri-*  
*man*, 5 B. Mon. (Ky.) 297.

J.—Jacob and Jaacob. *Jacob Aboab's*  
*Case*, 1 Mod. 107. *Japheth and Japh-*  
*ath*. *Morton v. McClure*, 22 Ill. 257.  
*Jefferds, Jeffards and Jervais*. *Com. v.*  
*Brigham*, 147 Mass. 414. *Josiah and*  
*Josier*. *Schooler v. Asherst*, 1 Litt.  
(Ky.) 217; s. c., 13 Am. Dec. 232. *Juli*  
*and Julec*. *Point v. State*, 37 Ala. 148.

K.—Kamberling and Kimberling.  
*Houston v. State*, 4 Greene (Iowa) 437.  
*Kenney and Kinney*. *Kinney v. Har-*  
*rett*, 46 Mich. 87. *Kay and Key*.  
*Deckenson v. Bower*, 16 East 112.  
*Kealiher, Keolliher, Kelliher, Kellier,*  
*Keolhier and Kelhier*. *Millett v.*  
*Blake*, 81 Me. 531. *Kreitz, Krietz,*  
*Critz and Crit*. *Kreitz v. Behrens-*  
*meyer*, 125 Ill. 141.

L.—Lancaster and Lancaster. *Anony-*  
*mous*, All. 91. *Lebering and Lebrun,*  
*or Lebring*. *Kentland v. Admr.*, 2  
Wash. (U. S.) 201. *Lawrence and*  
*Lawrance*. *Webb v. Lawrence*, 2  
Dowl. P. C. 81; s. c., 1 Crompt. & M.  
806. *Lawson and Lossene*. *State v.*  
*Pullens*, 81 Mo. 387. *Little and Lytle*.  
*Lytle v. People*, 47 Ill. 422. *Leaphardt*  
*and Leaphat*. *Leaphardt v. Sloan*, 5  
Blackf. (Ind.) 278. *Langford and*  
*Lankford*. *State v. Mahan*, 12 Tex.  
283. *Louis and Lewis*. *Girous v.*  
*State*, 29 Ind. 93; *Block v. State*, 66  
Ala. 493. *T. C. Lucky and C. C.*  
*Lucky*. *Brown v. State*, 32 Tex. 134.

M.—Mary Etta and Marietta. *Goode*  
*v. State*, 2 Tex. App. 520. *Michael*  
*and Michaels*. *State v. Houser*, Busb.  
(N. Car.) 410. *Minner and Miner*.  
*Jackson v. Boneham*, 15 Johns. (N. Y.)  
226. *McDonald and McDonell*. *Mc-*  
*Donald v. People*, 47 Ill. 533. *Mc-*  
*Laughlin and McGlofin*. *McLaughlin*  
*v. State*, 52 Ind. 476. *McGinnis and*  
*McInnis*. *Barnes v. People*, 18 Ill. 52;  
s. c., 65 Am. Dec. 699. *McGilligan and*  
*Megilligan*. *Pope v. Kirchner*, 77 Cal.  
152. *Marres and Mars*. *Com. v. Stone*,  
103 Mass. 421. *McNicole and Mc-*  
*Nicoll*. *Rex v. Wilson*, 2 C. & K. 527.  
*Meyer, Meyers and Mayer*. *Smurr v.*  
*State*, 88 Ind. 504. *Mozer and Mou-*  
*seuer*. *Ruddell v. Mozer*, 1 Ark. 503.  
See also *McAllister v. Clark*, 86 Ill.  
237.

N.—Nowels and Nowells. *Spoone-*  
*more v. State*, 25 Tex. App. 358. *Nunne*  
*and Nonne*. *Nonne v. Maxev*, 2 Jo.  
219. *Newton, Nuton and Newten*.  
*Newton v. Newell*, 26 Minn. 529.

O.—Owen D. Haverly and Owens D.  
Havely. *State v. Haverly*, 21 Mo. 498.

P.—Poll and Polly. *McAllister v.*  
*Clark*, 86 Ill. 236. *Philip and Pilip*.  
*Taylor v. Rogers*, 1 Ala. 197. *Penryn*  
*and Pennyryne*. *Elliot v. Knott*, 14  
Md. 121. *Patterson and Petterson*.  
*Jackson v. Cody*, 9 Cow. (N. Y.) 140.  
*Petris and Petrie*. *Petrie v. Wood-*  
*worth*, 3 Cal. (N. Y.) 219. *Preyer,*  
*Prior and Pryor*. *Page v. State*, 61  
Ala. 16.

R.—Reed and Read. *State v. Pott*, 9  
N. J. L. 32; s. c., 17 Am. Dec. 444.  
*Rae and Wray*. *Vance v. Wray*, 3  
Upp. Can. L. J. 69. *Rennoll and Ren-*  
*nolls*. ——— *v. Rennolls*, 1 Chitty  
659. *Robinson, Robertson and Rober-*  
*son*. *Winkerson v. State*, 13 Mo. 91;  
s. c., 53 Am. Dec. 137. *Robinson and*  
*Robison*. *People v. Cooke*, 6 Park. Cr.  
(N. Y.) 31. *Rooks and Rux*. *Rooks*  
*v. State*, 83 Ala. 79. *Rombauer and*  
*Rambauer*. *Patmor v. Rombauer*, 41  
Kan. 295.

S.—Sarmine and Sarmin. *Cull v.*  
*Sarmin*, 3 Lev. 66. *Saffell and Saffle*.  
*Hoffman v. Bircher*, 22 W. Va. 537.  
*Segear and Segar*. *Brunger v. Segar*,  
1 Roll. 425. *Segrave and Seagrave*.  
*Williams v. Ogle*, 2 Strange 889. *Sha-*  
*croft and Shacraft*. *Denner v. Sha-*  
*croft*, Cro. Eliz. 258. *Shafer and*  
*Shaffer*. *Rowe v. Palmer*, 29 Kan.  
337. *Shields and Sheals*. *Shield's Es-*  
*tate*, 3 Luz. Leg. Obs. (Pa.) 174. *Star-*  
*ford and Stratford*. *Wilson v. Stafford*,  
Chitty 355. *Steven Stebbins and*  
*Stevens Stebins*. *Stevens v. Stebbins*,  
4 Ill. 25. *St. Clair and Sinclair*. *Riv-*  
*ard v. Gardner*, 39 Ill. 125. *Storrs and*  
*Stores*. *People v. Sutherland*, 81 N.  
Y. 1. *Sunderland and Sandland*.  
*Sandland v. Adams*, 2 How. Pr. (N.  
Y.) 31. *Susan and Susannah*. *State*  
*v. Johnson*, 67 N. Car. 55. *Sofia and*  
*Sofira*. *Owen v. State*, 7 Tex. App.  
329. See also *Burgany v. State*, 4  
Tex. App. 72.

T.—Thompson and Thonpson. *State*  
*v. Wheeler*, 35 Vt. 261. *Tougaw and*  
*Tugaw*. *Girous v. State*, 29 Ind. 93.  
*Tinmarsh and Tidmarsh*. *Homan v.*  
*Tidmarsh*, 11 Moore 231. *Trowbridge*  
*and Trobridge*. *Buhl v. Trowbridge*, 42  
Mich. 44.

U.—Usrey and Userry. *Gresham v.*  
*Walker*, 10 Ala. 370.

V.—Van Nortrick and Van Nort-  
wick. *Mallory v. Riggs*, 76 Iowa 748.

W.—Wanzer and Wanser. *Wanzer*  
*v. Barker*, 4 How. (Miss.) 363. *Wash*  
*Pans and Was Pans*. *Lynch v. Wil-*  
*son*, 4 Blackf. (Ind.) 288. *Whyneard*  
*and Winyard*. *Rex v. Foster, R. &*

Ry. 412. Wilkinson and Wilkerson. *Wilkerson v. State*, 13 Mo. 91; s. c., 53 Am. Dec. 137. Woolley and Wolley. *Power v. Woolley*, 21 Ark. 462. Whitman and Whiteman. *Henry v. State*, 7 Tex. App. 388. Wray and Rae. *Vance v. Wray*, 3 Upp. Can. L. J. 69. William and Williams. *Williams v. State*, 5 Tex. App. 226.

Z.—Zemeriah and Zimri. *Ames v. Snider*, 55 Ill. 498.

**Sutings.**—In *State v. Wilson*, 40 La. An. 751, the verdict was, guilty of "assault by sutinge with intent to murder." It was held that the verdict was good, the word "sutinge" being reasonably intended to mean "shooting," under the rule of *idem sonans*.

**Names Not Idem Sonans.**—In the following cases the names in conjunction have been held to be not within the rule:

A.—Ammon and Amann. *Amann v. People*, 76 Ill. 188. Able Burgamy and Avie Burgamy. *Burgamy v. State*, 4 Tex. App. 572. Able and Ebling. *Weber v. Ebling*, 2 Mo. App. 15.

B.—Brimford and Binford. *Entrenkin v. Chambers*, 11 Kan. 377. Barnep and Barnap. *Queen v. Carter*, 6 Mod. 168. Bart and Bartholomew. *Curtis v. Marrs*, 29 Ill. 508. Burrall and Burril. *Com. v. Gillespie*, 7 S. & R. (Pa.) 469. Burger and Buerger. *Shumaker v. Schoen*, 19 Pitts. L. J. (Pa.) 69. Behrensmeyer and Dehbenmeyer. *Kreitz v. Behrensmeyer*, 125 Ill. 141.

C.—Catherine Swalls and Ratherine Swalls. *Swalls v. State*, 7 Blackf. (Ind.) 324. Comyns and Cummins. *Cruikshank v. Comyns*, 24 Ill. 692. *Cunnington v. Cunningham*. *Ex parte Cheatham*, 6 Ark. 531; s. c., 44 Am. Dec. 525. *Carter Gabriel and Gabriel Carter*. *Collins v. State*, 43 Tex. 577.

D.—Darius and Trius. *Rex v. Davis*, 4 New Sess. Cas. 411; s. c., 5 Cox C. C. 237; 2 Den. C. C. 233. Dellia and Della. *Vance v. State*, 65 Ind. 460.

E.—Ebling and Able. *Weber v. Ebling*, 2 Mo. App. 15. Elijah and Elisha. *Craig v. Brown*, Pet. C. Ct. (U. S.) 139. Eliere Lowtrheiser and Ezra Loutzenheiser. *Abbott v. State*, 59 Ind. 70.

F.—Fallock and Falk. *Calkins v. Falk*, 1 Abb. App. Dec. (N. Y.) 291; s. c., 39 Barb. (N. Y.) 620. Frank and Franks. *Parchman v. State*, 2 Tex. App. 228; s. c., 28 Am. Rep. 435. Fitzpatrick and Fitz Patrick. *Moynahan v. People*, 3 Colo. 367.

G.—Grautis and Gerardus. *Mann v. Carley*, 4 Cow. (N. Y.) 148. Griffin

and Griffith. *Henderson v. Cargill*, 31 Miss. 367.

H.—Hemessey and Hennessey. *Com. v. Mehan*, 11 Gray (Mass.) 321. Hairholser and Hairholts. *Mitchell v. State*, 63 Ind. 276, 574. Henry M. Hawkins and Henry F. Hawkins. *Dutton v. Simmons*, 65 Me. 583; s. c., 20 Am. Rep. 729. Henry and Harry. *Garrison v. People*, 21 Ill. 535. Humphreys and Humphrey. *Humphrey v. Whitten*, 17 Ala. 30.

J.—Jonathan and John. *Moore v. Graham*, 58 Mich. 25. Jeffery and Jeffries. *Marshall v. Jeffries*, 1 Hempst. (U. S.) 299. Jacques and Jakes. *Jacques v. Nichols*, T. T. 586, Vict., Ont. Rep.

K.—Kritler and Kladder. *Brotherline v. Hammond*, 69 Pa. St. 128.

L.—Lindly and Lindsey. *Selman v. Orr*, 75 Tex. 528. Labarron and Labern. *Lanesborough v. New Ashford*, 5 Pick. (Mass.) 190. Lyons and Lynes. *Lynes v. State*, 5 Port. (Ala.) 236; s. c., 30 Am. Dec. 557.

M.—Maley and Mealey. *Com. v. Donovan*, 95 Mass. 57. McKlaskey or McKloskey, McCoskey and McKaskey. *Black v. State*, 57 Ind. 109. Mathews and Mather. *Robson v. Thomas*, 55 Mo. 582. May and Mary. *Kennedy v. Merriam*, 70 Ill. 228. McCann and McCarn. *Tannett's Case*, Russ. & R. 351. Miller and Millen. *Chamberlain v. Blodgett*, 96 Mo. 482. Melvin and Melville. *State v. Curran*, 18 Mo. 320. McDevro and McDero. *McDevro v. State*, 23 Tex. App. 429. Mincher and Minchen. *Adams v. State*, 67 Ala. 89. Munkers and Moncus. (If, by local usage, the two names are given the same pronunciation, it was a question for the jury.) *Munkers v. State*, 87 Ala. 94.

N.—Newton, New, Newt, Newtoand Newn; Newell, Nall, Null and Neden (names of candidates on ballots). *Newton v. Newell*, 26 Minn. 529.

O.—Otha and Oatha. *Brown v. People*, 66 Ill. 344. Owen and Orrin. *Ferry v. Matthews*, T. T. 586, Vict. Ont. Rep.

S.—Saunders and Launder. *Jeune v. Jeune*, 7 Mass. 94. Sedbetter and Ledbetter. *Fellers v. State*, 7 Ind. 659. Schoonhoven and Schoonhover. *Schoonhoven v. Gott*, 20 Ill. 46; s. c., 71 Am. Dec. 247. Shurtliff and Shirliff. *Gordon v. Austin*, 4 T. R. 611. Shakespeare and Shakepeare. *Shakespeare's Case*, 10 East 83. Service and Servoss. *Shinkell v. Letcher*, 40 Ill. 48. Semon and Seaman. 7 Ark. 70. Sensitive and Sensitive. *Com. v. Bowers*, 3 Brewst. (Pa.) 350. Swift and Swist.

it is sufficient in law to spell a name as it is regularly or commonly pronounced.<sup>1</sup>

**2. How Question Determined.**—The question whether or not two or more names are *idem sonans* may, on a plea in abatement or special demurrer, be determined by the court upon a mere comparison, where the issue is free from doubt, as if the words *necessarily* do or do not sound alike; but the modern and approved practice is to submit the question to the jury whenever there is an opportunity to do so and where the correct sound appears at all doubtful or dependent upon particular circumstances.<sup>2</sup>

Jones v. Stenor, 3 Bulst. 121. Spintz and Sprinz. United States v. Spintz, 18 Fed. Rep. 377. Smith and Weston and Smith and Wesson. Morgan v. State, 61 Ind. 447. E. Seymour and E. Ly-mour. Porter v. State, 17 Ind. 415.

T.—Trius and Darius. Rex v. Davis, 4 New Sess. Cas. 411; s. c., 5 Cox C. C. 237. Tarbart and Tabart. Bingham v. Dickie, 5 Taunt. 814. Tarpley and Tapley. Tarpley v. State, 79 Ala. 271. Tragar and Troyer. Troyer v. Wood. 96 Mo. 478.

W.—Wood and Woods. Neiderluck v. State, 21 Tex. App. 320. Workman and Wortman. LaFayette v. Workman, 107 Ind. 404. Weston and Wesson. Morgan v. State, 61 Ind. 447. Wheeler and Wheelen. Whelen v. Weaver, 93 Mo. 430. Wilkin and Wilkins. Brown v. State (Tex. 1889), 11 S. W. Rep. 1022. Wilhelm and William. Becker v. German M. F. Ins. Co., 68 Ill. 412. Williston and Willison (Christian names). Bull v. Franklin, 2 Speers (S. Car.) 46. Pat Whelan and P. Whelan or D. Whelan. Murray v. State, 6 Week. Jur. 463.

Emily J. Schweitzer will not be presumed to be the same person as E. J. Schweitzer. Yount v. State, 64 Ind. 443.

An indictment for assault gave the name of the person assaulted in different clauses, as McKaskey, McKlaskey and McKloskey, and the evidence showed that his name was McCoskey. Held, after conviction, that the indictment was insufficient. Black v. State, 57 Ind. 109.

1. Schooler v. Ashurst, 3 Marsh. (Ky.) 493.

2. In Sayres v. State, 30 Ala. 15, STONE, J., referring to the issue of *idem sonans*, said: "Generally such issue is triable by the court without evidence, and not by the jury. We will not say that there might not be cases in which it would be permissible to introduce evidence on the question. A foreign

name might be in issue; and although the orthography of the supposed names might, according to the laws of our language, require us to affix to each a different sound, yet, in fact, the foreign orthography might be there sounded precisely as the letters employed by the American pleader would be here pronounced. Whether in such case the proper issue is *idem sonans*, or that the party is as well known by one name as the other, or if the former, whether the issue thereby becomes one for the jury, we do not now determine."

In the English case of Rex v. Davis, 4 New Sess. Cas. 411; s. c., 5 Cox C. C. 233, the rule of procedure is stated to be that: "If two names spelled differently necessarily sound alike, the court may, as matter of law, pronounce them to be *idem sonans*; but if they do not necessarily sound alike, the question whether they are *idem sonans* is a question of fact for the jury." This rule has been recognized and applied in Com. v. Donovan, 95 Mass. 57; Com. v. Jennings, 121 Mass. 47; Com. v. Warren, 143 Mass. 568; Weitzel v. State, 28 Tex. App. 523; Underwood v. State, 72 Ala. 220. See also Whart. Crim. Ev. (8th ed.), § 96; 1 Bish. Crim. Proc. (3rd ed.) 792, note 3.

In Taylor v. Com., 20 Gratt. (Va.) 825, the court said that "the question is one for the jury and not for the court, which cannot instruct the jury, as matter of law, that any two names are or are not of the same sound."

If a defendant submits to the court the question whether a name as proved is *idem sonans* with the name as alleged, and does not ask to have the question presented to the jury, and there is nothing of record to show how the names are pronounced, the appellate court will not interfere with the determination of the trial court. Com. v. Gill, 14 Gray (Mass.) 400.

**Judicial Notice.**—As a general rule,

**3. Names Beginning with Different Letter.**—Though two names be commonly pronounced alike, yet if the first letter of each is different, the rule of *idem sonans* cannot be invoked so as to bind third persons by constructive notice of public records indexed according to the different letter. Thus, although Yoest and Joest are pronounced alike in German, yet searchers for record encumbrances against "Yoest" are not bound to consult the indexes under the letter J.<sup>1</sup>

**XXI. WORDS OF IDENTIFICATION.**—Though the name of a party or third person be incorrectly given, yet the mistake may be sometimes cured by accompanying words of identification.<sup>2</sup>

**XXII. NAMES ON BALLOTS.**—While there has not been an entire unanimity of decision upon questions as to the effect of errors occurring in the names of candidates for office, as printed upon the tickets or written by the voters, it may be stated to be the prevailing tendency of courts and legislative bodies to disregard all such errors where, from the ballot itself and the circumstances surrounding the election, it can be ascertained with reasonable certainty that the name erroneously spelled was intended by the voter to designate the candidate whose name it resembles.<sup>3</sup> The

judicial notice will not be taken of the fact that two names are ordinarily pronounced so nearly alike as to be indistinguishable. *Donnel v. United States*, 1 *Morris* (Iowa Ty.) 141; s. c., 39 Am. Dec. 457.

**Instances.**—Whether "Flory" and "Fleur" are identical is a question for the jury. *Imhoff v. Fleurer*, 2 *Phila.* (Pa.) 35. So as to "Gigger" and "Jiger" or "Jigr." *Com. v. Jennings*, 121 *Mass.* 47. So as to whether "Hennessey" and "Hemessey" are usually sounded alike. *Com. v. Mehan*, 11 *Gray* (Mass.) 321. So as to the name "Celestia" and "Celeste." *Com. v. Warren*, 143 *Mass.* 568.

Where the name of the owner in an indictment for theft is alleged to be "Fraude" and is proven to be "Freude," the question of variance is for the jury, and it is error to rule as matter of law that the names are *idem sonans*. *Weltzel v. State*, 28 *Tex. App.* 523.

See also *Underwood v. State*, 72 *Ala.* 220; *Smurr v. State*, 88 *Ind.* 504; *Selbert v. State*, 95 *Ind.* 471.

1. *Heil and Lauer's Appeal*, 40 *Pa. St.* 453. The searcher is not required to know how the name he is examining may be spelled according to the rules applicable to foreign languages. *Buchan v. Sumner*, 2 *Barb. Ch.* (N. Y.) 197; s. c., 47 *Am. Dec.* 305. See also *Johnson v. Hess* (Ind. 1890), 25 *N. E. Rep.* 445.

2. In *Schee v. La Grange*, 78 *Iowa* 101, it was held that a notice and petition designating the defendant as "Charles A. Luckenbough, assignee of Benjamin G. Unangat," sufficiently named such assignee, though his true name was Charles A. Luckenbach. So, where John C. Hopkins and wife were defendants, the wife's initials being T. P. B., and in the notice they were given as P. T. B., but she was further designated as "the wife of John C. Hopkins," the court held that such descriptive words were sufficient to apprise her that she was the person intended. *Fanning v. Krapf*, 68 *Iowa* 244; s. c., 26 *N. W. Rep.* 133. So, where an indictment charged the defendant with entering upon the land of S. Sicily Garrett, "wife of John H. Garrett" and the evidence showed that the owner's name was Sicily Garrett, and that she was the wife of the man named, the variance was held immaterial. *Sewell v. State*, 82 *Ala.* 57.

3. Thus, where ballots were cast at an election for Henry M. and also for Joseph M., and it was proved in a contest of election that Henry M. was the Democratic nominee and another was the Republican nominee, and there were no other candidates for that office at that election and no person by the name of Joseph M. resided in the town or was known to the witnesses, residents of such town, and the name of Joseph M.

rule of *idem sonans* is by all the courts applied to names on the ballots.<sup>1</sup>

**XXIII. NAMES IN LEGAL PROCEEDINGS, MISNOMER—1. In General.**—There are a number of rules governing the manner of stating the names of parties and third persons, which apply to both criminal and civil proceedings. Other principles belong distinctively to, or are more rigidly enforced in, criminal cases.<sup>2</sup> Both classes will be treated of in this connection.

Although, as has already been stated, the courts will sometimes presume that a single letter, more especially a vowel, is itself a Christian name, the general rule is that it is not sufficient to designate a party, either plaintiff or defendant, by the initial letter or letters of the Christian name. The full name must be given for purposes of identification.<sup>3</sup>

But the designation of the parties by their initials and surnames only, or a misnomer, is not a ground of general demurrer. The remedy for such defects is by special demurrer or plea in abatement;<sup>4</sup> or, under the reformed procedure, by a motion to amend.<sup>5</sup>

Even the entire omission of the Christian name of a party is not a ground of general demurrer.<sup>6</sup>

It has been held immaterial that the plaintiff's name does

was printed on a number of Democratic ballots and voted by mistake, held, that the extraneous evidence admitted to show who was intended by Joseph M. was properly received, and that the ballots cast for Joseph M. counted for Henry M. McKennon *v. Malzacher*, 110 Ill. 305; s. c., 5 Am. & Eng. Corp. Cas. 492. See title ELECTIONS, 6 Am. & Eng. Encyc. of Law 346, 347. See also *Gumm v. Hubbard*, 97 Mo. 311; *Kreitz v. Behrensmeyer*, 125 Ill. 141; *State v. Williams*, 95 Mo. 159.

1. *Newton v. Newell*, 26 Minn. 529; *Kreitz v. Behrensmeyer*, 125 Ill. 141.

2. See titles INDICTMENT, 10 Am. & Eng. Encyc. of Law 483; CRIMINAL PROCEDURE, 4 Am. & Eng. Encyc. of Law 769. See also PLEADING; PRACTICE.

3. *Turner v. Fitt*, 3 M. G. & S. 701; *Oakley v. Pegler* (Neb. 1890), 46 N. W. Rep. 920; *Knox v. Starks*, 4 Minn. 20; *Gardner v. McClure*, 6 Minn. 250; *Kenyon v. Semon* (Minn. 1890), 45 N. W. Rep. 10; *Wilthaus v. Ludecus*, 5 Rich. L. (S. Car.) 326; *Norris v. Graves*, 4 Strobb. (S. Car.) 32; *Beggs v. Wellman*, 82 Ala. 391; *Labat v. Ellis*, Taylor (N. Car.) 148; *Chappell v. Proctor*, Harp. (S. Car.) 49; *Seeley v.*

*Boon*, 1 N. J. L. 138; Bliss Code Pl., § 146a.

4. *Turner v. Fitt*, 3 M. G. & S. 701; *Wilthaus v. Ludecus*, 5 Rich. L. (S. Car.) 326; *Woodbury v. Dye*, 10 Rich. L. (S. Car.) 31; *Seeley v. Boon*, 1 N. J. L. 138; *Peden v. King*, 30 Ind. 181; *Handley v. Ludington*, 3 W. Va. 53; *Miller v. Hay*, 3 Exch. 14; *Rust v. Kennedy*, 4 M. & W. 586; s. c., 7 Dowl. P. C. 199, 3 Jur. 198.

5. *Kenyon v. Semon* (Minn. 1890), 45 N. W. Rep. 10; *Hoffman v. Dickenson*, 31 W. Va. 142.

Unless the objection that the initials only are given is raised by motion to require the full Christian name to be set out, it will be regarded as waived. *Walgawood v. Randolph*, 22 Neb. 493; *Simonton v. Rohm* (Colo. 1890), 23 Pac. Rep. 86. And it has been held proper to dismiss a suit where the plaintiff's agent is unable to comply with an order to set out the plaintiff's full Christian name at or before the time issue is joined. *Fisher v. Northup*, 79 Mich. 287.

6. *Hahn v. Behrman*, 73 Ind. 120; *Hopper v. Lucas*, 86 Ind. 43; *Morningstar v. Wiles*, 96 Ind. 458.

In *Ohio* it is held a fatal defect to in-

not appear in the caption, if it does in the body of the complaint.<sup>1</sup>

As a general rule, misnomer can be taken advantage of only by timely objection in the nature of a plea in abatement.<sup>2</sup>

A plea in abatement or similar objection for misnomer must disclose the defendant's true name.<sup>3</sup> One defendant cannot object to a misnomer of his codefendant.<sup>4</sup>

After a trial under the general issue, an appeal, and order for new trial, a plea in abatement for defects in names will not be entertained.<sup>5</sup> Nor can the objection be raised for the first time on appeal.<sup>6</sup>

By pleading to the indictment, the defendant admits his name as laid therein, and is estopped to set up misnomer.<sup>7</sup> And if he is indicted by a wrong name and when arraigned declines to give his true name, he cannot afterwards complain that he was tried by the wrong name.<sup>8</sup>

If a person customarily uses the initial letter only of his Christian name, and is not known by any other name, he may be sued or indicted under such initial, and evidence of the use and reputation will be a sufficient answer to his plea of misnomer.<sup>9</sup> But an indictment against a person by the initials only of his Christian name is bad on a plea in abatement, unless it is alleged that his Christian name is to the grand jury unknown except as set out.<sup>10</sup>

sert only the initials of the plaintiff's Christian name in the writ. *Herf v. Shulze*, 10 Ohio 263.

1. *Collins v. Lightle*, 50 Ark. 97.

2. *Sunapee v. Eastman*, 32 N. H. 470; *State v. Farr*, 12 Rich. (S. Car.) 24; *First Nat. Bank v. Jagers*, 31 Md. 38; 6 c., 100 Am. Dec. 53; *Peden v. King*, 30 Ind. 181; *Melvin v. Clark*, 45 Ala. 285; *Hudson v. Poindexter*, 42 Miss. 304; *Salisbury v. Gillett*, 3 Ill. 290; *Moss v. Flint*, 13 Ill. 570; *Pendleton v. Bank of Kentucky*, 1 T. B. Mon. (Ky.) 174; *Hanly v. Blanton*, 1 Mo. 49; *Thompson v. Elliott*, 5 Mo. 118; *Plymouth Christian Soc. v. Macomber*, 3 Metc. (Mass.) 235; *Smith v. Bowker*, 1 Mass. 76; *Jewett v. Burroughs*, 15 Mass. 469; *Porter v. Cresson*, 10 S. & R. (Pa.) 257; *Pate v. Bacon*, 6 Munf. (Va.) 219; *Mann v. Carley*, 4 Cow. (N. Y.) 148; *Waterbury v. Mather*, 16 Wend. (N. Y.) 611; *Barnes v. Perine*, 9 Barb. (N. Y.) 202; *Scull v. Briddle*, 2 Wash. (U. S.) 200; *Baker v. Bessey*, 73 Me. 472; 8 c., 40 Am. Rep. 377; *Conaway v. Hays*, 7 Blackf. (Ind.) 159.

3. *Louisville etc. R. Co. v. Hall*, 12 Bush (Ky.) 132; *Union Bank v. Tilard*, 26 Md. 446; *Bliss Code Pl.*, § 146a.

4. *Atkinson v. Clapp*, 1 Wend. (N. Y.) 71.

5. *Lanier v. Cocke*, 6 Munf. (Va.) 580; *Murdock v. Hurndon*, 4 Hen. & M. (Va.) 200.

6. *Traver v. Eighth Ave. R. Co.*, 4 Abb. App. Dec. (N. Y.) 422; *Dawson v. State*, 33 Tex. 491.

7. *Mayo v. State*, 7 Tex. App. 342; *Musquez v. State*, 41 Tex. 226.

8. *State v. Burns*, 8 Nev. 251.

9. *City Council v. King*, 4 McCord L. (S. Car.) 487; *Diggs v. State*, 49 Ala. 311; *Vandermark v. People*, 47 Ill. 122; *Singer Mfg. Co. v. Paul*, 48 Ind. 98; *Rockwell v. State*, 12 Ohio St. 427; *Taylor v. Rossiter*, 2 Miles (Pa.) 355; *Jones's Estate*, 27 Pa. St. 336.

**Business Name.**—Where the defendant, whose name was Oscar R. Pegles, was in the habit of signing checks and doing business at banks and other places by the name of O. R. Pegles, those initials will be regarded as his business name, and a default judgment recovered against him by that name is not subject to collateral attack. *Oakley v. Pegles* (Neb. 1890), 46 N. W. Rep. 920. See also *Cummings v. Rice*, 9 Tex. 527.

10. *United States v. Upham*, 43 Fed. Rep. 68.

To a plea of misnomer, it is a sufficient replication that the party is as well known by the name used in the process or pleading as by the one he alleges.<sup>1</sup>

If the name of the defendant or of a third person be correctly given in the charging part of the indictment, an error in a subsequent unnecessary repetition of the name may be disregarded as surplusage.<sup>2</sup> But it is not sufficient to give the defendant's name in the caption alone, omitting it entirely from the charging part.<sup>3</sup>

The rule that the full Christian name and surname must be given in a pleading is not so strictly enforced in respect to papers subsequently filed in the cause. As to these, any designation which clearly identifies the party is sufficient.<sup>4</sup>

**2. Initials of Third Persons.**—The rule that initials cannot be used to designate an individual is not so strictly applied in cases of names of persons not parties to the proceeding. It is generally held to be sufficient, in giving the names of third persons in indictments, or in civil actions, to designate them by the initials of their Christian names.<sup>5</sup> It has been held, however, that the full name of the owner of property alleged to have been stolen must be given in the indictment, if ascertainable.<sup>6</sup>

**3. Partnership Names.**—Where a partnership, a part of whose firm name is "Co.," "Bros.," or "Sons," sues, a declaration in the firm name, without setting out the names of all the partners, is bad on demurrer or motion to dismiss, the reason being that there are apparently parties plaintiff whose names are not given at all.<sup>7</sup>

**4. Change of Name Pending Action.**—It is no cause of abatement that the plaintiff has had his name changed during the pendency of the action; but it is proper to suggest such change upon the record.<sup>8</sup>

1. *Petrie v. Woodworth*, 3 Cal. (N. Y.) 219; *Goodenow v. Tappan*, 1 Ham. (Ohio) 61; *Frye v. Hinkley*, 18 Me. 320; *Taylor v. Rossiter*, 2 Miles (Pa.) 355; *Norris v. Graves*, 4 Strobbh. (S. Car.) 32.

2. *Com. v. Hunt*, 4 Pick. (Mass.) 252; *Greeson v. State*, 5 How. (Miss.) 42; *Rex v. Morris*, 1 Leach 109.

3. *Campbell v. State*, 10 Ind. 420.

In *State v. Hand*, 6 Ark. 165; s. c., 62 Am. Dec. 689, the defendant was indicted by the name of "Hawkins —, late of," etc., and in a subsequent part of the indictment it was alleged that "he, the said Hawkins Hand, did," etc. The defendant pleaded, in abatement, that his name was not Hawkins, but was Hawkins Hand, and the plea was held good, notwithstanding the fact that the correct name was to be found in the indictment.

4. *Gordon v. State*, 59 Ind. 75.

5. *State v. Brite*, 73 N. Car. 26; *State*

*v. Black*, 31 Tex. 560; *Mead v. State*, 26 Ohio St. 505; *State v. Seeley*, 30 Ark. 162; *Ferguson v. Smith*, 10 Kan. 396.

6. *Willis v. People*, 1 Scam. (Ill.) 399. In this case, the property stolen was alleged to be the property of "T. D. Hawke and E. Dobbins, doing business in the town of E., under the style and firm of T. D. Hawke & Co.," but it was held that their Christian names ought to have been given.

7. *Weisz v. Davey* (Neb. 1890), 44 N. W. Rep. 470; *Hays v. Lanier*, 3 Blackf. (Ind.) 322; *Hughes v. Walker*, 4 Blackf. (Ind.) 51; *Barrackman v. Worthington*, 5 Blackf. (Ind.) 213; *Tanner v. Swearengen*, 6 Blackf. (Ind.) 277; *Bentley v. Smith*, 3 Cal. (N. Y.) 169; *Brubaker v. Poage*, 1 T. B. Mon. (Ky.) 123; *Revis v. Lamme*, 3 Mo. 207. See also PARTNERSHIP.

8. *Town of Ottawa v. La Salle Co.*, 11 Ill. 654.

**5. Name Unknown.**—In criminal cases, in warrants as well as in indictments, if the name of the accused or of a third person is not known, and cannot by due diligence be ascertained, it is sufficient to state that the name is not known; and the accused may be proceeded against under any fictitious name, the right one to be inserted when discovered.<sup>1</sup> It is not, however, necessary in such cases to give a fictitious name; the name may be entirely omitted, and the identity shown by words of description.<sup>2</sup>

It is not to be implied from circumstances, as shown by the indictment, that the names of third persons who are referred to therein, but whose names are not given, are unknown. There must be a positive averment to that effect.<sup>3</sup> The allegation that the true name is unknown need not be proven beyond a reasonable doubt.<sup>4</sup>

**6. Alias Dictus.**—When a person is known by two or more different names, and it is uncertain which one is his true name, he may be sued or indicted under any one of them, with an averment that he is also, or otherwise known by the other name—the common practice being to give the two names thus: "Smith *alias* Brown."<sup>5</sup> The omission of the word *dictus* after the word *alias* does not render the pleading uncertain or bad.<sup>6</sup> Christian names may be set out in the same way,<sup>7</sup> though the contrary was formerly held in *England*.<sup>8</sup> And so may the names of third persons.<sup>9</sup> In all cases it is sufficient to prove that the person in question is known by either one of the names given.<sup>10</sup>

It is a plain proposition that when a person executes a contract or deed in a name differing in any respect from his true name, he will not be allowed, on that account alone, to deny that

See also *Pennsylvania Co. v. Sloan*, 125 Ill. 72.

1. See also *INDICTMENT*, 10 Am. & Eng. Encyc. of Law, 483-485; *CRIMINAL PROCEDURE*, 4 Am. & Eng. Encyc. of Law 769, 770, 780.

*Rutherford v. State*, 13 Tex. App. 92; *Bryant v. State*, 36 Ala. 270; *Cameron v. State*, 13 Ark. 712; *State v. O'Donald*, 1 McCord L. (S. Car.) 532; *State v. Burns*, 8 Nev. 251; *People v. Jim Ti*, 32 Cal. 64; *State v. White*, 32 Iowa 19.

2. *Harris v. State*, 2 Tex. App. 102.

**Omission of Name.**—In *State v. Jackson*, 4 Blackf. (Ind.) 49, the deceased was described as "an Indian of this State, of the Miami nation of Indians, the name of which said Indian to the jurors aforesaid is wholly unknown," and it was held sufficient. So in *Reed v. State*, 16 Ark. 499, where the deceased was described as "a certain Wyandotte Indian, whose name is unknown to the grand jury." So in *Cameron v. State*, 13 Ark. 712, where the defendant was

indicted for assaulting "one Rice, whose Christian name is to the grand jurors aforesaid unknown." But in *State v. Geiger*, 5 Iowa 484, an indictment describing the defendant as "a man in Turner Hall, whose name to the grand jurors is unknown," was held fatally indefinite.

3. *State v. O'Donald*, 1 McCord L. (S. Car.) 532.

4. *Guthrie v. State*, 16 Neb. 667.

5. *Anonymous*, 3 Salk. 238; *Kennedy v. People*, 39 N. Y. 245; *Reid v. Lord*, 4 Johns. (N. Y.) 118; *Harrison v. State*, 6 Tex. App. 256; *Williams v. State*, 13 Tex. App. 285; *Rutherford v. State*, 13 Tex. App. 92; *U. S. v. Wright*, 16 Fed. Rep. 112; *Haley v. State*, 63 Ala. 89.

6. *Kennedy v. People*, 39 N. Y. 245.

7. *Lee v. State*, 55 Ala. 259.

8. *Rex v. Newman*, 1 Ld. Raym. 562.

9. *Kennedy v. People*, 39 N. Y. 245.

10. *Williams v. State*, 13 Tex. App. 285; *Evans v. State*, 62 Ala. 6.



it is his contract or deed.<sup>1</sup> An action thereon against him should be brought in his true name, and the manner of executing it shown by an *alias dictus*.<sup>2</sup>

One to whom an instrument is made payable by a name differing from his true name, should properly sue thereon in his true name, and aver that the instrument was executed to him by the wrong name, giving it.<sup>3</sup>

**7. Names in Judgments.**<sup>4</sup>—The entry of a judgment against "the defendants," or in favor of "the plaintiffs," is good, even though the names of the parties are not specified in the judgment. Their names are to be ascertained by the process, pleadings and proceedings in the action.<sup>5</sup> So a judgment for plaintiffs in their partnership name only is good where their individual names are given in the pleadings.<sup>6</sup> So is a judgment against a partnership, though their firm name is transposed.<sup>7</sup> But if the party in whose favor or against whom the judgment is rendered is not named therein, and is not referred to so as to be ascertainable from the pleadings, the judgment is a mere nullity.<sup>8</sup>

A judgment is not void where there were real parties in interest in the action, a real controversy and a real decision, though it was prosecuted by the real plaintiff under a fictitious name.<sup>9</sup> Material errors in the defendant's name, and variances therein between the pleadings and the judgment, are often sufficient to vitiate the judgment.<sup>10</sup>

1. *Fallon v. Kehoe*, 38 Cal. 44; s. c., 99 Am. Dec. 347; *O'Meara v. North American Min. Co.*, 2 Nev. 112; *Boothroyd v. Engles*, 23 Mich. 19.

*Martindale, Conveyancing*, 64; *Com. Dig. tit. Fail, B. 1*.

2. *Wilson v. Shannon*, 6 Ark. 196; *Lowell v. Morse*, 1 Metc. (Mass.) 473; *Blood v. Crandall*, 28 Vt. 396.

3. *Nicholay v. Kay*, 6 Ark. 59; s. c., 42 Am. Dec. 680; *Jester v. Hopper*, 13 Ark. 43; *Lowell v. Morse*, 1 Metc. (Mass.) 473; *Commercial Bank v. French*, 21 Pick. (Mass.) 486; *Medway Cotton Manufactory v. Adams*, 10 Mass. 360; *Board of Education v. Greenbaum*, 39 Ill. 609; *Pinckard v. Wilmine*, 76 Ill. 453; *Taylor v. Strickland*, 37 Ala. 642; *Wood v. Coman*, 56 Ala. 283; *Leaphardt v. Sloan*, 5 Blackf. (Ind.) 278; *Patterson v. Graves*, 5 Blackf. (Ind.) 593; *Robb v. Bailey*, 13 La. An. 457.

4. See also title JUDGMENTS, 12 Am. & Eng. Encyc. of Law 76, 106.

5. *Finnegan v. Manchester*, 12 Iowa 521; *Boyd v. Baynham*, 5 Humph. (Tenn.) 386; s. c., 42 Am. Dec. 438; *Wilson v. Nance*, 11 Humph. (Tenn.) 189; *Marshall v. Hill*, 8 Yerg. (Tenn.) 101; *Thomas v. Sterns*, 33 Ala. 137; *Collins v. Hyslop*, 11 Ala. 508; *Little*

*v. Birdwell*, 27 Tex. 688; *Hays v. Yarbrough*, 21 Tex. 487; *Claggett v. Blanchard*, 8 Dana (Ky.) 41.

6. *Brooks v. Ratcliff*, 11 Ired. L. (N. Car.) 321; *Cohoon v. Morton*, 4 Jones L. (N. C.) 256; *McNamee v. Huffman*, 3 Har. (Del.) 425; *Marshall v. Hill*, 8 Yerg. (Tenn.) 101; *Condry v. Henley*, 4 Stew. & P. (Ala.) 9; *Davis v. Kline*, 76 Mo. 310.

7. *Loyd v. Hicks*, 31 Ga. 140.

In *Pennsylvania*, judgments against partnerships, without setting out the names of the members, are not liens as respects subsequent purchasers and encumbrancers, without actual notice. *York Bank's Appeal*, 36 Pa. St. 458; *Smith's Appeal*, 47 Pa. St. 128; *Stephens' Appeal*, 38 Pa. St. 9.

8. A decree entered in favor of the "legatees of Phillip Joseph," without giving the names of such legatees, cannot be enforced by execution, nor can a writ of error be maintained against the legatees by that name. *Joseph v. Joseph*, 5 Ala. 280. See also *Turner v. Dupree*, 19 Ala. 198.

9. *McNair v. Taber*, 21 Minn. 175.

10. See also title JUDGMENTS, 12 Am. & Eng. Encyc. of Law 76, 106.

**Wrong Name.**—A judgment is of no

Whether the docket entry of a judgment affords constructive notice of its existence to subsequent encumbrancers or purchasers from the judgment debtor, depends upon the accuracy with which the name is given in the record. Instances where this question has been considered are given in the note.<sup>1</sup>

**8. Statute of Additions.**—By the English statute, 1 Hen. V, ch. 5, known as the statute of additions, indictments in certain cases were required to describe the defendants by adding to their names their "estate, degree or mystery, and place of residence." This statute has been held to be in force in some of the States of the

force against a party who made no appearance, and whose name is different from the name given in all the proceedings to designate the defendant, though process in the action was served upon him and judgment was rendered against him in his true name. *Moulton v. De McCarty*, 6 Robt. (N. Y.) 470.

**Christian Name.**—Where a writ and declaration were against "David" and the verdict and judgment against "Daniel," the variance was held to vitiate the judgment. *Sweazy v. Nettles*, 2 Mo. 6.

Where a person was sued by the Christian name of James, service was returned on John, and judgment entered against J., the judgment was held bad unless there was something of record to show that the person served was the defendant. *Sutter v. Cox*, 6 Cal. 415.

In an action against "Frederick D. Conrad," a judgment against "Daniel Frederick Conrad, the defendant," is good. *Conrad v. Griffey*, 11 How. (U. S.) 480.

**1. Junior.**—A judgment against M. C., Jr., under the name of M. C., becomes a lien upon the land of M. C., Jr., and is constructive notice to all persons, though there is another M. C., the defendant's father, residing in the same county. *Bidwell v. Coleman*, 11 Minn. 78.

**Middle Name.**—The record of a judgment against William Mankedick is not constructive notice to purchasers in good faith from H. W. Mankedick, who had never heard him called by the name of William. *Johnson v. Hess* (Ind. 1890), 25 N. E. Rep. 445.

**Middle Initial.**—It is the successful party's duty to see that the judgment is correctly entered, and if the omission of the judgment debtor's middle initial, which alone distinguishes him from others of the same name, deceives the purchaser of the defendant's real property, the judgment cannot be enforced against such purchaser. *Wood v.*

*Reynolds*, 7 W. & S. (Pa.) 406; *Hutchinson's Appeal*, 92 Pa. St. 186.

But unless it be made to appear that purchasers have been misled thereby, the omission of the defendant's middle initial does not affect the lien of the judgment. *Clute v. Emmerich*, 26 Hun (N. Y.) 10; *Hopper v. Lucas*, 86 Ind. 43.

In *Pennsylvania* the rule is well settled that the wrongful introduction or omission of a middle name or letter will postpone the judgment to one subsequently properly entered. *Scott v. Irwin*, 2 Chest. Co. Rep. (Pa.) 137; *Wood v. Reynolds*, 7 W. & S. (Pa.) 406; *Jones's Estate*, 27 Pa. St. 336. See also *Perkins v. Nichols*, 1 Del. Co. Rep. (Pa.) 519.

But it seems that knowledge of the facts by the subsequent lienholder will cause his postponement. *King v. King*, 2 Chester Co. Rep. (Pa.) 45.

In *Geller v. Hoyt*, 7 How. Pr. (N. Y.) 265, an error in the docket entry of the initial letter of the judgment debtor's middle name was corrected and the judgment declared a lien from the date of the original docketing.

**Idem Sonans.**—The index of a judgment against William Burger is not constructive notice of a judgment against William Buergee. *Schumaker v. Schoen*, 19 Pitts. L. J. (Pa.) 69.

**Docketing Under Wrong Letter.**—Docketing a judgment under the letter P, the initial of the judgment debtor's Christian name, and not under the letter S, the initial of his surname, is no compliance with the New York statute prescribing the docketing of judgments in an "alphabetical docket." *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165; s. c., 47 Am. Dec. 385.

**Omitting Christian Name.**—A judgment docketed against "Mitchell, Green . . . Wilson," omitting their Christian names, is not preferred to subsequent encumbrances. The judg-

Union,<sup>1</sup> but in others it is regarded as inapplicable, or has been changed by statutory provisions.<sup>2</sup>

**9. Effect of Sustaining Plea; Amendment.**—At common law in criminal cases, the indictment abated if the plea of misnomer was sustained;<sup>3</sup> but the more modern practice, particularly under the prevailing statutes of amendment, is to have the true name inserted when ascertained, and the trial to proceed under the indictment as amended.<sup>4</sup>

In civil proceedings nothing is gained by sustaining the plea, except to have the correct name inserted in the record.<sup>5</sup>

If the defendant has been sued under a wrong name, and the right one is disclosed by the answer, he cannot object to an amendment of the complaint accordingly, even after the evidence is in;<sup>6</sup> or after judgment.<sup>7</sup>

ment creditor was bound to see his judgment properly entered, so as not to deceive other creditors or purchasers, or put them to unnecessary trouble or risk. *Ridgway's Appeal*, 15 Pa. St. 181.

1. In *Alabama*, *Morgan v. State*, 19 Ala. 556.

In *Maryland*, *State v. Hughes*, 2 Har. & M. (Md.) 479.

*Maine*.—*State v. Bishop*, 15 Me. 122; *State v. Nelson*, 29 Me. 329.

*Massachusetts*.—*Com. v. Lewis*, 1 Metc. (Mass.) 151.

*Pennsylvania*.—*Com. v. France*, 2 Brewst. (Pa.) 568.

*Virginia*.—*Com. v. Sims*, 2 Va. Cas. 374.

*Georgia*.—*Studstil v. State*, 7 Ga. 2.

*Kentucky*.—*Com. v. Rucker*, 14 B. Mon. (Ky.) 184.

*New Hampshire*.—*State v. Moore*, 14 N. H. 451.

*North Carolina*.—*State v. Newmans*, 2 Car. L. Repos. (N. Car.) 74.

2. In *Rhode Island* the requirement has been abolished by statute, yet to give in an indictment a false addition or degree has been held to be fatal, as where a *feme covert* was indicted as "Spinster." *State v. Daly*, 14 R. I. 510. So it has been held in *England* that to describe a woman as "widow" when she is known to be married, is a fatal variance, though no description was necessary. *Rex v. Deeley*, 1 Wood. C. C. 303; s. c., 4 C. & P. 579.

In *Indiana*, the statute of additions is considered inapplicable. *State v. McDowell*, 6 Blackf. (Ind.) 49, in which DEWEY, J., said: "The objection urged against the indictment is that the defendant is not described by the addition of his degree, or mystery, and place of residence. By the common

law no addition was required in indictments against persons under the degree of a Knight. 1 Chit. C. L. 204. The statute of additions, 1 Hen. V, ch. 5, enacts that defendants shall be described by adding to their names their estate, degree or mystery, and place of residence, in all cases in which 'the *exigent* shall be awarded.' . . . The *exigent*, being a step in the proceedings of outlawry, is unknown to our law. It is therefore, evident that the statute of additions, from its own terms, is not applicable to prosecutions in this State; and it is equally clear that the common law does not require the defendant to be described by his addition."

3. 1 Bac. Abr. 10; *State v. Middleton*, 5 Port. (Ala.) 484; *Findley v. People*, 1 Mich. 234; *Rawls v. State*, 8 Smed. & M. (Miss.) 599.

4. See *State v. Jackson*, 4 Blatchf. (Ind.) 49; *ante*, XXIII, § 5, note 2.

5. 1 Chit. Pl. 246; *Murray v. Hubbard*, 1 B. & P. 645; *Dickinson v. Bowlers*, 16 East 110; *Rogers v. Boehm*, 2 Esp. 702; *Reeves v. Slater*, 7 Barn. & C. 487; *Waterbury v. Mather*, 16 Wend. (N. Y.) 611.

6. *Ramsey v. Cortland Cattle Co.*, 6 Mont. 408; *Oakley v. Pegles* (Neb. 1890), 46 N. W. Rep. 920.

7. *McDonald v. Swett*, 76 Cal. 257.

In *Anderson v. Horn*, 23 Abb. N. Cas. (N. Y.) 475, where defendant was sued by the name of John Horn, but in his answer he described himself as John A. Horan, the court, on an application to vacate the judgment, ordered the parties to appear for oral examination in order to ascertain the defendant's true name or his *alias dictus*, so as to decide whether or not he had been correctly proceeded against.

Where the plaintiff has made a mistake in his own name in the complaint, the court may permit him to amend.<sup>1</sup> But in *Maryland* it has been held that, under the code, where an attorney mistakes the name of his client in the declaration, he cannot have the error amended.<sup>2</sup>

It has been held that a company may acquire a name other than its original corporate name as a trade mark, and that another company will be enjoined from using it.<sup>3</sup>

**XXIV. NAMES OF CORPORATIONS**<sup>4</sup>—1. In General.—Corporations should, of course, sue or be sued by their corporate names, and not by the individual names of their members.<sup>5</sup> And when an

1. *Weaver v. Young*, 37 Kan. 70; *Woodson v. Law*, 7 Ga. 105 (where the plaintiff was permitted to change his name from William to James).

But in *Bingham v. Dickie*, 5 Taunt. 814, the court refused to allow an amendment of a clerical error in the spelling of the plaintiff's name in a bill piece, unless the sureties thereon would consent.

2. *Thanhauser v. Savins*, 44 Md. 410.

3. *Goodyear Rubber Co. v. Goodyear Rubber Mfg. Co.*, 8 Am. & Eng. Corp. Cas. 317. See also **TRADE MARK**. *Drummond v. Tobacco Co.*, 10 Am. & Eng. Corp. Cas. 9.

4. See **CORPORATIONS**, 4 Am. & Eng. Encyc. of Law 203, 206; 188 note 5; **FOREIGN CORPORATIONS**, 8 Am. & Eng. Encyc. of Law 329.

5. *Illinois State Hospital etc. v. Higgins*, 15 Ill. 185; *Campbell v. Brunk*, 25 Ill. 210; *Town of Fort Wayne v. Jackson*, 7 Blackf. (Ind.) 36.

"Where corporate rights and interests are affected in any way wrongfully and injuriously, those rights and interests, generally speaking, and unless some special ground be shown, must be asserted and defended, both at law and in equity, in the corporate name." *Bradley v. Richardson*, 2 Blatchf. (U. S.) 343.

"A court in a declaration in debt commenced as follows: A. P. Hay and others (naming them), being a body corporate and politic, known by the name of the Board of Trustees of the Clark County Seminary, and being the regular successors in office of Jno. C. Parker and others (naming them), were summoned to answer, etc. It then stated that the last named persons, Parker and others, being the board of trustees, etc., by an agreement, sealed with the seals of the trustees last mentioned,

promised, etc., that neither they nor the defendants, being their successors, had paid, etc. Held, that this count was insufficient; that the addition to the defendants' names of the words 'being a body corporate, etc.' was a mere *descriptio personarum*; that the defendants must be considered, under this count, as being sued in their individual capacities, on a contract to which they were not parties, and by which they were not bound; and also that if, as the plaintiff contended, the agreement sued on was binding on the board of trustees of the Clark County Seminary as a corporation, the suit should have been brought against the corporation by its corporate name." *Hay v. McCoy*, 6 Blackf. (Ind.) 69.

Where one subscribed for certain shares in a turnpike, and promised to pay to A B, agent of the proprietors, all assessments, etc., it was held that the agent could maintain no action for the assessments unpaid, but that the promise would support an action by the proprietors in their corporate capacity. *Gilmore v. Pope*, 5 Mass. 491.

In *Commercial Bank v. French*, 21 Pick. (Mass.) 486, the court held that where a promissory note was made payable "to the cashier of the Commercial Bank or his order," and the consideration proceeded from the bank, an action on the note might be maintained in the name of the bank as the promisee. *MORTON, J.*, observes: "Had the note been made to the cashier by name, the addition of 'cashier of the Commercial Bank' might have been considered as *descriptio personarum*, used to designate, as between him and the bank, the relation he bore to it in the transaction, and the individual might have been deemed the promisee. But such was not the fact." . . . See also *Medway Cotton Manufactory v.*

offence is charged in reference to the property or rights of a private corporation, its corporate capacity should be alleged,<sup>1</sup> and its corporate name should be stated with substantial accuracy;<sup>2</sup> but a slight variation in the name, such as would not raise a doubt of the identity of the corporation, will be regarded as immaterial.<sup>3</sup>

Adams, 10 Mass. 360, where it was decided that a note payable to Richardson, Metcalf & Co., might be declared on as a promise to The Medway Cotton Manufactory.

In Taunton etc. Turnpike v. Whiting, 10 Mass. 327; s. c., 6 Am. Dec. 124, it was held that the promise, in a subscription paper, to pay the assessments which should be made on certain shares to John Gilmore or order, would support an action in the name of the corporation.

And in Gilmore v. Pope, 5 Mass. 491, it was decided that an action would not lie upon the same subscription in the name of Gilmore, but must be brought by the corporation. See also Tucker v. Seaman's Aid Soc., 7 Metc. (Mass.) 188, 209.

See, however, Fisher v. Ellis, 3 Pick. (Mass.) 322, where the court held that a note payable to the treasurer of a parish might well be sued in the name of the treasurer. (But this case does not show that an action might not have been maintained in the name of the corporation.)

And in Fairfield v. Adams, 16 Pick. (Mass.) 381, it was decided that a note endorsed to S. S. Fairfield, cashier, would sustain an action in the name of Fairfield. See also Little v. O'Brien, 9 Mass. 423; Brigham v. Marean, 7 Pick. (Mass.) 40.

A banking association . . . brought an action, describing itself as "the Washington County National Bank, a corporation duly established by law and doing business in Greenwich in the State of New York;" and, to prove its corporate existence, introduced an organization certificate of "The Washington County National Bank of Greenwich" to be located . . . in the town of Greenwich, county of Washington and State of New York," and a certificate of the comptroller of the currency that "The Washington County National Bank of Greenwich, in the county of Washington and State of New York" had been duly organized. *Held*, that in the absence of evidence of the existence at Greenwich of another bank named "the Washington County Na-

tional Bank of Greenwich," the evidence would warrant the inference of the plaintiff's due organization. *Washington County National Bank v. Lee*, 112 Mass. 521. See also *Gifford v. Rochett*, 121 Mass. 431.

1. *People v. Schwartz*, 32 Cal. 160; *Cohen v. People*, 5 Park. Cr. (N. Y.) 330; *Wallace v. People*, 63 Ill. 452; *State v. Mead*, 27 Vt. 722; *Emmonds v. State*, 87 Ala. 12; *Johnson v. State*, 73 Ala. 483; 2 Russ. Crimes, 100; *Whart. Crim. Pl.*, § 110, note 1.

In *Emmonds v. State*, 87 Ala. 12, an indictment was held bad which charged a breaking and entering of the store of the "Perry Mason Shoe Company," without alleging such company to be either a corporation or a copartnership. If it had been a copartnership, there was nothing to show that the defendant was not one of the partners, in which case he could not have been guilty of the offence of breaking and entering into the firm's premises.

But see *Fisher v. State*, 40 N. J. L. 169, where an indictment for burglary with intent to steal, alleging that the building and goods were the property of the O. Iron Company, was held sufficient without an allegation that the company was duly incorporated. See also *Norton v. State*, 74 Ind. 337, where it was held unnecessary to allege the corporate existence of a certain railroad company upon whose premises the offence was alleged to have been committed, because it would be presumed to be a corporation.

2. In an indictment for wilfully obstructing a railroad alleged to have been built by the B. and W. Railroad Company, it is a fatal variance if the true name is the B. and W. Railroad corporation. *Com. v. Pope*, 12 Cush. (Mass.) 272. But the use of "railroad" for "railway" was held unimportant in *State v. Brin*, 30 Minn. 522. See also *Propst v. Georgia Pac. R. Co.*, 83 Ala. 518.

3. In *Thatcher v. West River Nat. Bank*, 19 Mich. 198, by the declaration, the plaintiff claimed to be a corporation by the name of "The West River National Bank of Jamaica, Vermont," and

Where a corporation sues or is sued by a wrong name, the proper practice is to take advantage of the misnomer by a plea in abatement.<sup>1</sup>

*Change of Name—How Change Is Effected.*—A corporation cannot of itself, like a partnership or simple stock company, effect a change of name. Such a change can only be wrought by the power that created the corporation.<sup>2</sup> In many of the States,

the certificates did not tend to show the existence of a corporation by this name, but only of one by the corporate name of "The West River National Bank of Jamaica." The variance was held to be immaterial.

Where the name of a corporation consists of several words, the transposition, omission or alteration of some of them may not be regarded as important, if it is evident what corporation is intended. *Chadsey v. McCreery*, 27 Ill. 252. See also *Mott v. Hicks*, 1 Cow. (N. Y.) 513; s. c., 13 Am. Dec. 550; *People v. Love*, 19 Cal. 677.

**Employers Liability Companies.**—Plaintiff, an English corporation doing business in New York under the corporate name of "Employers' Liability Assurance Corporation," sought to enjoin the defendant, a New Jersey corporation named the "Employers' Liability Insurance Company of the United States," and doing business in New York, from using the words "Employers Liability" as part of its corporate name. Plaintiff contended that such use by defendant would cause confusion as to the identity of the two companies, in view of the custom of referring to insurance companies by abbreviated titles. The evidence showed the existence of several other insurance companies engaged in the same kind of business, and that they all used the words "Employers Liability" in their corporate names. *Held*, that although plaintiff was the first to adopt and use the words, they must be considered as designating a particular kind of insurance business, rather than as expressing proprietorship, and that defendant had a right to use them. Also that, as defendant would have no right to do business except in its full corporate name, which is clearly distinguishable from plaintiff's, the objection based on the custom of abbreviating was not available. *Employers Liability Assurance Corp. v. Employers Liability Ins. Co.*, 10 N. Y. Supp. 845.

1. *Burnham v. Savings Bank*, 5 N.

H. 446; *Mellor v. Spateman*, 1 Saunders Rep. 340; *Lewiston v. Proctor*, 27 Ill. 416; *Marsh v. Astoria Lodge*, 27 Ill. 4; *Hoereth v. Franklin Mill Co.*, 30 Ill. 157; *Northumberland Co. Bank v. Eyer*, 60 Pa. St. 436. And cases cited where distinction is drawn between plea in abatement and plea in bar, as regards misnomer of corporations.

If a corporation, being sued by a wrong name, plead to the action by its true name, the misnomer is no cause for arresting the judgment; for it should have been pleaded in abatement. *Gilbert v. Nantucket Bank*, 5 Mass. 97. See also *Com. v. Dedham*, 16 Mass. 141.

Court will not take judicial notice of a statement in a report of the commissioner of railroads to the effect that the terms of a statute authorizing a change of name on the part of a railroad company have been complied with, and the name of the company changed. *Cincinnati etc. R. Co. v. Hoffhines*, 46 Ohio St. 643; 40 Am. & Eng. R. Cas. 221.

Where a fraternal beneficiary association organized under the Massachusetts statute sought an injunction against the use of a similar name by another organization, it was held that as the statute made the certificate of the insurance commissioner and secretary of the commonwealth conclusive, the interposition of the court was not required. *American Order of Scottish Clans v. Merrill* (Mass. 1890), 24 N. E. Rep. 918.

2. *Waterman on Corp.*, vol. 1, p. 119; *Boone on Corp.*, § 31; *Ang. & Ames on Corp.*, § 102; *McGary v. People*, 45 N. Y. 153; *Regina v. Registrar*, L. R., 10 Q. B. 844; s. c., 59 E. C. L. 843; *Shackelford v. Dangerfield*, L. R., 3 C. P. 407; *Morris v. St. Paul etc. R. Co.*, 19 Minn. 528; *Dubuque & Minn. R. Co. v. Keisel*, 43 Iowa 39.

The identity of name is the principal means for effecting the perpetuity of succession, which is an important purpose of incorporation. The title to

however, the legislature has empowered the courts, upon application, to change the names of corporations.<sup>1</sup>

**Effect Thereof.**—A mere change or abbreviation of the name of a corporation does not change or affect its corporate identity, nor will such change affect the right of a corporation to sue upon a note made payable to it under its former name; nor to accept the benefits of a grant made to it under such name; nor in any other way affect its rights or liabilities.<sup>2</sup> And where a corporation has

shares, the liability on contracts, and the right to assets, would be in danger of confusion if the name were subject to such change. *Regina v. Registrar*, 10 Adol. & Ell. 839. See also *Hazelett v. Buttes University*, 84 Ind. 232.

1. Corporations of this State (N. Y.), if organized under general laws (except banks, banking associations, trust companies, life, health, accident, marine, and fire insurance companies, railroad companies), may apply to supreme court, general term, in the judicial district in which is situated the principal corporate property of such corporation, or its chief business office, to have name changed. 1 L., 1870, p. 750, ch. 322, § 1.

In *Tennessee*, courts of chancery are clothed by statute with authority to change the name of any private corporation upon application and good reason shown by the directors. Act of Tenn. of 1871, § 11. In *Maine*, a corporation may, at a legal meeting of stockholders, vote to change its name and adopt a new one; and when the proceedings of such meeting, certified by its clerk, are returned to the office of the secretary of state, to be recorded by him, the name will be deemed changed. Rev. Stats. of Me. (ed. of 1871), p. 394, § 5. See *Trustees of Northwestern College v. Schwagler*, 37 Iowa 577; *In re First Pres. Church of Bloomfield*, 111 Pa. St. 156. The New York Code, § 1777.

**Legislature May Change Name of Corporation, Though Forbidden to Create by Special Act.**—Notwithstanding a clause in the constitution of a State, that "corporations may be formed under general laws but shall not be created by special acts except for municipal purposes," the legislature may change the name of a corporation, and give it powers to purchase additional property, no new corporate powers or franchises having been created. *Wallace v. Loomis*, 97 U. S. (7 Otto) 146.

In the case of *Pacific Bank v. Re Ro.*, 37 Cal. 538, this question was consid-

ered, but not determined. The court said: "The mere changing the name of a corporation is not, as it appears to us, the creation of a corporation in the sense of the constitution. As suggested by the counsel for the plaintiff, it would seem that the changing of the name of a corporation is no more the creation of a corporation than the changing of the name of a natural person is the begetting of a natural person. The act, in both cases, would seem to be what the language, which we use to designate it, imports—a change of name and not a change of being." *Waterman on Corp.*, vol. 1, p. 120.

**A Corporation May Resume Its Old Name by Usage.**—Even if the legislature changes the name of a corporation, yet if the corporation continues to do business in its old name, it may regain such name by usage, and be lawfully sued or proceeded against in bankruptcy by that name. *Alexander v. Buney*, 28 N. J. E. 90.

2. *Boone on Corp.*, § 31; *Ang. & Ames*, § 354; *Meyer v. Johnston*, 8 Am. & Eng. R. Cas. 584; *Girard v. Philadelphia*, 7 Wall. (U. S.) 1; *Rosenthal v. Madison*, 10 Ind. 358; *Cohill v. Bigger*, 8 B. Mon. (Ky.) 213; *Northwestern College v. Schwagler*, 37 Iowa 577; *Meyer v. German Lutheran Church*, 17 Am. & Eng. Corp. Cas. 195; s. c., 37 Minn. 241; *McGary v. People*, 45 N. Y. 153; *Shackelford v. Dangerfield, L. R.*, 3 C. P. 407; *Morris v. St. Paul etc. R.*, 19 Minn. 528; *Wallace v. Loomis*, 97 U. S. 146; *Dean v. La Motte Co.*, 59 Mo. 523.

A law changing the name of a corporation does not alter the contract between the shareholders, or impair any of their franchises. *Delaware etc. R. Co. v. Irick*, 3 Zab. (N. J.) 321.

*In Re Application of First Presbyterian Church of Bloomfield for Change of Name*, 15 Am. & Eng. Corp. Cas. 481, it was held that the court of common pleas of Pennsylvania may change the name of a corporation to that of

been incorporated under the general laws of a State, but has assumed no certain name, and has been known by various names, such want of name will not affect its identity.<sup>1</sup>

**2. Express Averment Not Necessary Where Name Implies a Corporation.**—In general, it may be stated, that the declaration in a suit brought in a corporate name need not aver the plaintiffs to be a corporation, where the name is such as might probably be adopted by a corporation, and the complaint does not show that they are not a corporation; for, under such circumstances, they will be presumed to be a corporation with capacity to sue.<sup>2</sup>

another corporation, but that change does not invest the corporation under its new name with any of the property, trusts, or charter rights of the corporation whose name is taken.

In *Episcopal Charitable Society v. Episcopal Church of Dedham*, 1 Pick. (Mass.) 372, by Stat. 1793, ch. 68, the rector, wardens and vestry of the Episcopal Church of Dedham were invested with certain corporate powers, by the name of the Episcopal Church of Dedham; but the proprietors of pews were left without any powers, except as a voluntary society. In 1879, the rector and wardens alone, pursuant to a vote of the proprietors, borrowed money for the use of the proprietors, and subscribed a promissory note for it, and the agents of the proprietors at different times paid the interest. The Stat. 1818, ch. 27, incorporated certain persons and the proprietors of the pews by the same name, gave them the control of the church property, and repealed the former act. The new corporation authorized the wardens and vestry to receive and make payment of all debts in favor of or against the church, which accrued under the first act. *Held*, that the new corporation was answerable on the note, or at least on the money counts.

A corporation organized under a special charter, and reorganized subsequently under a general law, with a change of its name, and, to some extent, of its powers, is essentially still the same; and a judgment in an action brought against it by its latter name, to adjudge it dissolved for forfeiture of its charter, may appropriately cover the acts of the original corporation. *Supreme Ct. Sp. T. 1862, People ex rel. Barton v. Rensselaer Ins. Co.*, 38 Barb. (N. Y.) 323.

And when, pending a suit by a corporation, an act of the legislature was passed changing the name of the cor-

poration, if the incorporators should consent, and the suit proceeded to judgment in the original name, *held*, that it was too late after judgment for the defendant to set up that there was no such corporation, especially if he fails to make it appear that the incorporators accepted the new name. *Water Lot Co. v. Bank*, 53 Ga. 30.

1. *Wardens v. Hall*, 22 Conn. 132.

2. *Bank of Waterville v. Beltzer*, 13 How. Pr. (N. Y.) 270; *Bank of Lowville v. Edwards*, 11 How. Pr. (N. Y.) 216; *Bank of Havana v. Wickham*, 16 How. Pr. (N. Y.) 97; *Kennedy v. Cotton*, 28 Barb. (N. Y.) 60; *United States Bank v. Haskins*, 1 Johns. Cas. (N. Y.) 132; *Dutchess Cotton Mfg. v. Davis*, 14 Johns. (N. Y.) 238; *Jackson v. Plumbe*, 8 Johns. (N. Y.) 378; *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770; s. c., 14 Am. Dec. 526; *Bank of Auburn v. Weed*, 19 Johns. (N. Y.) 300; *Bank of Michigan v. Williams*, 5 Wend. (N. Y.) 478; *Shoe & Leather Bank v. Brown*, 9 Abb. Pr. (N. Y.) 218; *Lafayette Ins. Co. v. Rogers*, 30 Barb. (N. Y.) 491; *Clark v. Benton etc. Mfg. Co.*, 12 Wend. (N. Y.) 218; *Proprietors of Southold v. Horton*, 6 Hill (N. Y.) 50; *Phenix Bank v. Donnell*, 41 Barb. (N. Y.) 571; *Camden etc. R. Co. v. Remer*, 4 Barb. (N. Y.) 127; *Union Mut. Ins. Co. v. Osgood*, 1 Duer (N. Y.) 707. *Contra*, *Johnson v. Kemp*, 11 How. Pr. (N. Y.) 186; *Litchfield Bank v. Church*, 29 Conn. 148; *Brown v. Illius*, 27 Conn. 83; s. c., 71 Am. Dec. 49; *Phenix Bank v. Curtis*, 14 Conn. 437; s. c., 36 Am. Dec. 492; *West Winsted Sav. Bank v. Ford*, 27 Conn. 282; *Plymouth Christian Soc. v. Macomber*, 3 Metc. (Mass.) 235; *First Parish in Sutton v. Cole*, 3 Pick. (Mass.) 245; *Concord v. McIntire*, 6 N. H. 527; *School District v. Blaisdell*, 6 N. H. 197; *Woodson v. Bank of Gallipolis*, 4 B. Mon. (Ky.) 203; *Jones v. Bank of Tennessee*, 8 B. Mon. (Ky.) 122; *Depew v.*



Bank of Limestone, 1 J. J. Marsh. (Ky.) 380; Bank of Gallipolis v. Trimble, 6 B. Mon. (Ky.) 599; Taylor v. Bank of Illinois, 7 T. B. Mon. (Ky.) 576, 584; Roxbury v. Huston, 37 Me. 42; Inhabitants of Orono v. Wedgewood, 44 Me. 49; s. c., 69 Am. Dec. 81; Norris v. Stapes, Hobart 211; Harris v. Muskingum Mfg. Co., 4 Blackf. (Ind.) 267; s. c., 29 Am. Dec. 372; Richardson v. St. Joseph Iron Co., 5 Blackf. (Ind.) 146; s. c., 33 Am. Dec. 460; Jones v. Cincinnati Type Foundry Co., 14 Ind. 89; Emery v. Evansville etc. R. Co., 13 Ind. 143; Cole v. Merchants' Bank, 60 Ind. 350; Heston v. Cincinnati etc. R. Co., 16 Ind. 275; Guago Iron Co. v. Dawson, 4 Blackf. (Ind.) 202; Dunning v. New Albany etc. R. Co., 2 Ind. 437; Railsback v. Liberty etc. Turnpike Co., 2 Ind. 656; Hubbard v. Chappel, 14 Ind. 601; O'Donald v. Evansville etc. R. Co., 14 Ind. 259; Cicero Hygiene Draining Co. v. Craighead, 28 Ind. 274; Indianapolis Furnace & Min. Co. v. Herkimer, 46 Ind. 142; Wiles v. Trustees of Phillippi Church, 63 Ind. 206; Stein v. Indianapolis etc. Assoc., 18 Ind. 237; s. c., 81 Am. Dec. 353; Mackenzie v. School Trustees, 72 Ind. 189; Beatty v. Bartholomew Co. Agricultural Soc., 76 Ind. 91; New Albany etc. R. Co. v. Lewis, 49 Ind. 161; Patterson v. Indianapolis Plank Road Co., 56 Ind. 20; Hunter v. Burnsville Turnpike Co., 56 Ind. 203; Walker v. Shelbyville etc. Turnpike Co., 80 Ind. 452; Cole v. Merchants' Bank, 60 Ind. 350; Anderson v. New Castle etc. R. Co., 12 Ind. 376; s. c., 64 Am. Dec. 218; Emery v. Evansville etc. R. Co., 13 Ind. 143; Ewing v. Robeson, 15 Ind. 26; Adams Express Co. v. Hill, 43 Ind. 157; Indianapolis Sun Co. v. Horrell, 53 Ind. 527; Johnson v. State, 65 Ind. 204; Northwestern Conference v. Myers, 36 Ind. 375; Grays v. Turnpike, 4 Rand. (Va.) 578; McKiel v. Real Estate Bank, 4 Ark. 592; Lion Church v. St. Peter's Church, 5 W. & S. (Pa.) 215; Bennington Iron Co. v. Rutherford, 18 N. J. L. 105; s. c., 35 Am. Dec. 528; Lake Superior Building Co. v. Thompson, 32 Mich. 293; United States v. Insurance Cos., 22 Wall. (U. S.) 99; Conrad v. Atlantic Ins. Co., 1 Pet. (U. S.) 450; Society for Propagation of the Gospel v. Pawlet, 4 Pet. (U. S.) 501; Pullman v. Upton, 96 U. S. 328.

**Estoppel.**—A contract with a party as a corporation estops the party so contracting to deny the existence of the corporation at the time it was contracted

with as such. Jones v. Cincinnati Type Foundry Co., 14 Ind. 89. See also Hamtramck v. Bank of Edwardsville, 2 Mo. 169; Hubbard v. Chappel, 14 Ind. 601; Mackenzie v. School Trustees, 72 Ind. 190.

But see as to the rule in *New York*, where it seems that, in a suit by a corporation, the plaintiffs, when the general issue is pleaded, must prove that they are a body corporate. Welland Canal Co. v. Hathaway, 8 Wend. (N. Y.) 481; s. c., 24 Am. Dec. 51, and cases cited.

See also Williams v. Bank of Michigan, 7 Wend. (N. Y.) 540; Jackson v. Plumbe, 8 Johns. (N. Y.) 378; Bank of Michigan v. Williams, 5 Wend. (N. Y.) 478; United States Bank v. Stearns, 15 Wend. (N. Y.) 314.

In *The Utica Ins. Co. v. Tilman*, 1 Wend. (N. Y.) 555, it was held that a corporation was sufficiently proved by the production of an exemplified copy of the act of incorporation, and evidence of user under it.

By sec. 3, R. S. N. Y. (4th ed.) 698, in suits by a domestic corporation, it is not necessary to prove its existence unless the defendants plead in bar that the plaintiffs are not a corporation. Otherwise as to foreign corporations. Williams v. Bank of Michigan, 7 Wend. (N. Y.) 540, 547, note (a).

See also, in this connection, Dutchess Cotton Mfg. Co. v. Davis, 14 Johns. (N. Y.) 245; s. c., 7 Am. Dec. 459; Henriques v. Dutch West India Co., 2 Ld. Raym. 1532; Norris v. Staps, Hobart 211.

#### Rule in Regard to Foreign Corporations.

—The cases in which foreign corporations must prove their existence, under the general issue, are exceptions to the general rule. School District v. Blaisdell, 6 N. H. 197; Lord v. Bigelow, 8 Vt. 445.

In *Jackson v. Bank of Marietta*, 9 Leigh (Va.) 240, PARKER, J., observes: "I think it is clearly established that although it is not necessary in the declaration to aver the incorporation, it is necessary, under the general issue, to prove it."

See Gray v. Turnpike Co., 4 Rand. (Va.) 578; Rees v. Conococheque Bank, 5 Rand. (Va.) 326; s. c., 16 Am. Dec. 755; Taylor v. Bank of Alexandria, 5 Leigh (Va.) 471; Jackson v. Plumbe, 8 Johns. (N. Y.) 378; Bill v. Fourth Great Western Turnpike Co., 14 Johns. (N. Y.) 416; Bank of Auburn v. Weed, 19 Johns. (N. Y.) 300; Ports-

**3. Variance in Corporate Name in Judgments.**—Corporate names are no exception to the general rule applied to natural persons: that names, with other circumstances, are facts from which identity can be presumed or established; and where a judgment is rendered against a corporation by one name, and execution issued upon that judgment under a different name, if both names are in fact applied to the same corporation, the apparent difference between the two names may be explained and harmonized by extrinsic evidence.<sup>1</sup>

But if the name of the corporation is mistaken, materially and substantially, the corporation cannot be affected by the proceedings, and the test seems to lie in the distinction made between a variance in words and syllables only and a variance in substance. If a corporation is sued by a name varying only in words and syllables, and not in substance, from the true name, the misnomer must be pleaded in abatement.<sup>2</sup> But if the name be mistaken in substance, the suit cannot be regarded as against the corporation.<sup>3</sup>

**4. Variance in Corporate Names in Grants.**—A variation from the legal designation in a deed, grant or devise to a corporation will not make the same void, provided that the corporation meant can be sufficiently ascertained from the terms used.<sup>4</sup>

mouth Livery Co. v. Watson, 10 Mass. 91; Bank of Utica v. Smalley, 2 Cow. (N. Y.) 770; s. c., 14 Am. Dec. 526.

**Where Corporation Is Public.**—While, under the general issue in a suit by a corporation, it is necessary for the plaintiff to show its charter, yet where such charter is a public law which judicial tribunals are bound to notice *ex officio*, it is not necessary to give it in evidence to make out the plaintiff's title. Agnew v. Bank of Gettysburg, 2 Hen. & G. (Md.) 478.

1. Talbott v. Hale, 72 Ind. 1.

2. "That a corporation defendant is not correctly named in an action can only be taken advantage of by plea in abatement. Where service is made upon the proper officers, and such plea is not made, the judgment will bind the corporation though named by another than its corporate name." Wilson v. Baker, 52 Iowa 423. See also Burnham v. Savings Bank, 5 N. H. 446; Sunapee v. Eastman, 32 N. H. 470; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404; Lehman v. Warner, 61 Ala. 455; Medway Cotton Manufactory v. Adams, 10 Mass. 360; African Society v. Varick, 13 Johns. (N. Y.) 38.

3. Gilbert v. Nantucket Bank, 5 Mass. 97; Com. v. Dedham, 16 Mass. 141; Medway Cotton Manufactory v. Adams,

10 Mass. 360; Society for Propagating the Gospel v. Young, 2 N. H. 310; Bank of Utica v. Smalley, 2 Cow. (N. Y.) 770; s. c., 14 Am. Dec. 526.

A judgment against a corporation cannot be corrected *nunc pro tunc* by striking out the name under which the defendant was sued and served with process, and substituting another name. Brown v. Terre Haute etc. R. Co., 72 Mo. 567.

4. Inhabitants of the First Parish in Sutton v. Cole, 3 Pick. (Mass.) 232; Case of the Chancellor of Oxford, 10 Coke 57, b; Witman v. Lex, 17 S. & R. (Pa.) 88; Vidal v. Girard, 2 How. (U. S.) 127; Chapin v. School District, 35 N. H. 445; Oler v. Baltimore etc. R. Co., 41 Md. 583; Union Bank of Florida v. Call, 5 Fla. 409; Northwestern Distilling Co. v. Brant, 60 Ill. 658; s. c., 18 Am. Rep. 631; O'Brien v. People, 41 Ill. 456; Garrison v. People, 21 Ill. 535; State Hospital v. Higgins, 15 Ill. 185; Graves v. People, 11 Ill. 542; Carder v. Fayette Co., 16 Ohio St. 353; Green Township v. Campbell, 16 Ohio St. 11; Douglass v. Branch Bank of Mobile, 19 Ala. 659; Brittan v. Newland, 2 Dev. & B. (N. Car.) 363; Clark v. Potter Co., 1 Pa. St. 163; Berks etc. Turnpike Co. v. Myers, 6 S. & R. (Pa.) 12; s. c., 9 Am. Dec. 402; Porter v. Blakely, 1

**XXV. Miscellaneous.**—Instances where the word "name," as employed in statutes or legal documents, has been considered by the courts, are given in the note.<sup>1</sup>

**NAMED.**—See note 2.

Root (Conn.) 440; County Court v. Griswold, 58 Mo. 175; Romeo v. Chapman, 2 Mich. 179.

**Mistake in Name Avoided by Pleading and Proof.**—Where a deed is made to a corporation by a name varying from the true one, the corporation may sue in its true name, and aver in the declaration that the defendant made the deed to them by the name mentioned in the deed. Northwestern Distilling Co. v. Brant, 69 Ill. 658; s. c., 18 Am. Rep. 631. See also N. Y. African Soc. v. Varick, 13 Johns. (N. Y.) 39.

**Parol Evidence to Explain Mistake in Name.**—A departure from the strict style of a corporation will not avoid its contracts, if it substantially appear that the particular corporation was intended; and a latent ambiguity may, under proper averments, be explained by parol evidence. Berks etc. Turnpike Co. v. Myers, 6 S. & R. (Pa.) 12; s. c., 9 Am. Dec. 402.

1. **"Name of the Owner."**—Where a statute made it lawful to kill dogs not wearing a collar "with the name of the owner or owners carved or engraved thereon," and the plaintiff, Jeremiah P. Morey, had engraved upon the collar of his dog the letters "J. P. M.," it was held that this was not engraving the "name" of the owner, within the meaning of the statute. Morey v. Brown, 42 N. H. 373.

Where a statute required that petitions for the establishment of a highway should be signed with "the names of the owners" of land affected, it was held that signatures containing only the initials of Christian names were not a compliance with the statute. Vawter v. Gilliland, 55 Ind. 278.

A similar ruling was made where land was owned by partners, and only the partnership name was signed. Hughes v. Sellers, 34 Ind. 337.

**"Of My Name and Blood."**—In a devise, a remainder was limited "unto the first and nearest of my kindred, being male and of my name and blood, that shall be living," etc. The complainant was of the testator's blood, but his name originally was not that of the testator; he had, however, by act of parliament, been allowed to change his name to that

of the testator. LORD ELDON held that he did not answer the description of the devise. Leigh v. Leigh, 15 Ves. Jr. 92.

**Name in Notice of Copyright.**—Under the act of congress requiring a notice of copyright to be placed on each copy of the copyrighted book or article, the "name" of the owner of the copyright is sufficiently indicated by his surname and the initial of his Christian name. Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53.

"Sometimes it is made part of the description or qualification of a devisee or legatee that he be of the testator's name. The word 'name,' so used, admits of either of the following interpretations: 1. As designating one whose name answers to that of the testator (which seems to be the more obvious sense); 2. As denoting a person of the testator's family—the word 'name' being, in this case, synonymous with 'family' or 'blood.' The former, as being the more natural construction, prevails in the absence of an explanatory context; and such is most indisputably its meaning when found in company with some other term or expression which would be synonymous with 'name' it otherwise construed." 2 Jarm. on Wills 141, 146.

A woman losing the "name" by marriage, loses her right to be classed as one of the "name;" but not so a person who assumes another name by licence or act of parliament. 2 Jarm. on Wills 144.

"Descendants who shall bear the name of." V. Re Roberts, 19 Ch. D. 520; 50 L. J. Ch 265.

2. Where a provision in a charter stated the names of specific officers, together with the term "such other subordinate officers as the common council deem necessary," and later in the same section it is stated that "the officers above named shall hold their several offices for one year," it was held that the words "above named" apply only to the officers specifically mentioned. State v. Trenton, 13 Atl. Rep. 228; State v. Trenton, 50 N. J. L. 388.

**"Relatives hereinbefore named"** in a will, held to mean "legitimate relatives hereinbefore mentioned *nominatim*, if

**NARCOTICS.**—The act of congress of May 20th, 1887 (24 Stat. at Large 69), requires that special instruction as to the nature and effects of alcoholic drinks and narcotics shall be given in the military and naval schools, in the schools of the District of Columbia, and in the Indian schools. Statutes similar in substance have been enacted in some of the States.<sup>1</sup>

**NARR.**—An abbreviation of the word narratio; a declaration in a cause.<sup>2</sup>

**NATION.**—The term "nation" implies a body of men united together to procure their mutual safety and advantage by means of their union.<sup>3</sup>

**NATIONAL BANKS.**—(See BANKS AND BANKING).

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not by all their names, by some at least." *Re Jodrell*, 61 L. T., N. S. 677. This was reversed in 59 L. J. R., Ch. 538, it being held that the children of persons named as cousins, whether legally related or not, came within the description of "relatives hereinbefore named."

**"Relations Hereafter Named."**—Where a testator left his property among his "relations hereafter named," and none were named in the will, it was held that the word "named" must be taken in its plain sense, indicating an intention to specify certain relations, and as testator had not done so there was an intestacy. *Crampton v. Wise*, 58 L. T., N. S. 718.

**In a City Charter.**—Where, in a city charter, power was given to a common council to appoint certain specifically designated officers and "other subordinate officers," and provision was made that the "officers above named" should hold their offices for one year, it was held, construing this section in connection with another similar one, that the "officers above named" included only those particularly designated by name, and excluded "other subordinate of-

ficers." *State v. Trenton*, 50 N. J. L. 388.

1. As to opium, see OPIUM, REVENUE LAWS.

2. *Bouv. Law Dict.*

3. *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1-52.

The very term "Nation" so generally applied to Indians, means a people distinct from others. The constitution declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian Nations, and consequently admits their rank among the powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings by ourselves. Each has a definite and well understood meaning. We have applied them to Indians as we have applied them to the other nations of the earth, and in the same sense. *Langford v. Monteith*, 1 Idaho, N. S. 612. See INDIANS, 10 Am. & Eng. Encyc. of Law 38. See also INTERNATIONAL LAW, 11 Am. & Eng. Encyc. of Law 432.

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**I. NATURE AND ORGANIZATION—1. General Nature—Description of.**  
 —National banks are private associations authorized by congress for the joint purposes of convenience and profit to the holders of United States bonds, and of furnishing the public with a convenient and uniform circulating medium. They were intended to be

to the nation what a well-regulated system of State banks was to the States, respectively.<sup>1</sup>

*Resemblance to Former United States Bank.*—The qualities, powers, and duties, as national agencies, of these associations, resemble, in almost all essential particulars, those of the bank of the United States authorized by the act of April 10th, 1816. But they are much more intimately associated with the national government in their functions and operations than was that bank.<sup>2</sup>

**2. National Bank Act.**—By an act passed February 25th, 1863, and amended and re-enacted on the 3rd of June, 1864, which is known as the National Bank act,<sup>3</sup> congress provided for the organization of national banking associations for the purpose of enabling the national government to exercise more effectually its constitutional powers and functions.<sup>4</sup>

*Object of Act.*—The object of the national banking act was to establish a system of national banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the treasury of the United States.<sup>5</sup>

*Constitutionality of Act.*—The constitutionality of the national bank act is beyond all question. It rests on the same principle as does the act creating the second bank of the United States.<sup>6</sup>

**3. Formation in General.**—A national banking association may be formed by any number of natural persons, not less than five, who shall enter into articles of association to be signed by them, and

1. *Stetson v. Bangor*, 56 Me. 274; s. c., 1 Nat. Bank Cas. 520. See also *Van Allen v. Assessors*, 3 Wall. (U. S.) 573; s. c., 1 Nat. Bank Cas. 1; *Mercantile Nat. Bank v. Mayor etc. of N. Y.*, 121 U. S. 138; s. c., 18 Am. & Eng. Corp. Cas. 92; s. c., 3 Nat. Bank Cas. 243, 257; *Flint v. Board of Aldermen*, 99 Mass. 141; s. c., 1 Nat. Bank Cas. 571. Compare National Currency acts, 11 Op. Atty. Gen. 334.

2. CHASE, C. J., in *Van Allen v. Assessors*, 3 Wall. (U. S.) 573; s. c., 1 Nat. Bank Cas. 1.

3. See declaration to this effect in act of June 3rd, 1874, ch. 343, p. 123, given in note to *Rev. Stat. U. S.* (2nd ed. 1878), § 5133, p. 992.

4. *Van Allen v. Assessors*, 3 Wall. (U. S.) 573; s. c., 1 Nat. Bank Cas. 1. The statutes of the United States regulating the organization, conduct and dissolution of national banking associations are contained in the revised statutes (*Rev. Stat. U. S.* (2nd ed.), 1878, tit. LXII., §§ 5133-5243), and in various enactments subsequent thereto. 2 Abb. L. Dict. 148. A State statute

prohibiting the establishment of banking companies without authority of the legislature does not apply to national banks. *Stetson v. Bangor*, 56 Me. 274; s. c., 1 Nat. Bank Cas. 520.

5. *Mercantile Nat. Bank v. Mayor etc. of N. Y.*, 121 U. S. 138; s. c., 3 Nat. Bank Cas. 243; s. c., 18 Am. & Eng. Corp. Cas. 92. See also *Van Allen v. Assessors*, 3 Wall. (U. S.) 573; s. c., 1 Nat. Bank Cas. 1. Compare National Currency Acts, 11 Op. Atty. Gen. 334. Concerning these associations as governmental agencies, see *Farmers' etc. Nat. Bank v. Dearing*, 91 U. S. 29; s. c., 1 Nat. Bank Cas. 117; and *First Nat. Bank v. Lamb*, 57 Barb. (N. Y.) 429.

6. *Farmers' etc. Nat. Bank v. Dearing*, 91 U. S. 29; s. c., 1 Nat. Bank Cas. 117, 120; s. c., regarding as applicable the reasoning in *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, and *Osborne v. Bank of the United States*, 9 Wheat. (U. S.) 738. See also *Van Allen v. Assessors*, 3 Wall. (U. S.) 573; s. c., 1 Nat. Bank Cas. 1.

filed in the office of the comptroller of the currency,<sup>1</sup> and shall make an organization certificate to be also recorded and preserved by the same officer,<sup>2</sup> and no authority other than that conferred by congress is necessary to enable a bank existing under a special or a general State law to become a national banking association.<sup>3</sup>

*Articles of Association.*—The national bank act provides that national banking associations shall enter into articles of association, which shall specify in general terms the objects for which the association is formed,<sup>4</sup> and may contain any other provisions, not inconsistent with the provisions of the act, which the association may see fit to adopt for the regulation of the business of the association and the conduct of its affairs.<sup>5</sup> And it is further required that these articles shall be signed by the persons uniting to form the association, and that a copy of them shall be forwarded to the comptroller of the currency, to be filed and preserved in his office.<sup>6</sup>

*Certificate of Organization.*—The contents and disposition of the organization certificate are prescribed by the act.<sup>7</sup> It seems to be well settled that a copy of the certificate of organization of a national bank, which is certified by the comptroller of the currency and authenticated by his seal of office, is competent evidence<sup>8</sup> of the existence of the corporation.<sup>9</sup> But there is not entire uniformity among the decisions as to the effect of such certificate. Some of the cases appear to hold merely that it makes out a *prima facie* case in favor of the existence of the corporation, when supplemented by other evidence of like purport.<sup>10</sup> Yet, other rulings, perhaps more authoritative, including a decision of the United States Supreme Court, regard the certificate of the comptroller as conclusive as to the completeness of the organization of a national bank.<sup>11</sup>

1. U. S. Rev. Stat., § 5133, partially quoted in *Bullard v. Nat. Eagle Bank*, 18 Wall. (U. S.) 589; s. c., 1 Nat. Bank Cas. 93.

2. U. S. Rev. Stat., § 5134.

3. *Casey v. Galli*, 94 U. S. 673, 678; s. c., 1 Nat. Bank Cas. 142.

4. The provisions of the National Currency act of June 3rd, 1864 (13 U. S. Stat. at Large 99), and of the amendatory act of March 3rd, 1865 (Id. 484), authorize the creation of banking associations without the right to obtain, issue and circulate notes. National Currency acts, 11 Op. Atty. Gen. 334.

5. U. S. Rev. Stat., § 5133; Act of 1864, § 5, substantially quoted in *Lockwood v. Mechanics' Bank*, 9 R. I. 308; s. c., 11 Am. Rep. 253.

6. U. S. Rev. Stat., § 5133.

7. U. S. Rev. Stat., §§ 5134, 5135. References to some of the require-

ments are made in *Davis v. Stevens*, 17 Blatchf. (U. S.) 259; *Chatham Nat. Bank v. Merchants' Nat. Bank*, 4 Thomp. & C. (N. Y.) 196.

8. *Tapley v. Martin*, 116 Mass. 275; s. c., 1 Nat. Bank Cas. 611, relating to competency in a State court. See also *First Nat. Bank v. Kidd*, 20 Minn. 234; s. c., 1 Nat. Bank Cas. 935.

9. *Mix v. National Bank*, 91 Ill. 20; s. c., 33 Am. Rep. 44; s. c., 2 Nat. Bank 232.

10. *Mix v. National Bank*, 91 Ill. 20; s. c., 33 Am. Rep. 44; s. c., 2 Nat. Bank Cas. 232. See also *Merchants' Exchange Nat. Bank v. Cardozo*, 35 N.Y. Super. Ct. 162.

11. *Casey v. Galli*, 94 U. S. 673; s. c., 1 Nat. Bank Cas. 142. See also *Thatcher v. West River Nat. Bank*, 19 Mich. 196; s. c., 1 Nat. Bank Cas. 622; *National Bank v. Phoenix Warehousing*

*Other Evidence of Organization.*—In an action, however, by a national bank against the maker of a promissory note, the fact that the note is made payable at the plaintiff bank, without such bank being a party to the note, is not conclusive evidence that such bank is a corporation.<sup>1</sup>

**4. Extension or Termination of Existence—Effect of Extension.**—Where the term of existence of a national bank, which would otherwise have expired in 1883, was by act of congress prior to that time extended twenty years longer, the identity of the old corporation was in no wise affected, but it simply obtained a new lease of life.<sup>2</sup>

*Effect of Closing Up Business.*—Where, however, a national bank has determined to close its business and not to avail itself of the right given by the statute of the United States, to continue after the term of twenty years, the corporation, as such, is not wholly dissolved and reduced to a nominal existence without power to elect directors.<sup>3</sup>

**5. Location and Citizenship—Where National Bank "Located" or "Established."**—A national banking association is "located" or "established" at the place specified in its organization certificate as that where its operations are to be carried on.<sup>4</sup>

*Citizenship of Bank.*—It may be treated for jurisdictional purposes, as a citizen of the State within which it is, in this sense, "located,"<sup>5</sup> and the fact that it is incorporated under an act of congress of the United States does not make it a citizen of the United States exclusively, or necessitate the removal to the federal courts of an action brought by it against a citizen of the State in which it is located.<sup>6</sup> Yet, as a citizen of the State in

Co., 6 Hun (N. Y.) 71. The first of the cases cited in this note laid down the doctrine as applicable in a suit against a stockholder to enforce his liability, or against a party upon his contract with the bank. The second regarded it as immaterial that the bank was shown to have been doing business before the date of the organization certificate.

1. *Hungerford Nat. Bank v. Van Nostrand*, 106 Mass. 559; s. c., 1 Nat. Bank Cas. 559. As to variance in name of bank, see *Washington Co. Nat. Bank v. Lee*, 112 Mass. 521. As to proof of doing business, see *Merchants' Nat. Bank v. Glendon Co.*, 120 Mass. 97. Putting organization in issue, see on this subject *Huffaker v. National Bank*, 12 Bush (Ky.) 287; s. c., 1 Nat. Bank Cas. 504; *National Bank v. Orcutt*, 48 Barb. (N. Y.) 256.

2. *National Exch. Bank v. Gay*, 57 Conn. 224.

3. *Richards v. Attleborough Nat. Bank*, 148 Mass. 187; *citing*, as to con-

dition of corporation closing up its affairs, *Crease v. Babcock*, 23 Pick. (Mass.) 334; *Thornton v. Marginal Freight R. Co.*, 123 Mass. 32; *First Nat. Bank v. Colby*, 21 Wall. (U. S.) 615; and *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.*, 104 U. S. 54.

4. *Manufacturers' Nat. Bank v. Baach*, 2 Abb. (U. S.) 232; s. c., 8 Blatchf. (U. S.) 137; s. c., 1 Nat. Bank Cas. 161. See to like effect, *Main v. Second Nat. Bank*, 6 Biss. 26; s. c., 1 Nat. Bank Cas. 200.

5. See *St. Louis Nat. Bank v. Allen*, 2 McCrary (U. S.) 92.

6. *Davis v. Cook*, 9 Nev. 134; s. c., 1 Nat. Bank Cas. 656; relying upon full discussion of subject in *Manufacturers' Nat. Bank v. Baach*, 2 Abb. (U. S.) 232; s. c., 8 Blatchf. (U. S.) 137; s. c., 1 Nat. Bank Cas. 161. The State case points out that though a corporation existing by virtue of an act of congress of the United States



which it is located, it may be entitled to remove into the federal courts an action against a bank in another State.<sup>1</sup>

*Citizenship of Shareholders.*—So it has been held in a circuit court that on the strength of the citizenship of its shareholders in the State<sup>2</sup> in which it is located, it may be a citizen of that State and sue an individual in the federal courts of another State of which such individual is a citizen, because the controversy then arises between citizens of different States.<sup>3</sup>

*Recent Enactments.*—But all that has been stated concerning suits or their removal must be understood as expressing the state of the law prior to recent enactments of 1882 and 1888 of the most material bearing upon the matter.<sup>4</sup>

**6. Transaction of Business—Place of.**—Under the provision that the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate,<sup>5</sup> it would not be competent for a national bank to provide for the cashing of checks upon it at any other place than at its office or banking house,<sup>6</sup> and it cannot make a valid contract for the cashing of checks

must be considered as a citizen of the United States, yet a citizen of the United States resident in any State in the Union is a citizen of that State, and cites upon this matter *Gassies v. Ballou*, 6 Pet. (U. S.) 761.

1. *Chatham Nat. Bank v. Merchants' Nat. Bank*, 4 Thomp. & C. (N. Y.) 196; s. c., 1 Nat. Bank Cas. 769. Decisions adverse to such removals were, however, made in *Pettiton v. Noble*, 7 Biss. (U. S.) 449; s. c., 2 Nat. Bank Cas. 120; *Widder v. Union Nat. Bank*, 2 Chic. Leg. News 84; s. c., 2 Nat. Bank Cas. 124.

**"Habitat ion."**—Prior to the amendment of the Judiciary act the "habitation" of the national bank for purposes of suit was held to be in the federal district in which it was located. *Main v. Second Nat. Bank*, 6 Biss. (U. S.) 26; s. c., 1 Nat. Bank Cas. 200. But compare *Commercial Bank v. Simmons*, 10 Abb. L. J. 155; s. c., 1 Nat. Bank Cas. 294; *Mitchell v. Walker*, 25 Int. Rev. Rec. 64; s. c., 2 Nat. Bank Cas. 180. As to change in Judiciary act, see *Osgood v. Chicago etc. R. Co.*, 6 Bliss. (U. S.) 330. As to locality, etc., of corporations in general, the Main case relies upon *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519; *Day v. Newark India Rubber Mfg. Co.*, 1 Blatchf. (U. S.) 628, and *Pomeroy v. New York etc. R. Co.*, 4 Blatchf. (U. S.) 120.

2. See *Manufacturers' Nat. Bank v. Baach*, 2 Abb. (U. S.) 232; s. c., 8 Blatchf. (U. S.) 147; s. c., 1 Nat. Bank Cas. 161.

3. *National Park Bank v. Nichols*, 4 Biss. (U. S.) 315. Compare *St. Louis Nat. Bank v. Allen*, 2 McCrary (U. S.) 92. In the former of these cases reference is made to the doctrine of the United States Supreme Court, modifying *Bank of the United States v. Deveaux*, 5 Cranch (U. S.) 61, that it is an irrebuttable presumption that the individual members of a corporation are citizens of the State in which the corporation is located. This point is fully considered in *Ohio etc. R. Co. v. Wheeler*, 1 Blatchf. (U. S.) 286. See also to like effect subsequent cases of *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Baltimore etc. R. Co. v. Harris*, 12 Wall. (U. S.) 65; *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445; *Hatch v. Chicago etc. R. Co.*, 6 Blatchf. (U. S.) 105; *Terry v. Imperial Ins. Co.*, 3 Dill. (U. S.) 408. But compare *Williams v. Missouri etc. R. Co.*, 3 Dill. (U. S.) 267. See CORPORATIONS, 4 Am. & Eng. Ency. of Law 276.

4. See *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778; s. c., 3 Nat. Bank Cas. 208; *First Nat. Bank v. Forrest*, 40 Fed. Rep. 705.

5. U. S. Rev. Stat., § 5190.

6. *Armstrong v. Second Nat. Bank*, 38 Fed. Rep. 883.

upon it, at a different place from that of its location, through the agency of another bank.<sup>1</sup>

*Time of Commencing.*—So whatever the terms of such an arrangement, yet if it is made before the date of the certificate of authorization of the drawee bank, it is invalid under the provision<sup>2</sup> that no banking association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the comptroller of the currency to commence the business of banking.<sup>3</sup>

**7. Transformation of State Into National Banks.—In General.**—The act of congress providing for the organization of national banking institutions was intended not only to provide for the organization of new banks, but to absorb the old, and establish a general exclusive banking system for the whole country; and it, therefore, provided for the reorganization of the existing State banks.<sup>4</sup> Thus a bank existing under a special or general State law may, by complying with prescribed requirements, become a national banking association under the provisions of the national bank act.<sup>5</sup>

*Ad Interim Directors, etc.*—In prescribing the mode in which State banks may become national banks, the national bank or currency act provides that the articles of association and the organization certificate may be executed by a majority of the directors of the bank or banking institutions, etc., and that the directors aforesaid<sup>6</sup> may be the directors of the association until others are elected or appointed in accordance with the provisions of the act.<sup>7</sup>

*Status of Reorganized Bank.*—The general scheme of the national banking act is that State banks may avail themselves of its privileges and subject themselves to its liabilities, without abandoning their corporate existence, without any change in the organization, officers, stockholders, or property, and without in-

1. *Armstrong v. Second Nat. Bank*, 38 Fed. Rep. 883.

2. U. S. Rev. Stat., § 5136.

3. *Armstrong v. Second Nat. Bank*, 38 Fed. Rep. 883.

4. *State v. Phoenix Bank*, 34 Conn. 205.

5. Rev. Stat. U. S., §§ 5154, 5155; *Scofield v. State Nat. Bank*, 9 Neb. 316; s. c., 31 Am. Rep. 412; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; s. c., 11 Am. Rep. 253; *Coffey v. National Bank*, 46 Mo. 140; s. c., 2 Am. Rep. 488.

**Want of State Authority.**—No authority from the State is necessary to enable the bank so to change its organization. *Casey v. Galli*, 94 U. S. 673, 678; s. c., 1 Nat. Bank Cas. 142. Nor can the State continue to exact from a State bank so reorganized a bonus imposed

under legislative provisions. *State v. National Bank*, 33 Md. 75; s. c., 1 Nat. Bank Cas. 527.

**District of Columbia.**—As to right of savings banks in the District of Columbia to avail themselves of the law, see *Keyser v. Hitz*, 2 Mackey (D. C.) 473.

6. These words mean those who were the directors of the State bank, whether they signed the articles of association and the organization certificate or not. *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; s. c., 11 Am. Rep. 253; s. c., 1 Nat. Bank Cas. 895.

7. Act of 1864, § 44; 1st sess. 38th congress, chap. 106. As to recognition of nonacting directors, see *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; s. c., 11 Am. Rep. 253; s. c., 1 Nat. Bank Cas. 895.

terruption of their pending business or contracts.<sup>1</sup> And even where a national bank does not adopt the mode of transformation prescribed by the act of congress, yet, if it is, in fact, organized as the successor of a State bank with the consent of more than two-thirds of the stockholders, it has been held that such bank may hold and own assets of its predecessor, although in form it was organized as a new bank, and the assets were transferred to it as if by sale and purchase.<sup>2</sup>

**II. STATE CONTROL.—1. State Control in General.**—*Subject to Permission of Congress.*—National banks organized under the act are the instruments designed to be used to aid the government in the administration of an important branch of the public service;<sup>3</sup> and as congress, which is the sole judge of the necessity for their creation, has brought them into existence, the States can exercise no control over them, nor in any wise affect their operation, except so far as congress may see proper to permit.<sup>4</sup>

**Stockholders.**—As to effect of transformation upon nontransferable and qualified stockholders, see *State v. Phoenix Bank*, 34 Conn. 205; s. c., note, 1 Nat. Bank Cas. 930-31; *State v. Hartford Bank*, 34 Conn. 240, 246-47; s. c., note, 1 Nat. Bank Cas. 931.

**Legacy in Bank Shares.**—As to effect of transformation upon legacy in bank shares, see *Maynard v. Mechanics' Bank*, 7 Phila. (Pa.) 6; s. c., 1 Nat. Bank Cas. 892, *citing*, as to ademption of legacy, 1 Roper on Legacies, 240, 241; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258; and *Bringhurst v. Cuthbert*, 6 Binn. (Pa.) 398.

1. *City Nat. Bank v. Phelps*, 97 N. Y. 44; s. c., 49 Am. Rep. 513. See also, to like effect, *Coffey v. National Bank*, 46 Mo. 140; s. c., 2 Am. Rep. 488; s. c., 1 Thomp. Nat. Bank Cas. 644.

**Action on Continuing Guaranty.**—A national bank changed from a State bank may maintain an action on a continuing guaranty for loans, for fresh advances, as well as on those made prior to its reorganization. *City Nat. Bank v. Phelps*, just cited, and reported on a former appeal in 86 N. Y. 484, and below in 16 Hun (N. Y.) 158.

**Foreclosing Mortgage.**—So a reorganized national bank may foreclose a mortgage assigned to it by the State bank out of which it was formed, and to which the mortgage was given. *Scofield v. State Nat. Bank*, 9 Neb. 316; s. c., 31 Am. Rep. 412, where the transfer is held not to be invalid, and citation is made of *Union Nat. Bank v. Matthews*, 98 U. S. 621.

**Other Rights and Liabilities.**—As to validity of assignment to reorganized national bank of right of action for officer or agent's improper dealing with property, see *Grocers' Nat. Bank v. Clark*, 48 Barb. (N. Y.) 26; s. c., 32 How. Pr. (N. Y.) 160. As to liability of transformed bank for conversion of special deposits, see *Coffey v. National Bank of Missouri*, above cited. As to want of set-off against reorganized bank, see *Thorpe v. Wegefarth*, 56 Pa. St. 82; s. c., 93 Am. Dec. 789. Reorganized national bank is proper party to be sued for a reward offered by the State bank. *Kelsey v. National Bank*, 69 Pa. St. 426; s. c., 1 Nat. Bank Cas. 847.

**State Enabling Acts.**—For the construction of State enabling acts, see *Thomas v. Farmers' Bank*, 46 Md. 43; s. c., 2 Nat. Bank Cas. 248; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; s. c., 2 Nat. Bank Cas. 454; *Claggett v. Metropolitan Nat. Bank*, 4 N. Y. Supp. 115; *Clafin v. Farmers' etc. Bank*, 54 Barb. (N. Y.) 228.

2. *Bank v. McIntire*, 40 Ohio St. 528; s. c., 3 Nat. Bank Cas. 707.

As to a State bank succeeding a national bank, see *Eans v. Exchange Bank*, 79 Mo. 282.

3. But for view of these banks as private corporations, etc., see *Branch v. United States*, 12 Ct. of Cl. 281; s. c., 1 Nat. Bank Cas. 363.

4. *Farmers' etc. Nat. Bank v. Dearing*, 91 U. S. 29; s. c., 1 Nat. Bank Cas. 117; *citing*, as to the authority of the States in general, *McCulloch v. Mary-*

**Taxation by States.**—But the power of the States to tax the existing national banks lies within the category of those governmental powers which the States may exercise, at least with the consent of congress.<sup>1</sup>

**Scope of State Legislation.**—So in general the national banks, as federal agencies, are exempted from State legislation only so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve the government of the United States;<sup>2</sup> and, in fact, these banks are subject to the laws of the State, and are governed in their daily business far more by the laws of the State than of the nation.<sup>3</sup>

land, 4 Wheat. (U. S.) 316; *Weston v. Charleston*, 2 Pet. (U. S.) 466; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Dobbins v. Erie Co.*, 16 Pet. (U. S.) 435; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; and *Ex parte McNeil*, 13 Wall. (U. S.) 240. Portions of the opinion in the case first noted are quoted in *Central Nat. Bank v. Richland Nat. Bank*, 52 How. Pr. (N. Y.) 136, 138; s. c., 1 Nat. Bank Cas. 801.

1. *Farmers' etc. Nat. Bank v. Dearing*, 91 U. S. 29; s. c., 1 Nat. Bank Cas. 117. See also, concerning taxation of national bank shares, *Van Allen v. Assessors*, 3 Wall. (U. S.) 573; s. c., 1 Nat. Bank Cas. 1; affirmed in *People v. Commrs. of Taxes*, 4 Wall. (U. S.) 244; s. c., 1 Nat. Bank Cas. 9, and in *Bradley v. People*, 4 Wall. (U. S.) 459; s. c., 1 Nat. Bank Cas. 14. Even under the original act of 1863 national bank shares were held taxable by State authority in *Stetson v. Bangor*, 56 Me. 274; s. c., 1 Nat. Bank Cas. 520, which relies upon questions of constitutional taxation, etc., on *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316; *Weston v. Charleston*, 2 Pet. (U. S.) 449; *Bank of Commerce v. N. Y. City*, 2 Black (U. S.) 620; *Osborne v. Bank of U. S.*, 9 Wheat. (U. S.) 738; *Bank Tax Case*, 2 Wall. (U. S.) 200; *Providence Bank v. Billings*, 4 Pet. (U. S.) 563; *Sturgis v. Crowninshield*, 4 Wheat. (U. S.) 122; *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. (U. S.) 245; *Cooley v. Port Wardens of Philadelphia*, 12 How. (U. S.) 299; and *Gibbons v. Ogden*, 9 Wheat. (U. S.) 200. As to conditions and reservations upon the exercise of the power of the States to tax anything pertaining to national banks, see *Maguire v. Board of Revenue etc.*, 71 Ala. 401; s. c., 6 Am. & Eng. Corp. Cas. 452. Concerning right of State taxation, consult also

full discussion in *First Nat. Bank v. Com.*, 9 Wall. (U. S.) 353; s. c., 1 Nat. Bank Cas. 34.

2. *Thomas v. Farmers' Bank*, 46 Md. 43; s. c., 2 Nat. Bank Cas. 248.

3. *First Nat. Bank v. Com.*, 9 Wall. (U. S.) 353; s. c., 1 Nat. Bank Cas. 34. All their contracts, as is pointed out in this case, are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that such law becomes unconstitutional. The argument that these banks are financial agents of the government, and, as such, exempt from State legislation, based on the statements of CHASE, C. J., in *Van Allen v. Assessors*, 3 Wall. (U. S.) 589; s. c., 1 Nat. Bank Cas. 1, is combatted and confined to adverse legislation, and not as authorizing exemption from State process for breach of contract, in *Talmage v. Third Nat. Bank*, 91 N. Y. 531; s. c., 1 Am. & Eng. Corp. Cas. 148. See also *First Nat. Bank v. Lamb*, 50 N. Y. 95.

**Restriction Upon Extra-state National Bank.**—In *New York*, a national bank organized under the laws of the United States and doing business in another State is prohibited from keeping an office of discount or deposit in the State of New York, and cannot maintain an action upon any note discounted by it at such office. *National Bank v. Phoenix Warehousing Co.*, 6 Hun (N. Y.) 71; s. c., 1 Nat. Bank Cas. 784.

In *Winter v. Baldwin* (Ala.), 31 Am. & Eng. Corp. Cas. 406, it was held that the provisions of § 1677 of the Code, giving stockholders of private corporations the right to inspect the corporate

**2. Jurisdiction of State Courts—In General.**—It has been held that State courts have jurisdiction of suits brought by national banks, because such courts may exercise jurisdiction in cases authorized by the laws of the State, and not distinctly prohibited by enactments fixing the exclusive jurisdiction of the federal courts.<sup>1</sup>

**Governing Provisions.**—Any objection to the jurisdiction, in cases where a national bank is a party to the action, founded upon the character of the association as an instrument of the national government, is met by the existence of an express provision in the act of congress,<sup>2</sup> whereby suits, actions and proceedings against any such association may be had not only in the federal courts, but also in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases;<sup>3</sup> and this provision has been extended by construction to cover actions by as well as against such associations.<sup>4</sup>

**Provision as Permissive or Otherwise.**—But there is a conflict in the decisions upon the question whether suit may also be brought in a State other than that in which the national bank is legally located.<sup>5</sup>

books and papers, apply to national banks within the State as well as to other corporations, and that §§ 5240 and 5241 of the U. S. Rev. Stat., providing for national bank examiners, and exempting national banks from all visitatorial powers other than those authorized by congress, or vested in courts of justice, did not affect the statutory right of the stockholder.

1. *First Nat. Bank v. Hubbard*, 49 Vt. 1; s. c., 1 Nat. Bank Cas. 912; s. c., 24 Am. Rep. 97. See also, to like effect, *Adams v. Daunis*, 29 La. An. 315; s. c., 1 Nat. Bank Cas. 510. Concerning the principles regulating this matter, see *Ordway v. Central Nat. Bank*, 47 Md. 217; s. c., 1 Nat. Bank Cas. 559; s. c., 28 Am. Rep. 455, 460, stating the conclusion reached in 1 Kent's Com. 396, 400, and following and quoting the decision in *Clafin v. Houseman*, 93 U. S. 130; also *Crocker v. Marine Nat. Bank*, 101 Mass. 240; s. c., 3 Am. Rep. 336; citing, besides 1 Kent's Com. (6th ed.) 396, *et seq.*; the cases of *Bank of United States v. Deveau*, 5 Cranch (U. S.) 85, and *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, neither of which seems to be directly in point; and the more pertinent cases of *Teall v. Felton*, 1 N. Y. 537; s. c., 12 How. Pr. (N. Y.) 284, and *Ward v. Jenkins*, 10 Metc. (Mass.) 583; also *First Nat. Bank v.*

*Overman*, 22 Neb. 116; s. c., 3 Nat. Bank Cas. 556, which substantially quotes the statement of the ruling in *Clafin v. Houseman*, 93 U. S. 130, made in *Hade v. McVay*, 31 Ohio St. 231; s. c., 2 Nat. Bank Cas. 353. Consult, further, *Holmes v. National Bank*, 18 S. Car. 31; s. c., 44 Am. Rep. 558; *Robinson v. National Bank*, 81 N. Y. 385; s. c., 37 Am. Rep. 508; *Bletz v. Columbia Nat. Bank*, 87 Pa. St. 87; s. c., 30 Am. Rep. 343; s. c., 2 Nat. Bank Cas. 366.

**Receiver's Suit Against Directors.**—An action may be brought in a State court by a receiver or a stockholder of a national bank against its directors for negligence, etc., causing loss of funds. *Brinckerhoff v. Bostwick*, 88 N. Y. 52; s. c., 3 Nat. Bank Cas. 591.

2. National Bank act, § 57; 13 U. S. St. at Large 116.

3. *Bank of Bethel v. Pahquoque Bank*, 14 Wall. (U. S.) 383; s. c., 1 Nat. Bank Cas. 77.

4. *First Nat. Bank v. Hubbard*, 49 Vt. 1; s. c., 1 Nat. Bank Cas. 912; s. c., 24 Am. Rep. 97, following a like construction in *Kennedy v. Gibson*, 8 Wall. (U. S.) 498. See reference to this construction in *Robinson v. National Bank*, 81 N. Y. 385; s. c., 37 Am. Rep. 508.

5. Some of the cases hold that the

*Proceeding to Oust Director of Bank.*—And it has been held that an information in the nature of a *quo warranto* will not lie in a State court to try the right to office of a director in a national bank.<sup>1</sup>

**3. Place of Bringing Action—Conflicting Views.**—Not only is it the general doctrine that State courts have jurisdiction of suits brought by a national bank,<sup>2</sup> and that it may be sued in the proper courts of the State in which it is located,<sup>3</sup> but it is held by some of the cases that such a bank can be sued only in the courts of the State in which it is established, and not in those of another State.<sup>4</sup> Furthermore, it is sometimes, at least, indicated that the suit in such cases must be brought in the proper court of the particular city or county in which the bank is located.<sup>5</sup> Other cases, however, hold that a national bank doing business in one State may be sued in the courts of other States,<sup>6</sup> and even in a county of the same State different from that in which the bank is located.<sup>7</sup> Indeed, a national bank has been regarded as being a foreign corporation even in the State in which it is located, within the meaning of a statute requiring security for costs.<sup>8</sup>

provision in question is permissive, not mandatory. See full statement of grounds for this construction in *Cooke v. State Nat. Bank*, 52 N. Y. 96; s. c., 11 Am. Rep. 667; s. c., 1 Nat. Bank Cas. 698. Consult further *Talmage v. Third Nat. Bank*, 91 N. Y. 531; s. c., 1 Am. & Eng. Corp. Cas. 148. According to this view the provision does not, of itself, exclude the jurisdiction of other State courts. See *Robinson v. National Bank*, 81 N. Y. 385; s. c., 37 Am. Rep. 508, citing *Clafin v. Houseman*, 93 U. S. 130; 1 Kent's Com. 395, 396; *Bank of United States v. Deveaux*, 5 Cranch (U. S.) 85; *Osborn v. United States Bank*, 9 Wheat. (U. S.) 738; *Teall v. Felton*, 1 N. Y. 537, and *Houston v. Moon*, 5 Wheat. (U. S.) 1. The pertinency of most of these citations has already been considered. According to the other view the provision is not permissive in any such sense as to allow a national bank, established in one State, to be sued in the courts of any State of the Union in which litigation against an extra-State corporation is authorized, and in which it might be effectually served with process. *Crocker v. Marine Nat. Bank*, 101 Mass. 240; s. c., 3 Am. Rep. 336. See, to same effect, *Cadle v. Tracy*, 11 Blatchf. (U. S.) 101; s. c., 1 Nat. Bank Cas. 230.

1. *State v. Curtis*, 35 Conn. 374, 382.  
2. *First Nat. Bank v. Hubbard*, 49 Vt. 1; s. c., 24 Am. Rep. 97; s. c., 1 Nat. Bank Cas. 912. See also *Ordway v.*

*Central Nat. Bank*, 47 Md. 217; s. c., 28 Am. Rep. 455; s. c., 1 Nat. Bank Cas. 559.

3. *Adams v. Daunia*, 29 La. An. 315; s. c., 1 Nat. Bank Cas. 510; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. (U. S.) 383; s. c., 1 Nat. Bank Cas. 77.

4. See *Crocker v. Marine Nat. Bank*, 101 Mass. 240; s. c., 1 Nat. Bank Cas. 575; s. c., 3 Am. Rep. 336. Consult also *Cadle v. Tracey*, 11 Blatchf. (U. S.) 101; s. c., 1 Nat. Bank Cas. 230.

5. See *Crocker v. Marine Nat. Bank*, 101 Mass. 240; s. c., 1 Nat. Bank Cas. 575; s. c., 3 Am. Rep. 336. See also, as to jurisdiction over receiver, *Adams v. Daunia*, 29 La. An. 315; s. c., 1 Nat. Bank Cas. 510. But compare *New Orleans Banking Assoc. v. Adams*, 3 Woods (U. S.) 21; s. c., 2 Nat. Bank Cas. 207. The doctrine of the text is inapplicable to a change of the place of trial. *Kinser v. Farmers' Nat. Bank*, 58 Iowa 728.

6. *Cooke v. State Nat. Bank*, 52 N. Y. 96; s. c., 11 Am. Rep. 667; s. c., 1 Nat. Bank Cas. 698; *Robinson v. National Bank*, 81 N. Y. 385; s. c., 2 Nat. Bank Cas. 319; s. c., 37 Am. Rep. 508; *Holmes v. Nat. Bank*, 18 S. Car. 31; s. c., 44 Am. Rep. 558.

7. *Talmage v. Third Nat. Bank*, 91 N. Y. 531; s. c., 1 Am. & Eng. Corp. Cas. 148.

8. *National Park Bank v. Gunst*, 1 Abb. N. Cas. (N. Y.) 292; s. c., 1 Nat. Bank Cas. 797.

*Distinction Between Local and Transitory Actions.*—The Supreme Court of the United States does not adopt either view, but applies to this matter the old distinction between local and transitory actions. It holds that a national bank can be sued in a State court in a local action, in contradistinction from one of a transitory character, in a county or city other than that where the bank is located.<sup>1</sup>

**4. Attachment Against National Bank in Another State—Conflict of Decisions.**—There has been considerable conflict in the decisions upon the question whether an attachment may ordinarily issue out of a State court against the property of a national bank which is located in another State.

*Ruling by United States Supreme Court.*—This conflict may, however, doubtless be regarded as set at rest by a recent decision of the United States Supreme Court, based upon a full consideration of the provisions on the subject and the amendments thereof. This decision comprehensively holds that the effect of the act of congress is to deny altogether the remedy by attachment so far as national banks are concerned, whether in federal courts or in those of the States, without restriction to cases of actual or contemplated insolvency,<sup>2</sup> and the view thus taken has been followed as obligatory by the New York supreme court.<sup>3</sup>

**5. Suits for Recovery of Interest Penalties.**—The decisions of the different State courts are not entirely uniform upon the question, whether or not such courts have jurisdiction of actions against

1. *Casey v. Adams*, 102 U. S. 66; s. c., 2 Nat. Bank Cas. 102. But this view is regarded by the Supreme Court of Georgia as an unwarranted construction of the pertinent provisions of the National Bank act in *Continental Nat. Bank v. Folsom*, 78 Ga. 449; s. c., 3 Nat. Bank Cas. 350, which holds that a national bank giving an attachment bond in one State may be sued thereon in that State, though located in another State; and the decision under due consideration has been distinguished by the New York court of appeals upon the ground that the question there was a local question, and the plea was to the jurisdiction, and that the effect of the statute on transitory actions was not expounded. *Talmage v. Third Nat. Bank*, 91 N. Y. 531; s. c., 1 Am. & Eng. Corp. Cas. 148.

2. *Butler v. Coleman*, 124 U. S. 721. For a previous ruling adverse to the validity of an attachment against the property and credits of an extra-State national bank, see *Chesapeake Bank v. First Nat. Bank*, 40 Md. 269; s. c., 1 Nat. Bank Cas. 531; s. c., 17 Am. Rep. 601. But compare *contra*, *Southwick*

*v. First Nat. Bank*, 7 Hun (N. Y.) 96; s. c., 1 Nat. Bank Cas. 789.

3. *Bank of Montreal v. Fidelity Nat. Bank*, 1 N. Y. Supp. 852, and *First Nat. Bank v. La Due*, 39 Minn. 415. A different position had been taken in *Robinson v. National Bank*, 19 Hun (N. Y.) 477; s. c., 81 N. Y. 385, or 37 Am. Rep. 508, or 2 Nat. Bank Cas. 319; followed in *National Shoe etc. Bank v. Mechanics' Nat. Bank*, 89 N. Y. 467, s. c., 3 Nat. Bank Cas. 601; and *Peoples' Bank v. Mechanics' Nat. Bank*, 62 How. Pr. (N. Y.) 422, disapproving *Central Nat. Bank v. Richland Nat. Bank*, 52 How. Pr. (N. Y.) 136; s. c., 1 Nat. Bank Cas. 801, and *Rhoner v. First Nat. Bank*, 14 Hun (N. Y.) 126; s. c., 2 Nat. Bank Cas. 331. And this view had been adopted in *Holmes v. National Bank*, 18 S. Car. 31; s. c., 44 Am. Rep. 558. It was not considered necessary to decide the question in *McCracken v. Covington City Nat. Bank*, 4 Fed. Rep. 602. Concerning the prohibition of attachment against national banks which are insolvent or on the eve of insolvency, see *National Shoe etc. Bank v. Mechanics' Nat. Bank*, 89 N.

national banks for penalties and forfeitures, prescribed by the act of congress for exacting and receiving usurious interest.<sup>1</sup> Various cases may be found which are either directly or indirectly adverse to the existence of such jurisdiction.<sup>2</sup> The decided weight of the more recent decisions, however, seems to be in favor of sustaining such jurisdiction, especially where the actions are by private persons for the recovery of the penalty of twice the amount of interest prescribed by the congressional statute.<sup>3</sup>

**III. NATIONAL CONTROL—1. In General—Scope of.**—It has been well said of the national banks organized under the act of congress, that they are instruments designed to be used to aid the government in the administration of an important branch of the public service; that they are means appropriate to that end; that congress is the sole judge of the necessity which existed for creating them; and that being such means the States can exercise no control over them, nor in any wise affect their operation, except so far as congress may see proper to permit.<sup>4</sup>

**Supervision by National Officers.**—The national banks are located in different parts of the United States, most of them at a great distance from the city of Washington and from each other, and all under the supervision of officers residing in that city.<sup>5</sup>

Y. 467; *Raynor v. Pacific Nat. Bank*, 93 N. Y. 371.

1. *Lynch v. Merchants' Nat. Bank*, 22 W. Va. 554; s. c., 46 Am. Rep. 520.

2. See *Newell v. National Bank*, 12 Bush (Ky.) 57; s. c., 1 Nat. Bank Cas. 501; *Missouri R. Tel. Co. v. First Nat. Bank*, 74 Ill. 217; s. c., 1 Nat. Bank Cas. 401. Compare also *State v. Puller*, 34 Conn. 280; s. c., 1 Nat. Bank Cas. 375.

3. *Lynch v. Merchants' Nat. Bank*, 22 W. Va. 554; s. c., 46 Am. Rep. 520. See the following cases supporting this view: *First Nat. Bank v. Overman*, 22 Neb. 116; s. c., 3 Nat. Bank Cas. 556; *Schuyler Nat. Bank v. Bollong*, 24 Neb. 821; s. c., 3 Nat. Bank Cas. 558; *Bletz v. Columbia Nat. Bank*, 87 Pa. St. 87; s. c., 2 Nat. Bank Cas. 366; s. c., 30 Am. Rep. 343. Followed in *Gruber v. First Nat. Bank*, 87 Pa. St. 465; s. c., 2 Nat. Bank Cas. 395; *Pittkett v. Merchants' Nat. Bank*, 32 Ark. 346; s. c., 2 Nat. Bank Cas. 209; *Hade v. McVay*, 31 Ohio St. 231; s. c., 2 Nat. Bank Cas. 353; *Dow v. Irasburgh Nat. Bank*, 50 Vt. 112; s. c., 28 Am. Rep. 493; s. c., 2 Nat. Bank Cas. 421; *Ordway v. Central Nat. Bank*, 47 Md. 217; s. c., 28 Am. Rep. 455; s. c., 1 Nat. Bank Cas. 559.

**Waiver of Exemption.**—The statutory exemption of national banks from suits in State courts, in counties other than those in which the association is located,

is a personal privilege which is waived by appearing and making defence without claiming the immunity granted by congress. *Charlotte Nat. Bank v. Morgan*, 132 U. S. 141.

4. *Farmers' etc. Nat. Bank v. Dearling*, 91 U. S. 29; s. c., 1 Nat. Bank Cas. 117. See also as to regulation of currency by congress, *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533; s. c., 1 Nat. Bank Cas. 22.

A State statute prohibiting the establishment of banking companies without authority of the legislature does not apply to banking corporations like national banks, created by authority of congress. *Stetson v. Bangor*, 56 Me. 274; s. c., 1 Nat. Bank Cas. 520, 521, concerning right to sue in federal courts; *First Nat. Bank v. Douglass Co.*, 3 Dill. (U. S.) 298; s. c., 1 Nat. Bank Cas. 267; *Foss v. First Nat. Bank*, 5 Fed. Rep. 185; s. c., 2 Nat. Bank Cas. 104; *Fifth Nat. Bank v. Pittsburgh etc. R. Co.*, 1 Fed. Rep. 190; s. c., 2 Nat. Bank Cas. 190. But compare *St. Louis Nat. Bank v. Brinkman*, 1 Fed. Rep. 45; s. c., 2 Nat. Bank Cas. 141.

5. *Platt v. Beebe*, 57 N. Y. 339; s. c., 1 Nat. Bank Cas. 725.

**Comptroller of the Currency.**—Chief among these officers is the comptroller of the currency who, for the purpose of



**2. Jurisdiction of Federal Courts—Concurrent Jurisdiction Taken Away by Act of 1882.**—After the act of 1882, to enable national banks to continue their corporate existence, took effect, the concurrent jurisdiction of the federal courts over suits by and against national banks, as such, was taken away, and a suit by or against a national bank could not be removed from a State court to a circuit court of the United States,<sup>1</sup> unless a similar suit by or against a State bank in like situation with the national bank could be so removed.<sup>2</sup>

protecting the public, particularly those confiding in the solvency of the banks and having business with them, is under the necessity of taking the management from such of them as fail to comply with the law, and confiding them to the care of a receiver. *Platt v. Beebe*, just cited. Consult, further, concerning suspended national banks, *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437; s. c., 1 Nat. Bank Cas. 133; *Chemical Nat. Bank v. Bailey*, 12 Blatchf. (U. S.) 480; s. c., 1 Nat. Bank Cas. 260.

**National Bank Examiner.**—A national bank examiner, however, is not an officer or agent of the bank, but of the government, and has no authority, as such examiner, to act for the bank in any binding manner. *Witters v. Sowles*, 32 Fed. Rep. 762.

**Internal Revenue Officers.**—The law under which national banks are incorporated does not exempt them from examination by internal revenue officers. *United States v. Rhawn*, 11 Phila. (Pa.) 521; s. c., 1 Nat. Bank Cas. 358. See also *United States v. Mann*, 95 U. S. 580; s. c., 1 Nat. Bank Cas. 154.

**United States Treasurer.**—Concerning disposition of redemption fund by United States Treasurer, see *Jackson v. United States*, 20 Ct. of Cl. 208.

**Jurisdictional Questions Concerning Such Officers.**—As to want of jurisdiction of United States circuit court to entertain suit in control of comptroller and treasurer, as to bonds deposited with latter, see *Van Antwerp v. Hubbard*, 7 Blatchf. (U. S.) 426; s. c., 1 Nat. Bank Cas. 208, relying, as to power of circuit courts over United States officers, upon *Kendall v. United States*, 12 Pet. (U. S.) 524, and following cases therein cited: *Marbury v. Madison*, 1 Cranch (U. S.) 137; *McIntire v. Wood*, 7 Cranch (U. S.) 504; *McClung v. Silliman*, 6 Wheat. (U. S.) 598; *Reeside v. Walker*, 11 How. (U. S.) 272; *United States v. Guthrie*, 17 How. (U. S.) 284;

and *United States v. Edmunds*, 5 Wall. (U. S.) 563. See also reference to same view in *Van Antwerp v. Hubbard*, 8 Blatchf. (U. S.) 282; s. c., 1 Nat. Bank Cas. 219.

Receiver of suspended national bank cannot subject the government to the jurisdiction of the courts, nor can comptroller do so to determine the conflicting claims of the United States and other creditors. *Case v. Terrell*, 11 Wall. (U. S.) 99. But receiver is an officer of the United States so as to give the federal court jurisdiction of an action at common law brought by him to collect a claim which was due to the bank at the time of his appointment. *Platt v. Beech*, 2 Ben. (U. S.) 303; s. c., 1 Nat. Bank Cas. 182.

1. As to when removal justifiable and in time, see *Davies v. Marine Nat. Bank*, 24 Fed. Rep. 194, 195; *Richards v. Rock Rapids*, 31 Fed. Rep. 505.

2. *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778; s. c., 3 Nat. Bank Cas. 208.

Prior to that act it was held by inferior federal courts that a bank organized under the national banking law is not authorized to sue outside of the district in which it is located, in a circuit court of the United States, independently of any question of citizenship. *St. Louis Nat. Bank v. Allen*, 2 McCrary (U. S.) 92. Or when the amount in controversy does not exceed \$500. *St. Louis Nat. Bank v. Brinkham*, 1 McCrary (U. S.) 9; s. c., 2 Nat. Bank Cas. 141.

But on the other hand it was held by a court of like character that national banks may, by reason of their character as such, sue in the federal courts, in *First Nat. Bank v. Douglas Co.*, 3 Dill. (U. S.) 330; s. c., 1 Nat. Bank Cas. 267. See also *White v. Com. Nat. Bank*, 4 Brewst. (Pa.) 234; *First Nat. Bank v. Bohne*, 8 Fed. Rep. 115; *Foss v. First Nat. Bank*, 3 Fed. Rep. 185; s. c., 2 Nat. Bank Cas. 104; and by the Supreme

Nor could a national bank, after such act, sue in the federal courts in virtue of a mere corporate right, nor unless, as in the case of other banks and citizens, the subject-matter of litigation involved some other element of federal jurisdiction.<sup>1</sup>

But the provisions of the act are inapplicable to an action brought against private persons by a receiver of a national bank.<sup>2</sup>

**Effect of Act of 1888.**—Nor is jurisdiction of the federal courts over suits to which national banks are a party so far taken away by the act of 1888 as to deprive such courts of jurisdiction of an action between a national bank located in one State and a citizen of another State, because the provision of the act making such banks, for purposes of litigation, citizens of the States in which they are located, is followed by a provision that the circuit and district courts of the United States shall not have in such cases "jurisdiction over them, except such as they would have in cases between individual citizens of the same State."<sup>3</sup>

**3. Functions of Comptroller of Currency—In General.**—The comptroller of the currency has certain supervisory powers and duties in relation to national banks, designed to keep the officers within the limits of the law, in conducting their legitimate business, and, as far as lies within the province of official supervision by the government, to protect the creditors and stockholders against fraud, negligence and mismanagement.<sup>4</sup> Among the functions of the comptroller of the currency are the filling of

Court of the United States that the circuit courts had jurisdiction of suits brought by or against national banks (in the district of their location) without regard to the citizenship of the parties. *Kennedy v. Gibson*, 8 Wall. (U. S.) 498; s. c., 1 Nat. Bank Cas. 17; *Wilson Co. v. National Bank*, 103 U. S. 770. See also *Mitchell v. Butler*, 25 Int. Rev. Rec. 185; s. c., 8 Reporter 232; s. c. (apparently), as *Mitchell v. Walker*, 25 Int. Rev. Rec. 64, or 2 Nat. Bank Cas. 180.

The fact that one of the parties to a suit is a national bank was held to be no ground for removal from a State to a federal court, in *Wilder v. Union Nat. Bank*, 9 Biss. (U. S.) 178; s. c., 2 Nat. Bank Cas. 124, discussing requisites to authorize a removal on the ground that the controversy involves a question arising under the constitution and laws of the United States.

The National Bank act and not the Judiciary act was held to control the power and right of national banks to sue in the federal courts in the district of their location, in *Commercial Nat. Bank v. Simmons*, 1 Flap. (U. S.) 449; s. c., 1 Nat. Bank Cas. 294.

1. *Union Nat. Bank v. Miller*, 15 Fed. Rep. 703, 704.

Against right of a national bank to institute and maintain a suit against residents of its own State and judicial district, since act of 1882, see *National Bank v. Fore*, 25 Fed. Rep. 209.

2. *Price v. Abbott*, 17 Fed. Rep. 506.

3. *First Nat. Bank v. Forrest*, 40 Fed. Rep. 705, objecting to the literal construction that would make one clause nullify the other, and holding the design of the qualifying clause to be that the federal courts should have no other or different jurisdiction, where the suits concerned national banks, than they would have in case the suits were pending between individual citizens.

**Jurisdiction of United States Supreme Court.**—The Supreme Court of the United States has jurisdiction to re-examine the judgment of a State court involving the right of a national bank to purchase a promissory note secured by a deed of trust upon real estate; but a motion to affirm will be granted where that is the only federal question in the case and the decision below is in recognition of the right. *Swope v. Leffingwell*, 105 U. S. 3.

4. *Branch v. United States*, 12 Ct.

requisitions for currency from States and Territories,<sup>1</sup> and the issuance of a certificate of approval of the increase of the capital stock of a national bank.<sup>2</sup>

*Power to Enforce Stockholder's Liability.*—It has been repeatedly decided that the comptroller of the currency is vested with authority to determine the extent to which the individual liability of stockholders is to be enforced.<sup>3</sup> The conclusive character of this authority is upheld by some of the decisions;<sup>4</sup> but it is apparently denied by others, which hold that the authority is not made exclusive in character, particularly in view of supplementary legislation by congress on the subject.<sup>5</sup>

Should the comptroller, however, attempt to enforce an assessment clearly and palpably contrary to the provisions of the national bank act, a court of equity, if its aid were invoked, would promptly restrain him by injunction.<sup>6</sup>

The comptroller of the currency has also no power to discontinue a suit against a stockholder to enforce his individual liability for the debts of a national bank, though the comptroller might, perhaps, direct the receiver of the bank to make such discontinuance.<sup>7</sup>

*Comptroller's Certificate of Organization.*—Under the construction generally given to the provisions of the national bank act concerning the comptroller's certificate of organization,<sup>8</sup> the comptroller is clothed with jurisdiction to decide as to the completeness of the organization of a national bank, and his certificate is conclusive upon the subject for all the purposes of a litigation to enforce the individual liability of a stockholder for the debts of the association;<sup>9</sup> and so the production of such certificate has been regarded

of Cl. 281; s. c., 1 Nat. Bank Cas. 363.

1. As to priority permitted among requisitions arriving at about the same time, see Nat. Banks, 14 Op. Atty. Gen. 414, 417.

2. National Bank act, § 13; 13 U. S. Stat. at Large 99, 103. See Keyser v. Hitz, below, 2 Mackey (D. C.) 473; or 3 Nat. Bank Cas. 340. Concerning taxation of new shares upon which a dividend was declared as of a date prior to such approval and certificate, see Charleston v. People's Nat. Bank, 5 S. Car. 103; s. c., 22 Am. Rep. 1; s. c., 1 Nat. Bank Cas. 898, 901.

3. Stanton v. Wilkeson, 8 Ben. (U. S.) 357. See to such effect, Kennedy v. Gibson, 8 Wall. (U. S.) 498; s. c., 1 Nat. Bank Cas. 17; Sanger v. Upton, 91 U. S. 56; Strong v. Southworth, 8 Ben. (U. S.) 331; Bailey v. Sanger, 4 Dill. (U. S.) 463; s. c., 1 Nat. Bank Cas. 356; Casey v. Galli, 94 U. S. 673; s. c., 1 Nat. Bank Cas. 142; Germania Nat. Bank v. Case, 99 U. S.

628. Consult also National Bank v. Kennedy, 17 Wall. (U. S.) 19; s. c., 1 Nat. Bank Cas. 87; Bowden v. Morris, 1 Hughes (U. S.) 378.

4. Kennedy v. Gibson, 8 Wall. (U. S.) 498; s. c., 1 Nat. Bank Cas. 17, followed in Strong v. Southworth, 8 Ben. (U. S.) 331; Bailey v. Sawyer, 4 Dill. (U. S.) 463; s. c., 1 Nat. Bank Cas. 156; Casey v. Galli, 94 U. S. 673, 677; s. c., 1 Nat. Bank Cas. 142. See also Sanger v. Upton, 91 U. S. 56; Germania Nat. Bank v. Case, 99 U. S. 628.

5. Richmond v. Irons, 121 U. S. 27; s. c., 17 Am. & Eng. Corp. Cas. 71; Irons v. Manufacturers' Nat. Bank, 6 Biss. (U. S.) 301. See also Hawey v. Lord, 11 Biss. (U. S.) 144; s. c., 10 Fed. Rep. 236.

6. United States v. Knox, 102 U. S. 422.

7. Case v. Small, 4 Woods (U. S.) 78; s. c., 10 Fed. Rep. 722.

8. National Bank act, §§ 18, 44; 13 U. S. Stat. at Large 101, 113.

9. Casey v. Galli, 94 U. S. 673, rely-

as sufficiently proving the incorporation of the bank,<sup>1</sup> and as conclusive in regard to the regularity of the proceedings by which any bank has been converted into a national bank.<sup>2</sup> Some cases, however, seem to go no further than to hold that the comptroller's certificate is competent evidence, which may aid in making out a *prima facie* case.<sup>3</sup>

*Comptroller's Appointment of Receiver.*—The action of the comptroller of the currency in making the appointment of a receiver is conclusive upon debtors<sup>4</sup> until set aside on the application of the bank;<sup>5</sup> and a certificate of the comptroller, approved and concurred in by the secretary of the treasury, and reciting the existence of the facts of which the former is required to be satisfied under the national bank act,<sup>6</sup> is sufficient evidence of the validity of the appointment of the receiver in an action brought by him as such.<sup>7</sup>

*Comptroller's Relation to Bank in Liquidation.*—Under the construction given to provisions of the original national bank act, in regard to the receiver's action under the direction of the comptroller, in assuming charge of national banks under certain circumstances, and enforcing the liability of stockholders, etc., the receiver is the instrument of the comptroller by whom he is appointed, and it is therefore considered to be for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and to determine how much, if only a part, shall be collected.<sup>8</sup>

*Comptroller's Suit for Dissolution of Bank.*—A forfeiture of the rights and privileges of a national banking association must be determined and adjudged in a suit instituted by the comptroller of

ing, concerning conclusiveness of certificate, upon *Thacher v. West River Bank*, 19 Mich. 196.

1. *National Bank v. Phoenix Warehousing Co.*, 6 Hun (N. Y.) 71, citing also as to estoppel by dealing with the bank as a corporation, *Palmer v. Lawrence*, 3 Sandf. (N. Y.) 161; *Steam Nav. Co. v. Weed*, 17 Barb. (N. Y.) 378; *White v. Coventry*, 29 Barb. (N. Y.) 305; and *White v. Ross*, 15 Abb. Pr. (N. Y.) 661.

2. *Keyser v. Hitz*, 2 Mackey (D. C.) 473; s. c., 3 Nat. Bank Cas. 340.

3. *Mix v. National Bank*, 91 Ill. 20; s. c., 33 Am. Rep. 44. See also *Tapley v. Martin*, 116 Mass 275; s. c., 1 Nat. Bank Cas. 611.

4. See *Platt v. Crawford*, 8 Abb. Pr., N. S. (N. Y.) 297, 305-6.

5. *Cadle v. Baker*, 20 Wall. (U. S.) 650, holding that the bank and not the debtor may move in that behalf.

6. National Bank act, § 50; 13 U. S. Stat. at Large 99.

7. *Platt v. Beebe*, 57 N. Y. 339, taking the position that there is nothing in the act to indicate a design that the appointment should be upon legal proof or evidence of the facts as to violation of the law in the management of the bank, but that the act is framed to meet the emergency of want of time to get legal evidence of this character.

8. *Kennedy v. Gibson*, 8 Wall. (U. S.) 498; s. c., 1 Nat. Bank Cas. 17, construing act of June 3rd, 1864, § 50, quoted in *Sanger v. Upton*, 91 U. S. 56, and as authoritative in *Strong v. Southworth*, 8 Ben. (U. S.) 331, followed in *Bailey v. Sawyer*, 4 Dill. (U. S.) 463; s. c., 1 Nat. Bank Cas. 356, and in *Casey v. Galli*, 94 U. S. 673; s. c., 1 Nat. Bank Cas. 142; treated as stating established doctrine in *Germania Nat. Bank v. Case*, 99 U. S. 628; distinguished in *Bank v. Kennedy*, 17 Wall. (U. S.) 922; s. c., 1 Nat. Bank Cas. 87, and in *Bowden v. Morris*, 1 Hughes (U. S.) 378. Compare *Irons v. Manufacturers' Nat.*

the currency in his own name;<sup>1</sup> and such an association must stand until dissolved in that way.<sup>2</sup> Nor can any person, by a conspiracy to evade its regulations, escape the liability for borrowed money, loaned by a bank whose forfeiture has not been determined, upon personal security, in the manner authorized.<sup>3</sup>

**IV. POWERS—1. General and Incidental Powers—*Provision Concerning.***—As from the date of its organization certificate, a national banking association becomes a body corporate.<sup>4</sup> As such it has power to adopt and use a corporate seal, to have succession for the period of twenty years, unless sooner dissolved or suffering forfeiture of its franchise; to make contracts, to sue and be sued,<sup>5</sup> to elect or appoint directors, and by its board of directors to appoint a president and other officers; and to exercise all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt,<sup>6</sup> by buying and

Bank, 6 Biss. (U. S.) 301; and see as to supplementary enactment concerning involuntary liquidation by act of June 30th, 1876 (19 U. S. Stat. at Large 63; supplement to Rev. Stat. 216). See *Richmond v. Irons*, 121 U. S. 27; s. c., 17 Am. & Eng. Corp. Cas. 71; *Hawey v. Lord*, 11 Biss. (U. S.) 144; s. c., 10 Fed. Rep. 236.

1. National Bank act, § 53; 13 U. S. Stat. at Large 99.

2. *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 1 Colo. 531.

3. *Stephens v. Monongahela Nat. Bank*, 88 Pa. St. 157; s. c., 32 Am. Rep. 438; s. c., 2 Nat. Bank Cas. 398. But a decree of forfeiture at the instance of the comptroller abates a suit against a national bank to enforce the collection of a demand. *First Nat. Bank v. Colby*, 21 Wall. (U. S.) 609, 614.

4. U. S. Rev. Stat., § 5, 36.

5. See *Main v. Second Nat. Bank*, 6 Biss. (U. S.) 26; s. c., 1 Nat. Bank Cas. 200.

6. This clause (which is also liberally construed in *Shinkle v. First Nat. Bank*, 22 Ohio St. 517; s. c., 1 Nat. Bank Cas. 824) does not exclude authority to guaranty the payment of a note at maturity. *Peoples' Bank v. National Bank*, 101 U. S. 181; s. c., 2 Nat. Bank Cas. 97. But a national bank has no power to guaranty a contract between other persons for the delivery of building materials. *Norton v. Derry Nat. Bank*, 61 N. H. 509; s. c., 60 Am. Rep. 334; s. c., 3 Nat. Bank Cas. 568. As to right to take railway aid coupons, see *Town of Lyons v. Lyons*

*Nat. Bank*, 19 Blatchf. (U. S.) 279; *First Nat. Bank v. Town of Bennington*, 16 Blatchf. (U. S.) 53; s. c., 2 Nat. Bank Cas. 437.

"To receive deposits is among the powers specifically delegated to national banks." *Eastern Townships' Bank v. Vermont Nat. Bank*, 22 Blatchf. (U. S.) 498; s. c., 22 Fed. Rep. 186.

**Special Deposits.**—It seems now to be settled that a national bank may receive special deposits. *National Bank v. Graham*, 100 U. S. 699; s. c., 2 Nat. Bank Cas. 64.

But there was formerly much conflict in the decisions as to whether this clause, or perhaps any other provision of the National Bank act, conferred such authority. The view adverse to the existence of such authority was sustained mainly by *Whitney v. First Nat. Bank*, 50 Vt. 388; s. c., 28 Am. Rep. 503, and *Wiley v. First Nat. Bank*, 47 Vt. 546; s. c., 19 Am. Rep. 122; s. c., 1 Nat. Bank Cas. 905. Support to the same position is given by *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; s. c., 19 Am. Rep. 181; s. c., 1 Nat. Bank Cas. 728, and *Third Nat. Bank v. Boyd*, 47 Md. 47; s. c., 22 Am. Rep. 35; s. c., 1 Nat. Bank Cas. 445. See also *Weckler v. First Nat. Bank*, 42 Md. 581; s. c., 1 Nat. Bank Cas. 545. The contrary view upholding the authority to take special deposits was sustained by *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82; s. c., 36 Am. Rep. 582. The question was waived in *De Haven v. Kensington Nat. Bank*, 81 Pa. St. 95; s. c., 1 Nat. Bank Cas. 882.

selling exchange, coin,<sup>1</sup>

Other authorities bearing upon same phase of the subject are reviewed in the above cited case of *Whitney v. First Nat. Bank*, 50 Vt. 388; s. c., 28 Am. Rep. 503, which case is reported on other points in 55 Vt. 154; s. c., 3 Am. & Eng. Corp. Cas. 266, and the judgment wherein is reversed in 1 Morr. Trans. 263, upon the authority of the before cited case of *First Nat. Bank v. Graham*, 100 U. S. 699; s. c., 2 Nat. Bank Cas. 64. These reviewed authorities comprise *Fowler v. Scully*, 72 Pa. St. 456; s. c., 14 Am. Rep. 699; s. c., 1 Nat. Bank Cas. 854; *First Bank v. Graham*, 79 Pa. St. 106; s. c., 21 Am. Rep. 49; s. c., 1 Nat. Bank Cas. 875; *Foster v. Essex Bank*, 17 Mass. 479; s. c., 9 Am. Dec. 168; *Coffey v. National Bank*, 46 Mo. 140; s. c., 2 Am. Rep. 438; s. c., 1 Nat. Bank Cas. 644; *Leach v. Hale*, 31 Iowa 69; s. c., 7 Am. Rep. 112; *Scott v. National Bank*, 72 Pa. St. 471; s. c., 13 Am. Rep. 711; s. c., 1 Nat. Bank Cas. 864; *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369; s. c., 1 Nat. Bank Cas. 379; *Pearce v. Madison etc. R. Co.*, 21 How. (U. S.) 441; *Vermont etc. R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 47; *Bullard v. National Eagle Bank*, 18 Wall. (U. S.) 589; s. c., 1 Nat. Bank Cas. 93, and *Head v. Providence Ins. Co.*, 2 Cranch (U. S.) 467. Additional cases reviewed or noted in *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82; s. c., 36 Am. Rep. 582. Relevant to the discussion of the matter are *Lloyd v. West Branch Bank*, 15 Pa. St. 172; *Lancaster Co. Nat. Bank v. Smith*, 62 Pa. St. 47; *Turner v. First Nat. Bank*, 26 Iowa 562; s. c., 1 Nat. Bank Cas. 154; *Smith v. First Nat. Bank*, 99 Mass. 605; s. c., 97 Am. Dec. 59; and *Giblin v. McMullen*, 2 L. R., P. C. 317.

The doctrine of the Supreme Court of the United States, which may be regarded as establishing the law upon this subject, is that it would undoubtedly be competent for a national bank to receive a special deposit of such securities or bonds, "written on a contract of hiring or without reward," and that "it would be liable for a greater or less degree of negligence accordingly." *First Nat. Bank v. Graham*, 100 U. S. 699; s. c., 2 Nat. Bank Cas. 64. This proposition is spoken of as "decided," in the case just cited, in *Myllie v. Northampton Bank*, 119 U. S. 361; s. c., 3 Nat. Bank Cas. 188. And the case is also treated as authority upon

the liability of a national bank, in *Whitney v. National Bank*, 1 Morr. Trans. 263, and cited in regard to the scope of such liability in *Prather v. Kean*, 29 Fed. Rep. 498.

The "proper construction" of the National Bank act is said to have been "conclusively determined" by this case in *Bank v. Zent*, 39 Ohio St. 105, 108; s. c., 3 Nat. Bank Cas. 698, 700.

The view thus taken is based upon the provision of the National Bank act, as to delivery of special deposits by national banks after they have stopped business (U. S. Rev. Stats., § 5228, act of 1864, § 46), which is considered to imply clearly and as effectually as by virtue of an express declaration (upon the authority of *United States v. Babbitt*, 1 Black (U. S.) 55) that a national bank may receive such special deposits as a part of its legitimate business. The connected subject of the liability of national banks for loss of special deposits, to which many of the foregoing authorities really relate, is considered in *Lancaster Co. Nat. Bank v. Smith*, 62 Pa. St. 47; *Scott v. National Bank*, 72 Pa. St. 471; s. c., 13 Am. Rep. 711; s. c., 1 Nat. Bank Cas. 864; *De Haven v. Kensington Nat. Bank*, 81 Pa. St. 95; s. c., 1 Nat. Bank Cas. 882; *First Nat. Bank v. Graham*, 85 Pa. St. 91; s. c., 27 Am. Rep. 628; *First Nat. Bank v. Rex*, 89 Pa. St. 308; s. c., 33 Am. Rep. 767; note to *Foster v. Essex Bank*, 9 Am. Dec. 183; *Smith v. First Nat. Bank*, 99 Mass. 605; s. c., 97 Am. Dec. 59; *Dearborn v. Union Nat. Bank*, 58 Me. 273; s. c., 61 Me. 369; *Jenkins v. National Village Bank*, 58 Me. 275; *Whitney v. First Nat. Bank*, 55 Vt. 154; s. c., 3 Am. & Eng. Corp. Cas. 266; *Yorkes v. National Bank*, 69 N. Y. 383; s. c., 25 Am. Rep. 208; *Third Nat. Bank v. Boyd*, 44 Md. 47; s. c., 22 Am. Rep. 35; s. c., 1 Nat. Bank Cas. 45; *Leach v. Hale*, 31 Iowa 69; s. c., 7 Am. Rep. 112; s. c., 1 Nat. Bank Cas. 466; *Coffey v. National Bank*, 46 Mo. 140; s. c., 2 Am. Rep. 438; s. c., 1 Nat. Bank Cas. 644; *Second Nat. Bank v. Ocean Nat. Bank*, 11 Blatchf. (U. S.) 362; *Prather v. Kean*, 29 Fed. Rep. 498; *Myllie v. Northampton Bank*, 119 U. S. 361; s. c., 3 Nat. Bank Cas. 188; *Bank v. Zent*, 39 Ohio St. 105, 108; s. c., 3 Nat. Bank Cas. 698.

1. See *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604; s. c., 1 Nat. Bank Cas. 47.

and bullion;<sup>1</sup> by loaning money on personal security,<sup>2</sup> and by issuing, etc., circulating notes.<sup>3</sup>

*Construction of Provision.*—The provision as to the incidental powers of national banks is sometimes strictly construed as limiting and defining the kind of banking they may conduct, instead of leaving the scope of their business to implication;<sup>4</sup> but a more liberal construction is sometimes adopted, which regards the provision as containing five distinct grants of power, none of which is a limitation upon any other.<sup>5</sup>

*Agency in Purchase of Bonds or Stocks.*—A national bank has no inherent power to act as broker or agent in the purchase of bonds or stocks, and its president cannot bind it by an agreement so to act, without special authority.<sup>6</sup>

*Seeking to Recover Lost Property.*—But it certainly would be competent for a national bank to take measures for the recovery of its own property lost through a burglary, and to act for others jointly concerned with itself.<sup>7</sup>

*Collecting Commercial Paper.*—The business of collecting commercial paper is part of the regular business of banking when carried on under national as well as under other bank charters.<sup>8</sup>

**2. Prescribing By-laws—Authority For.**—A national banking association is empowered by statute to prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner

1. Neither this clause nor that concerning the discounting of promissory notes, etc., authorize the selling of railroad bonds on commission by a national bank. *Weckler v. First Nat. Bank*, 42 Md. 581; s. c., 20 Am. Rep. 95; s. c., 1 Nat. Bank Cas. 533. Under the express authority to buy and sell exchange, a national bank may lawfully purchase a draft drawn in its favor by a seller of goods upon a buyer, with a bill of lading attached. *Union Nat. Bank v. Rowan*, 23 S. Car. 339; s. c., 55 Am. Rep. 26.

As to right to take railway aid coupons, see *Town of Lyons v. Lyons Nat. Bank*, 19 Blatchf. (U. S.) 79, 289.

2. This clause does not exclude the power of national banks to take a pledge of stock as collateral security for notes or bills of exchange cashed by them. *Shoemaker v. National Mechanics' Bank*, 2 Abb. (U. S.) 416; s. c., 1 Hughes (U. S.) 101 (quoting, as to restrictions upon powers of banks and corporations in general, the doctrine of *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 68, from *Head v. Providence Ins. Co.*, 2 Cranch (U. S.) 127; *Steam Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 318, 319).

See also *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; s. c., 11 Am. Rep. 253; s. c., 1 Nat. Bank Cas. 895. Nor does it preclude a national bank from making a loan on a note and taking a warehouse receipt as collateral security therefor. *Cleveland v. Shoeman*, 40 Ohio St. 176; s. c., 1 Am. & Eng. Corp. Cas. 140; s. c., 3 Nat. Bank Cas. 701.

3. Nat. Bank act of June 3rd, 1864, § 8; 13 Stats. at Large 101; U. S. Rev. Stats., § 5136.

4. *Weckler v. First Nat. Bank*, 42 Md. 581; s. c., 20 Am. Rep. 95; s. c., 1 Nat. Bank Cas. 533.

5. *Shoemaker v. National Mechanics' Bank*, 2 Abb. (U. S.) 416; s. c., 1 Hughes (U. S.) 101.

6. *First Nat. Bank v. Hoch*, 89 Pa. St. 324; s. c., 33 Am. Rep. 769; s. c., 2 Nat. Bank Cas. 375.

7. *Mylie v. Northampton Nat. Bank*, 119 U. S. 361; s. c., 3 Nat. Bank Cas. 188.

8. *Mound City Paint etc. Co. v. Commercial Nat. Bank*, 4 Utah 353. This would appear to be assumed in *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, *et seq.*, and in *Merchants' Nat. Bank v. Goodman*, 109 Pa. St. 422.

in which its stock shall be transferred,<sup>1</sup> its directors elected and appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.<sup>2</sup>

*Adoption of By-law by Quorum of Board.*—A by-law of a national bank must, as a prerequisite to its validity, be adopted by a majority of all the directors, or by a quorum of the board;<sup>3</sup> and, accordingly, a by-law of a national bank is invalid where it is adopted at a meeting of six *ad interim* directors of a national bank which had twelve directors before its conversion from a State bank.<sup>4</sup>

*Validity of By-law Giving Bank a Lien, etc.*—The validity of a by-law giving the bank a lien upon the stock as against the stockholders, and restricting their transfer of the same, has been the subject of conflicting decisions, though it would seem that the later and more authoritative rulings are opposed to sustaining such a by-law.<sup>5</sup>

1. See *Knight v. Old Nat. Bank*, 3 Cliff. (U. S.) 429, 431, 432; s. c., noted 1 Nat. Bank Cas. 929.

2. U. S. Rev. Stat., § 5136. See quotation of language of act of 1864, § 8, and act of 1863, § 11, in *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; s. c., 11 Am. Rep. 253; s. c., 1 Nat. Bank Cas. 895.

3. As to status of affairs if bank has never legally adopted any by-laws, see *Taylor v. Hutton*, 43 Barb. (N. Y.) 195; s. c., 18 Abb. Pr. (N. Y.) 16; s. c., 1 Nat. Bank Cas. 755.

4. *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; s. c., 11 Am. Rep. 253; s. c., 1 Nat. Bank Cas. 895. This view is based upon the familiar principle applicable to the proceedings of corporations in general, as developed in 2 Kent Com. 293; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. (Mich.) 124; note to *Ex parte Wilcocks*, 7 Cow. (N. Y.) 401; *King v. Bellringer*, 4 Term. Rep. 810, and *King v. Miller*, 6 Term. Rep. 268. An objection has been dismissed as untenable and inapplicable to the particular case, that seven only of the eight directors of a national bank were present at a meeting when a by-law was adopted, in *Knight v. Old Nat. Bank*, 3 Cliff. (U. S.) 429; s. c., noted, 1 Nat. Bank Cas. 929.

5. The view favorable to the validity of such a by-law is taken in *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; s. c., 1 Nat. Bank Cas. 895; s. c., 11 Am. Rep. 253; *Knight v. Old Nat. Bank*, 3 Cliff. (U. S.) 429; s. c., noted 1 Nat.

Bank Cas. 929; *In re Dunkerson*, 4 Biss. (U. S.) 227. The adverse view is maintained in *Fekkhimer v. Nat. Exch. Bank*, 79 Va. 80; s. c., 5 Am. & Eng. Corp. Cas. 156; *First Nat. Bank v. Lainer*, 11 Wall. (U. S.) 369; s. c., 1 Nat. Bank Cas. 93; *Bullard v. National Eagle Bank*, 18 Wall. (U. S.) 589; s. c., 1 Nat. Bank Cas. 93; *Evansville Nat. Bank v. Metropolitan Nat. Bank*, 2 Biss. (U. S.) 527; s. c., 1 Nat. Bank 189. The controversy turns largely upon the intention of congress in prohibiting national banking associations from making loans upon shares of their stock (U. S. Rev. Stat., § 5201; Nat. Bank act, § 35), and upon a change in the provisions of the act, which left out a section providing for a lien of the bank upon the stock. (§ 36 of act of 1863, omitted in act of 1864.)

The discussion of the question involved a consideration of by-laws relating to transfer of stock in general, upon which matter the above cited case of *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; s. c., 11 Am. Rep. 253; s. c., 1 Nat. Bank Cas. 895, reviews *Child v. Hudson Bay Co.*, 2 P. Wms. 207; *Cunningham v. Alabama L. Ins. Co.*, 4 Ala. 652; *St. Louis etc. Ins. Co. v. Goodfellow*, 9 Mo. 149; *Waln v. Bank of North America*, 8 S. & R. (Pa.) 73; *Brent v. Bank of Washington*, 10 Pet. (U. S.) 615, and *McDowell v. Bank of Wilmington*, 1 Har. (Del.) 27. The same case also reviews under New York act identical in this matter with the national act of 1863, *Bank of Attica v. Manufacturers' etc.*



**3. Acts Ultra Vires—What Acts Not Ultra Vires.**—An agreement by a national bank to procure a release of a mortgage held by a third person upon lands on which the bank also had a mortgage, is not *ultra vires* as foreign to the purposes of the corporation or beyond its powers;<sup>1</sup> and where a national bank, in order to secure its indebtedness, takes possession, by its cashier, of goods under a chattel mortgage and disposes of them, it cannot claim immunity from liability for any surplus remaining after payment in full of its claims, on the ground that its cashier, being an officer of a national bank, exceeded his powers and acted *ultra vires*.<sup>2</sup>

**Voidable by Government Only.**—If a national bank has entered into a contract not authorized by its charter, it is held by the Supreme Court of the United States that the bank cannot repudiate the contract and at the same time retain the fruits of such con-

Bank, 20 N. Y. 501, and *Leggett v. Bank of Sing Sing*, 24 N. Y. 283, and cites, in regard to the effect of a by-law requiring a transfer of stock to be made on the books of the corporation, *Union Bank v. Laird*, 2 Wheat. (U. S.) 293; *Stebbins v. Phoenix F. Ins. Co.*, 3 Paige (N. Y.) 361; *Bank of Attica v. Manufacturers' etc. Bank*, 20 N. Y. 512, *Vansands v. Middlesex Co. Bank*, 26 Conn. 144; *Mechanics' Bank v. New Haven etc. R. Co.*, 13 N. Y. 622; *Fisher v. Essex Bank*, 5 Gray (Mass.) 373. The Supreme Court of the United States, through Mr. Justice Strong, in the above cited case of *Bullard v. Nat. Eagle Bank*, 18 Wall. (U. S.) 589; s. c., 1 Nat. Bank Cas. 93, sustains and follows the prior decision of the same tribunal in *First Nat. Bank v. Lanier*, 11 Wall. (U. S.) 369; s. c., 1 Nat. Bank Cas. 70, which is also followed in *Evansville Nat. Bank v. Metropolitan Nat. Bank*, 2 Biss. (U. S.) 527; s. c., 1 Nat. Bank Cas. 189. But Mr. Justice Clifford dissented for the reasons assigned by him in his opinion in *Knight v. Old Nat. Bank*, 3 Cliff. (U. S.) 429. As the only other federal case of like tenor with that last cited, is *In re Dunkerson*, 4 Biss. (U. S.) 227, the preponderance of federal authority is clearly against the validity of a by-law of the character in question, and the only antagonism on the authorities so far considered is between the Supreme Courts of Rhode Island and Virginia, respectively. The decision of the Supreme Court of the United States has been followed or recognized as to the lien of a national bank on its own stock, in *New York (Conklin v. Second Nat. Bank*, 45 N.

Y. 655; s. c., 1 Nat. Bank Cas. 693). *Maine (Hagar v. Union Nat. Bank*, 63 Me. 509, making special distinctions). *Kentucky (Second Nat. Bank v. National Bank*, 10 Bush (Ky.) 367, where a claim under articles of association or by-laws was repudiated), and *Minnesota (Nicollet Nat. Bank v. City Bank*, 38 Minn. 85; s. c., 8 Am. St. Rep. 643; s. c., 21 Am. & Eng. Corp. Cas. 423, where a by-law ran counter to a State law copied from the National Bank act). A like view as to a lien created by a by-law had, prior to the national rulings, been favored in *New York, in Rosenback v. Salt Springs Nat. Bank*, 53 Barb. (N. Y.) 495. In *New Jersey* it seems to have been considered in one case that a by-law of a national bank is reasonable, and authorized by the act of congress, where it declares that no shares shall be transferred while the holder is indebted to the bank. *Young v. Vough*, 23 N. J. Eq. 325. But in a subsequent case the court refused to pass upon the question whether a like by-law was legal under the act of congress, and said that the matter must be considered as unsettled in that court. *Mattison v. Young*, 24 N. J. Eq. 535.

1. *McCraith v. National Mohawk Valley Bank*, 104 N. Y. 414.

2. *Cooper v. First Nat. Bank*, 40 Kan. 5. A national bank can take from contractors an assignment of the money due and to become due from a city of the second class on a contract for paving a street, to secure an existing *bona fide* indebtedness by the contractor to the bank. *First Nat. Bank v. Ottawa* (Kan. 1890), 23 Pac. Rep. 485.

tract;<sup>1</sup> and in general it is the doctrine of the later cases that various acts of a national bank which are *ultra vires*, such as the taking of a mortgage upon real estate to secure a contemporaneous loan or future advances, are not void, but merely voidable at the instance of the government.<sup>2</sup>

*Certification of Check, etc.*—The provision of the National Bank act prohibiting a national bank from certifying a check, except under certain circumstances, does not render the contract of certification illegal and void, but expressly affirms the validity of such contract, and impliedly limits the penalty for the violation of the provision to a forfeiture of the bank's charter and the winding up of its affairs.<sup>3</sup> Nor is a certified check illegal as being in violation of the provision of the National Bank act which forbids national banks to issue any other notes to circulate as money than such as are authorized by the provisions of the act.<sup>4</sup>

*Receiving Deposit as Collateral for Contract.*—It has been considered that a national bank has power to receive a deposit of money as collateral security for the performance of a contract of sale; but that, even if the undertaking of the bank was *ultra vires*, yet, as it was not illegal, the bank was estopped from setting up that defence, as it would be a fraud upon the seller to allow it to do so, after he had entered into the contract relying thereon.<sup>5</sup>

*Taking Possession of Warehouse as Security.*—Where a national bank takes possession of a public warehouse containing grain in store for which warehouse receipts had been issued, and conveyed to it by the owner by deed of trust to secure a debt due to the bank, the bank cannot refuse to redeliver the grain merely because the conducting of a warehouse business is not within its corporate powers.<sup>6</sup>

1. *Casey v. La Societi etc.*, 2 Woods (U. S.) 77; s. c., 1 Nat. Bank Cas. 285. See also *Norton v. Derry Nat. Bank*, 61 N. H. 589; s. c., 60 Am. Rep. 334; s. c., 3 Nat. Bank Cas. 568; *First Nat. Bank v. Stewart*, 107 U. S. 676; s. c., 1 Am. & Eng. Corp. Cas. 138; s. c., 3 Nat. Bank Cas. 96.

2. *Union Nat. Bank v. Matthews*, 98 U. S. 621; s. c., 2 Nat. Bank Cas. 12; *Howard Nat. Bank v. Loomis*, 51 Vt. 349; s. c., 2 Nat. Bank Cas. 424; *Warner v. De Witt Co. Nat. Bank*, 4 Ill. App. 305; s. c., 2 Nat. Bank Cas. 222; *Wroten v. Armat*, 31 Gratt. (Va.) 228; s. c., 2 Nat. Bank Cas. 426; *First Nat. Bank v. Elmore*, 52 Iowa 541; s. c., 2 Nat. Bank Cas. 237; *Graham v. National Bank*, 32 N. J. Eq. 804; s. c., 2 Nat. Bank Cas. 293; *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325; s. c., 3 Nat. Bank Cas. 663; *Gloversville Nat. Bank v. Burr*, 27 Hun (N. Y.) 109. See also *First Nat. Bank v. Stewart*, 107 U. S. 676; s. c., 1 Am. & Eng. Corp.

Cas. 138; s. c., 3 Nat. Bank Cas. 96; *Union Nat. Bank v. Roman*, 23 S. Car. 339; s. c., 55 Am. Rep. 26; *Town of Lyons v. Lyons Nat. Bank*, 19 Blatchf. (U. S.) 279.

3. *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325; s. c., 3 Nat. Bank Cas. 663.

4. *Hunt's Appeal*, 141 Mass. 515; s. c., 3 Nat. Bank Cas. 474. See also *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604; s. c., 1 Nat. Bank Cas. 47. And as to certificates of deposit, *Riddle v. First Nat. Bank*, 27 Fed. Rep. 503.

The National Bank act does not invalidate an oral or conditional acceptance or promise to pay a check when the drawer has sufficient funds in the bank. *National Bank v. National Bank*, 7 W. Va. 544.

5. *Bushnell v. Chatauqua Nat. Bank*, 10 Hun (N. Y.) 378.

6. *German Nat. Bank v. Meadowcroft*, 95 Ill. 124.

**4. Loans Which Are Ultra Vires—*Loaning Credit*.**—It seems to be *ultra vires* of a national bank to loan its credit for a compensation, and become an accommodation endorser of a promissory note, so as to procure the discounting of the paper of its customers by another bank, thereby evading the restraints imposed by the usury clauses in the National Bank act.<sup>1</sup>

***Loans in Excess of Prescribed Proportion of Capital Stock*.**—But loans made to any person by a national bank in excess of one-tenth of its capital stock, though illegal and *ultra vires*, are not void;<sup>2</sup> and in an action to recover such loans the defendant cannot interpose the defence that they are in violation of the National Bank act, and not recoverable beyond the proportions specified.<sup>3</sup> Nor can such defence be urged to defeat securities given for a loan made by a national bank.<sup>4</sup>

**5. Powers Concerning Personal Property—*Taking Pledge or Mortgage of Chattels*.**—The words "loans on personal security," in the National Bank act, are not used in any such restricted sense as to preclude a national bank from taking a pledge of personal chattels, such as a locomotive;<sup>5</sup> and so a national bank has implied authority to take, hold, and enforce a chattel mortgage given as security for a previously contracted debt.<sup>6</sup>

***Taking Stocks or Bonds as Security*.**—It is also within the incidental powers of a national bank to accept bonds as collateral se-

1. *Gloversville Nat. Bank v. Wells*, 79 N. Y. 498; reversing 15 Hun (N. Y.) 51, or 2 Nat. Bank Cas. 333. But compare *Gloversville Nat. Bank v. Burr*, 27 Hun (N. Y.) 109. A national bank may lend money on personal security, but not its credit. *Seligman v. Charlottesville Nat. Bank*, 3 Hughes (U. S.) 647; s. c., 2 Nat. Bank Cas. 195, 198. See also *Johnston v. Charlottesville Nat. Bank*, 3 Hughes (U. S.) 657; s. c., 2 Nat. Bank Cas. 199.

2. *Gold Min. Co. v. National Bank*, 96 U. S. 640; s. c., 1 Nat. Bank Cas. 151; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 1 Colo. 531. See reference in *Bowditch v. New England Mut. L. Ins. Co.*, 141 Mass. 292.

3. *Gold Min. Co. v. National Bank*, 96 U. S. 640; s. c., 1 Nat. Bank Cas. 151, 152. See also to like effect *O'Hare v. Second Nat. Bank*, 77 Pa. St. 96; s. c., 1 Nat. Bank Cas. 869; *Bly v. Second Nat. Bank*, 79 Pa. St. 453; *Shoemaker v. Nat. Mechanics' Bank*, 2 Abb. (U. S.) 416; s. c., 1 Hughes (U. S.) 101; *Stewart v. Nat. Union Bank*, 2 Abb. (U. S.) 424; s. c., 1 Nat. Bank Cas. 175, 177; *Shoemaker v. Mechanics' Nat. Bank*, 31 Md. 396; s. c., 100 Am. Dec. 73; *Corcoran v. Batchelder*,

147 Mass. 541; s. c., 3 Nat. Bank Cas. 491. Compare, as to injunction against bank, *Elder v. First Nat. Bank*, 12 Kan. 238; s. c., 1 Nat. Bank Cas. 488. And as to taking of notes from State bank, *Allen v. First Nat. Bank*, 23 Ohio St. 97; s. c., 1 Nat. Bank Cas. 828.

4. *Mills Co. Nat. Bank v. Perry*, 72 Iowa 15; s. c., 2 Am. St. Rep. 228. See also *Wyman v. Citizens' Nat. Bank*, 29 Fed. Rep. 734.

5. *Pittsburgh Locomotive Works v. State Nat. Bank*, 2 Cent. L. J. 692; s. c., 21 Int. Rev. Rec. 349; s. c., 1 Nat. Bank Cas. 315. Nor is it beyond the power of a national bank to take a warehouse receipt as collateral security for the note of a borrower. *Cleveland v. Shoeman*, 40 Ohio St. 176; s. c., 1 Am. & Eng. Corp. Cas. 140, 144; s. c., 3 Nat. Bank Cas. 701. As to right to take note of third party, and other collaterals, see *Merchants' Nat. Bank v. Mears*, 8 Biss. (U. S.) 158; s. c., 1 Nat. Bank Cas. 353. As to pledge of gold certificates, see *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604; s. c., 1 Nat. Bank Cas. 47.

6. *Spofford v. First Nat. Bank*, 37 Iowa 181; s. c., 18 Am. Rep. 68; s. c., 1 Nat. Bank Cas. 486. See also *Gaar*

curity for existing debts and for future loans and discounts;<sup>1</sup> and a national bank does not exceed its powers by taking stock in a corporation as security for a loan;<sup>2</sup> nor is the transfer to a national bank, as security for a loan, of stock of a corporation whose property consists of real estate invalid as a loan upon mortgage security, which it is incompetent for a national bank to make;<sup>3</sup> and even where a national bank makes a loan upon the security of shares of its own stock, such as it is prohibited from making, yet if the prohibition can be urged against the validity of the transaction by any one except the government, this can only be done before the contract is executed.<sup>4</sup>

*Taking Personal Property in Payment for Real Estate.*—So, conceding that national banks have no power to engage generally in buying and selling personal property, nevertheless they have the power to sell real estate which they have lawfully acquired, and to take personal property in payment therefor.<sup>5</sup>

*Holding Dividends as Security for Stockholder's Debt.*—A national bank has also the right to hold a cash dividend as pledged for the indebtedness of the shareholder to the bank, despite the restrictions relating to lien on its own stock, etc.<sup>6</sup>

**6. Powers Concerning Negotiable Instruments, Stocks, etc.—Purchase of Negotiable Paper.**—In the business of banking, the purchasing and discounting of paper is only "a mode of loaning money,"<sup>7</sup> and a national bank is authorized thus to acquire not only notes and bills<sup>8</sup> which are perfect and available in the hands of the borrower,<sup>9</sup> but also his own paper made directly to the bank. Nor, according to the latest view of the matter, is it material whether the transaction through which the bank acquires notes is a purchase of the notes in the ordinary sense of the word "pur-

v. First Nat. Bank, 20 Ill. App. 611.

1. Third Nat. Bank v. Boyd, 44 Md. 47; s. c., 1 Nat. Bank Cas. 545.

2. Canfield v. State Nat. Bank, reported in 1 Nat. Bank Cas. 312, 314, as from 1 N. W. Rep. 173. See also Shoemaker v. Nat. Mechanics' Bank, 2 Abb. (U. S.) 416; s. c., 1 Nat. Bank Cas. 169; National Bank v. Case, 99 U. S. 628.

3. Baldwin v. Canfield, 26 Minn. 43; s. c., 2 Nat. Bank Cas. 278.

4. First Nat. Bank v. Stewart, 107 U. S. 676; s. c., 1 Am. & Eng. Corp. Cas. 138, 139; s. c., 3 Nat. Bank Cas. 96; relied upon, as to its principle, in Thompson v. St. Nicholas Nat. Bank, 113 N. Y. 325; s. c., 3 Nat. Bank Cas. 663.

5. First Nat. Bank v. Reno, 73 Iowa 145.

6. Hagar v. Union Nat. Bank, 63 Me. 509.

7. See Niagara Co. Bank v. Baker, 15 Ohio St. 68; Fleckner v. Bank of United States, 8 Wheat. (U. S.) 338; National Bank v. Johnson, 104 U. S. 271; s. c., 3 Nat. Bank Cas. 25; First Nat. Bank v. Sherburne, 14 Ill. App. 566.

8. As to right to take railway aid coupons, see First Nat. Bank v. Town of Bennington, 16 Blatchf. (U. S.) 53; s. c., 2 Nat. Bank Cas. 437, 438; Town of Lyons v. Lyons Nat. Bank, 19 Blatchf. (U. S.) 279.

9. A national bank cannot make a loan upon a note containing a stipulation for attorney's fees. Merchants' Nat. Bank v. Levier, 14 Fed. Rep. 662; Smith v. Exchange Bank, 26 Ohio St. 141; s. c., 1 Nat. Bank Cas. 836, 840. Compare like view as to former United States bank in Fleckner v. Bank of United States, 8 Wheat. (U. S.) 338, 351. The power to buy a draft with bill of lading attached is sustained in

chase," or a discount of the notes<sup>1</sup> as a loan to the payee,<sup>2</sup> for the plea of *ultra vires* is not available to defeat a recovery by a national bank upon negotiable paper purchased by it, even though the bank acquired such paper not as security but as its absolute property.<sup>3</sup>

*Dealing in Stocks, etc.*—Though dealing in stocks by national banks is not expressly prohibited, yet such a prohibition is implied from the failure to grant the power;<sup>4</sup> and so the selling of railroad bonds on commission is not within the authorized business of a national bank, and therefore it may set up the defence of *ultra vires* to escape liability for any false representations of its teller which might have induced the purchase of such bonds.<sup>5</sup> But there may be instances where the bank is precluded from setting up the defence of *ultra vires*, as where it refuses to carry out its agreement to resell bonds to the vendor at the same price or

Union Nat. Bank v. Rowan, 23 S. Car. 339; s. c., 55 Am. Rep. 26; and the power to buy a check in First Nat. Bank v. Harris, 108 Mass. 514.

1. As to when it is a necessary part of an agreement that the bank, on discounting a draft, should become the owner of it, see *Mechanics' Nat. Bank v. Robins*, 134 Mass. 331; s. c., 3 Am. & Eng. Corp. Cas. 244. A savings bank empowered to discount notes has power to purchase notes. *Pope v. Capitol Bank*, 20 Kan. 440; s. c., 27 Am. Rep. 183, 187-89; s. c., 2 Nat. Bank Cas. 238, 243-44.

2. *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40; s. c., 53 Am. Rep. 5; s. c., 3 Nat. Bank Cas. 509. This conclusion is also supported by *First Nat. Bank v. Sherburne*, 14 Ill. App. 566. See to like effect as to State banks, *Atlantic State Bank v. Lavery*, 18 Hun (N. Y.) 36. *Contra*, formerly *First Nat. Bank v. Pierson*, 24 Minn. 140; s. c., 31 Am. Rep. 341; s. c., 1 Nat. Bank Cas. 637; s. c., 3 Nat. Bank Cas. 506 (distinguishing *Smith v. Exchange Bank*, 26 Ohio St. 141; s. c., 1 Nat. Bank Cas. 836, and relying upon *Farmers' etc. Bank v. Baldwin*, 23 Minn. 108; s. c., 23 Am. Rep. 683). Also *Lazear v. Nat. Union Bank*, 52 Md. 78, 123; s. c., 36 Am. Rep. 355; s. c., 2 Nat. Bank Cas. 261.

3. *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40; s. c., 53 Am. Rep. 5; s. c., 3 Nat. Bank Cas. 509, 510, overruling *First Nat. Bank v. Pierson*, 24 Minn. 140; s. c., 31 Am. Rep. 341; s. c., 1 Nat. Bank Cas. 637; s. c., 3 Nat. Bank Cas. 506. Upon the authority of *Union*

*Nat. Bank v. Matthews*, 98 U. S. 621, s. c., 2 Nat. Bank Cas. 12, and *National Bank v. Whitney*, 103 U. S. 99; s. c., 3 Nat. Bank Cas. 5. It has been held in *Massachusetts* that a national bank which purchases a promissory note from an endorser may maintain an action thereon in its own name against a prior party thereto, without regard to the question whether the purchase was *ultra vires* or was one which the bank was authorized by law to make. *Nat. Pemberton Bank v. Porter*, 125 Mass. 333; s. c., 28 Am. Rep. 235; distinguishing, as decided under a special statute, *Farmers' etc. Bank v. Baldwin*, 23 Minn. 108; s. c., 23 Am. Rep. 683, and *First Nat. Bank v. Pierson*, 24 Minn. 140; s. c., 1 Nat. Bank Cas. 637; and itself followed in *Atlas Nat. Bank v. Savery*, 127 Mass. 75; s. c., 2 Nat. Bank Cas. 273. The question of the power of a national bank to purchase promissory notes was held not to arise in *Attleborough Nat. Bank v. Rogers*, 125 Mass. 339. But its authority to buy checks, whether payable to bearer or to order, was distinctly upheld in *First Nat. Bank v. Harris*, 108 Mass. 514.

4. *First Nat. Bank v. Nat. Exch. Bank*, 92 U. S. 122; s. c., 1 Nat. Bank Cas. 124. See also *First Nat. Bank v. Hoch*, 80 Pa. St. 324; s. c., 33 Am. Rep. 769; s. c., 2 Nat. Bank Cas. 375. But see *contra*, as to power to sell stocks, *Williams v. Mason*, 12 Hun (N. Y.) 97.

5. *Weckler v. First Nat. Bank*, 42 Md. 581; s. c., 20 Am. Rep. 95; s. c., 1 Nat. Bank Cas. 533; relying upon analogy of *Talmage v. Pell*, 7 N. Y. 328.

less;<sup>1</sup> and so the taking of stocks may be justified when it is done in compromising a debt due the bank or a claim against it.<sup>2</sup> The authority of national banks to exchange or deal in government bonds or securities seems to be sustained by some of the decisions;<sup>3</sup> but the question appears to be interwoven with that concerning the power to receive special deposits in general.<sup>4</sup>

**7. Powers Concerning Real Estate—To Take Mortgage of Real Estate.**—A national banking association may purchase, hold and convey real estate only for purposes specified in the National Bank act;<sup>5</sup> and these give such authority as to real estate mortgaged to it in good faith by way of security for debts previously contracted.<sup>6</sup> Accordingly, in general, the loaning of money upon mortgage or other real estate security is *ultra vires*, as being forbidden by the act of congress;<sup>7</sup> but this does not apply to the case where a bank has in good faith taken a mortgage by way of security for a previously existing debt, which comes within one of the express exceptions in the act;<sup>8</sup> though a mortgage of real estate to a national bank to secure a contemporaneous<sup>9</sup> or fu-

1. Logan Co. Nat. Bank v. Townsend (Ky. 1887), 3 S. W. Rep. 122; s. c., 3 Nat. Bank Cas. 448.

2. First Nat. Bank v. National Exch. Bank, 92 U. S. 122; s. c., 1 Nat. Bank Cas. 124; relying upon Fleckner v. Bank of United States, 8 Wheat. (U. S.) 351.

3. Caldwell v. Nat. Mohawk Valley Bank, 64 Barb. (N. Y.) 333; Van Leuven v. First Nat. Bank, 54 N. Y. 671; s. c., 1 Nat. Bank Cas. 724; Leach v. Hale, 31 Iowa 69; s. c., 7 Am. Rep. 112; s. c., 1 Nat. Bank Cas. 466; Yerkes v. National Bank, 69 N. Y. 382; s. c., 25 Am. Rep. 208; s. c., 2 Nat. Bank Cas. 206.

4. See First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278; s. c., 1 Nat. Bank Cas. 728; commenting on Van Leuven v. First Nat. Bank, just cited. But compare Yerkes v. National Bank, just cited.

5. U. S. Rev. Stat., § 5137.

6. U. S. Rev. Stat., § 5137.

7. Fowler v. Scully, 72 Pa. St. 456; s. c., 1 Nat. Bank Cas. 854; s. c., 13 Am. Rep. 699; Merchants' Nat. Bank v. Mears, 8 Biss. (U. S.) 158; s. c., 1 Nat. Bank Cas. 353, 355; Crocker v. Whitney, 71 N. Y. 161; s. c., 1 Nat. Bank Cas. 745. But compare Wroten v. Armat, 31 Gratt. (Va.) 228; s. c., 2 Nat. Bank Cas. 426.

8. Woods v. People's Nat. Bank, 83 Pa. St. 57; s. c., 1 Nat. Bank Cas. 888; Allen v. First Nat. Bank, 23 Ohio St. 97; s. c., 1 Nat. Bank Cas. 828; Kansas

Valley Nat. Bank v. Rowell, 2 Dill. (U. S.) 371; s. c., 1 Nat. Bank Cas. 264; Worcester Nat. Bank v. Cheeney, 87 Ill. 602; s. c., 2 Nat. Bank Cas. 227; Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405; s. c., 3 Nat. Bank Cas. 131; Farmers' etc. Nat. Bank v. Wallace, 45 Ohio St. 152. So of deed of trust, Warner v. DeWitt Co. Nat. Bank, 4 Ill. App. 305; s. c., 2 Nat. Bank Cas. 222.

9. Kansas Valley Nat. Bank v. Rowell, 2 Dill. (U. S.) 371; s. c., 1 Nat. Bank Cas. 264; Fridley v. Bowen, 87 Ill. 151; s. c., 2 Nat. Bank Cas. 224. But see Warner v. DeWitt Co. Nat. Bank, 4 Ill. App. 305; s. c., 2 Nat. Bank Cas. 222, 223. So of a deed of trust, Matthews v. Skinker, 62 Mo. 329; s. c., 21 Am. Rep. 425; s. c., 1 Nat. Bank Cas. 647. But compare Union Nat. Bank v. Matthews, 98 U. S. 621; s. c., 2 Nat. Bank Cas. 12; Thornton v. National Exch. Bank, 71 Mo. 221; s. c., 3 Nat. Bank Cas. 513. For mortgage held not to have been given as security for a debt concurrently created, see Orms v. Merchants Nat. Bank, 16 Kan. 341; s. c., 1 Nat. Bank Cas. 490. Compare also First Nat. Bank v. Haire, 36 Iowa 443; s. c., 1 Nat. Bank Cas. 480; Richards v. Kuntze, 4 Neb. 201; s. c., 1 Nat. Bank Cas. 652; Upton v. National Bank, 120 Mass. 153; s. c., 1 Nat. Bank Cas. 618; Howard Nat. Bank v. Loomis, 51 Vt. 349; s. c., 2 Nat. Bank Cas. 424; Ripley v. Harris, 3 Biss. (U. S.) 199, regarding point as not made.

ture<sup>1</sup> loan is invalid,<sup>2</sup> or, rather, according to the distinction drawn by the later cases, voidable at the instance of the government.<sup>3</sup>

*To Purchase Real Estate.*—The national bank act authorizes a bank established under it to purchase, hold and convey such real estate as it shall purchase under judgments, decrees or mortgages held by it, or to secure debts due it,<sup>4</sup> and under this provision a national bank may purchase such real estate as may be necessary in order to secure a debt due to it,<sup>5</sup> although of greater amount than such debt, if the security of the debt is the real object of the purchase;<sup>6</sup> nor is it forbidden, by either the letter or the spirit of the law, to make a purchase, for such purpose, of real estate which is encumbered;<sup>7</sup> nor is it material that the title to the land, for which considerably more than the debt is paid, is taken in the name of the president of the bank, if this is done for the use of the bank.<sup>8</sup> But conveyances to a national bank must for all purposes, according to the later authorities, be regarded as valid until called in question by a direct proceeding instituted for that purpose by the government.<sup>9</sup>

1. *Fowler v. Scully*, 72 Pa. St. 456; s. c., 1 Nat. Bank Cas. 854; s. c., 13 Am. Rep. 699; *Kansas Valley Nat. Bank v. Rowell*, 2 Dill. (U. S.) 371; s. c., 1 Nat. Bank Cas. 264; *Crocker v. Whitney*, 71 N. Y. 161; s. c., 1 Nat. Bank Cas. 745.

2. *Kansas Valley Nat. Bank v. Rowell*, 2 Dill. (U. S.) 371; s. c., 1 Nat. Bank Cas. 264.

3. *Union Nat. Bank v. Matthews*, 98 U. S. 621; s. c., 2 Nat. Bank Cas. 12; *National Bank v. Whitney*, 103 U. S. 99, 100, 103; s. c., 3 Nat. Bank Cas. 5; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439; s. c., 3 Nat. Bank Cas. 140; *Howard Nat. Bank v. Loomis*, 51 Vt. 349; s. c., 2 Nat. Bank Cas. 424; *Warner v. DeWitt Co. Nat. Bank*, 4 Ill. App. 305; s. c., 2 Nat. Bank Cas. 222. Relating to deed of trust and discrediting authority of *Fridley v. Bowen*, 87 Ill. 151; s. c., 2 Nat. Bank Cas. 224 (But compare comments of MULKEY, J., in *Penn v. Bornman*, 102 Ill. 523); *Wroten v. Armat*, 31 Gratt. (Va.) 228; s. c., 2 Nat. Bank Cas. 426; *First Nat. Bank v. Elmore*, 52 Iowa 541; s. c., 2 Nat. Bank Cas. 237; *Graham v. National Bank*, 32 N. J. Eq. 804; s. c., 2 Nat. Bank Cas. 293; *Simons v. First Nat. Bank*, 93 N. Y. 269; s. c., 3 Nat. Bank Cas. 622; *Oldham v. Wilmington Bank*, 85 N. Car. 240; s. c., 3 Nat. Bank Cas. 688. See also, as to deed of trust, *Thornton v. National Exch. Bank*, 71 Mo. 221; s. c., 3 Nat. Bank Cas. 513. And as to transfer of mortgage by re-organized State bank, *Scofield v. State Nat. Bank*, 9 Neb. 316; s. c., 31 Am. Rep.

412; s. c., 2 Nat. Bank Cas. 280. Reference to the doctrine is made in *Bowditch v. New England Mut. L. Ins. Co.*, 141 Mass. 292.

4. U. S. Stat. 1864, ch. 106. See *Heath v. Second Nat. Bank*, 70 Ind. 106; s. c., 3 Nat. Bank Cas. 406; *Wherry v. Hale*, 77 Mo. 20; s. c., 3 Nat. Bank Cas. 521. A national bank which has loaned money on timber land may, to protect itself and collect the debt, purchase the land at foreclosure sale, and cut and sell the timber. *Roebling v. First Nat. Bank*, 30 Fed. Rep. 744, 746.

5. See as to acquisition in discharge of debt previously contracted, *Turner v. First Nat. Bank*, 78 Ind. 19; s. c., 3 Nat. Bank Cas. 408.

6. *Upton v. National Bank*, 120 Mass. 153; s. c., 1 Nat. Bank Cas. 618.

7. *Mapes v. Scott*, 88 Ill. 352; s. c., 2 Nat. Bank Cas. 228. See reference to this case in *Mapes v. Scott*, 94 Ill. 379.

8. *Libbey v. Union Nat. Bank*, 99 Ill. 622; s. c., 3 Nat. Bank Cas. 358. As to bank causing conveyance to individual which creates a trust, see *Wherry v. Hale*, 77 Mo. 20; s. c., 3 Nat. Bank Cas. 521, 523.

9. *Mapes v. Scott*, 94 Ill. 380; *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405; s. c., 3 Nat. Bank Cas. 131; *Union Nat. Bank v. Matthews*, 98 U. S. 621; s. c., 2 Nat. Bank Cas. 12; *Wherry v. Hale*, 77 Mo. 20; s. c., 3 Nat. Bank Cas. 521. See also *Turner v. First Nat. Bank*, 78 Ind. 19; s. c., 3 Nat. Bank Cas. 408.

*Acquiring Additional Property as Further Security.*—The fact that a national bank, in order to secure a debt, purchases additional property to that mortgaged to it and which it had the right to acquire, does not affect the validity of the transaction, so as to render it assailable by the debtor or by any party except the government;<sup>1</sup> nor is there any reason why such a bank may not thus purchase a prior mortgage,<sup>2</sup> or take a new mortgage incorporating a note and mortgage against the same party, which it has purchased from a third person.<sup>3</sup>

*Security for Advances.*—A loan of money made by a national bank on the security of a mortgage may be enforced; objection to the bank's taking a mortgage lien, as security for future advances, can only be made by the United States.<sup>4</sup>

*Power to Sell Real Estate.*—There is, in the National Bank act, no restriction upon the power "to convey" real estate; and a national bank may sell its real estate on terms of credit and reserve a mortgage to secure the price.<sup>5</sup>

**V. LIABILITIES IN GENERAL—Not Imposed Upon Government.**—National banks are private corporations, organized for private gain, and managed by officers of their own selection, so that they constitute no part of the government; and though the comptroller of the currency has supervisory powers over them, yet this does not involve the government in any liability for their acts, except the statute liability for the final redemption of their circulating notes.<sup>6</sup> Nor does designating a national bank as a national depository of public moneys<sup>7</sup> change the character of its organization, or convert its managers into public officers, or render the government liable for its acts.<sup>8</sup>

*For Undertaking of Individual, Dependent on Ratification.*—A written promise signed by an individual as commissioner for a national bank, to give stock thereof when it is fully organized, and a designated sum of money when it is in operation, in consideration of expenditures for the institution and services rendered it, is not the contract of the bank upon which it is liable,

1. *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405; s. c., 3 Nat. Bank Cas. 131. And see *Union Nat. Bank v. Matthews*, 98 U. S. 621; s. c., 2 Nat. Bank Cas. 12; *National Bank v. Whitney*, 103 U. S. 99; s. c., 3 Nat. Bank Cas. 5; *Swope v. Leffingwell*, 105 U. S. 3.

2. *Holmes v. Boyd*, 90 Ind. 332; s. c., 3 Nat. Bank Cas. 414.

3. *Oldham v. Wilmington Bank*, 85 N. Car. 240; s. c., 3 Nat. Bank Cas. 688.

4. *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439; *Nat. Bank v. Whitney*, 103 U. S. 99; *Winton v. Little*, 94 Pa. St. 64; s. c., 3 Nat. Bank Cas. 725. See

also *Reynolds v. Bank*, 112 U. S. 405.

5. *New Orleans Nat. Bank v. Raymond*, 29 La. An. 355; s. c., 29 Am. Rep. 335.

6. *Branch v. United States*, 12 Ct. of Cl. 281. As to limits of doctrine exempting national banks from State legislation as instrumentalities of the federal government, see *First Nat. Bank v. Com.*, 9 Wall. (U. S.) 353, 361.

7. As is done under the National Bank act, § 45; 13 Stat. at Large 113; Rev. Stat. U. S., § 5153.

8. *Branch v. United States*, 12 Ct. of Cl. 281.



unless so made by the bank, by its approval and adoption after its organization.<sup>1</sup>

*Where Reorganized Out of State Bank.*—A State bank does not relieve itself from any liabilities by reorganizing as a national bank;<sup>2</sup> and accordingly the national bank is properly sued for a reward offered while the bank was a State institution.<sup>3</sup>

*Liability for Losses by Theft.*—A national bank is liable for the loss of United States bonds, where, while they were in its hands, its cashier agreed to exchange them for registered bonds, but the bank neglected to do so, and the bonds were stolen;<sup>4</sup> but such a bank is not liable for the theft by an absconding teller of bonds deposited by a gratuitous bailee, where the teller's accounts turned out to be false, and it appeared that he had been abstracting the funds of the bank for two years, merely because the bank failed to examine his accounts.<sup>5</sup>

**VI. INTEREST AND USURY**—1. **Interest in General**—*State Rate Followed.*—National banks, under the liberal construction given to the act of congress, may take the rate of interest allowed by the State to lenders generally,<sup>6</sup> and may take a higher rate, if State banks of issue are authorized by the laws of the State to reserve more,<sup>7</sup> whether such authorization be by general statute or by special charter.<sup>8</sup>

1. *McDonough v. Bank of Houston*, 34 Tex. 309.

2. *Coffey v. National Bank*, 46 Mo. 140; s. c., 2 Am. Rep. 488. See also, *Kelsey v. National Bank*, 69 Pa. St. 426; s. c., 1 Nat. Bank Cas. 847. As to liability for debts of transformed bank, see *Thorpe v. Wegefarth*, 56 Pa. St. 82; s. c., 93 Am. Dec. 789. Consult further as to status of reorganized bank, *City Nat. Bank v. Phelps*, 97 N. Y. 44; s. c., 49 Am. Rep. 513; *Scofield v. State Nat. Bank*, 9 Neb. 316; s. c., 31 Am. Rep. 412; *Grocers' Nat. Bank v. Clark*, 48 Barb. (N. Y.) 26.

3. *Kelsey v. National Bank*, 69 Pa. St. 426; s. c., 1 Nat. Bank Cas. 847.

4. *Yerkes v. National Bank*, 69 N. Y. 382; s. c., 25 Am. Rep. 268. See also as to liability of bank for cashier's hypothecation of stocks entrusted for sale by a distant customer, *Williamson v. Mason*, 12 Hun (N. Y.) 97, 100.

5. *Scott v. National Bank*, 72 Pa. St. 471; s. c., 1 Nat. Bank Cas. 864.

6. *Tiffany v. National Bank*, 18 Wall. (U. S.) 409; s. c., 1 Nat. Bank Cas. 90, construing Nat. Bank act, § 30; U. S. Rev. Stat., § 5197; *Wiley v. Starbuck*, 44 Ind. 298; s. c., 1 Nat. Bank Cas. 436. Accordingly, in *California*, national banks may charge and receive such rates of interest as may be agreed

upon. *Hines v. Marmolejo*, 60 Cal. 229; s. c., 3 Nat. Bank Cas. 338, noted in *Farmers' Nat. Gold Bank v. Stover*, 60 Cal. 387, 393. To the same effect is *National Bank v. Bruhn*, 64 Tex. 571; s. c., 53 Am. Rep. 771.

7. *Tiffany v. National Bank*, 18 Wall. (U. S.) 409, 411; s. c., 1 Nat. Bank Cas. 90.

See also *National Bank v. Johnson*, 104 U. S. 271; s. c., 3 Nat. Bank Cas. 25; and, generally, *Farmers' etc. Nat. Bank v. Dearing*, 91 U. S. 29; s. c., 1 Nat. Bank Cas. 117; *Wiley v. Starbuck*, 44 Ind. 298; s. c., 1 Nat. Bank Cas. 436.

But in *Ohio* it is held that if the rate allowed for banks of issue is lower than that for other persons, the former rate must be followed. *Shunk v. First Nat. Bank*, 22 Ohio St. 508; s. c., 10 Am. Rep. 762; s. c., 1 Nat. Bank Cas. 820, distinguishing the federal case of *Parks v. First Nat. Bank*, cited from *Banker's Mag.* for Dec., 1870, p. 416 (which we do not find regularly reported). Compare also as to higher rate for a few banks of issue, *Duncan v. First Nat. Bank*, 11 Bank. Mag. 787; s. c., 1 Nat. Bank Cas. 360, 361.

8. *First Nat. Bank v. Duncan*, 24 Int. Rev. Rec. 206 (apparently reversing case between same parties in 1 Nat. Bank Cas. 360). But the charter must be put

*Special State Rate.*—Where, by the statute law of a State, parties are allowed to contract for a rate of interest higher than the ordinary legal rate, if such contract be evidenced by a memorandum in writing, signed by the party to be charged, a national bank located in the State may, without liability for usury, discount notes and charge such higher rate in advance without other memorandum than the notes.<sup>1</sup> But it has been held, though it may well be doubted if such is the law, that national banks are not authorized to take the rate of interest allowed by special statutes of a State to a few banks of issue, where such rate is higher than that allowed to banks of issue generally.<sup>2</sup>

*Addition of Current Rate of Exchange.*—It is not usurious but expressly allowable for a national bank to receive the current rate of exchange, as well as legal interest, on the discounting of a draft; and to enforce a forfeiture against the bank for excessive interest, it must affirmatively appear that the exchange charged exceeded the current rate.<sup>3</sup>

*Legal Rate Where No State Rate.*—If no rate of interest is fixed by the laws of the State wherein the national bank is located, it is provided by the act of congress that seven per cent. is the highest limit of the allowed rate.<sup>4</sup> And this rule applies, so as to make a higher rate of interest a cause of forfeiture, where a State statute forbids a corporation to interpose the defence of usury, and this statute has been construed to the effect that the rate of interest which a corporation may pay is not fixed or limited.<sup>5</sup>

*State Usury Laws Superseded.*—It is within the constitutional power of congress to fix the rate of interest which a national bank might take upon a loan of money, and to determine the penalty to be imposed for taking a greater rate;<sup>6</sup> and this power, when exercised, is exclusive of State legislation,<sup>7</sup> so that the provisions of the national bank act imposing penalties upon national

in proof, or judicial notice will not be taken of the banking institution. *First Nat. Bank v. Gruber*, 86 Pa. Stat. 468; s. c., with title reversed, 2 Nat. Bank Cas. 382, 386-87.

*Usury in General.*—Concerning conflict of State laws as to usury, see *National Bank v. Smoot*, 2 McArthur (U. S.) 371; *Hackettstown Nat. Bank v. Rea*, 64 Barb. (N. Y.) 175. A surety cannot avail himself of usury paid by his principal. *Lamoille Co. Nat. Bank v. Bingham*, 50 Vt. 105; s. c., 28 Am. Rep. 105. As to requisites of answer setting up usury, see *National Bank v. Orcutt*, 48 Barb. (N. Y.) 256, 257.

1. *Newell v. National Bank*, 12 Bush (Ky.) 57, 60; s. c., 1 Nat. Bank Cas. 501. As to effect of a like statute in Indiana, see *Wiley v. Starbuck*, 44 Ind. 298; s. c., 1 Nat. Bank Cas. 436.

2. *Duncan v. First Nat. Bank*, 11 Bank. Mag. 787; s. c., 1 Nat. Bank Cas. 360. But see *First Nat. Bank v. Tinstman*, 36 Leg. Int. 182; s. c., 2 Nat. Bank Cas. 182, and compare *Lebanon Nat. Bank v. Karmany*, 98 Pa. St. 65; s. c., 3 Nat. Bank Cas. 746.

3. *Wheeler v. National Bank*, 96 U. S. 268; s. c., 2 Nat. Bank Cas. 9.

4. U. S. Rev. Stat., § 5197.

5. *In re Wild*, 11 Blatchf. (U. S.) 243; s. c., 1 National Bank Cas. 246.

6. *Central Nat. Bank v. Pratt*, 115 Mass. 539; s. c., 15 Am. Rep. 138; s. c., 1 Nat. Bank Cas. 505.

7. *Central Nat. Bank v. Pratt*, as just cited; *Wiley v. Starbuck*, 44 Ind. 298; s. c., 1 Nat. Bank Cas. 436; *Higley v. First Nat. Bank*, 26 Ohio St. 75; s. c., 1 Nat. Bank Cas. 833.

banks for taking usury, supersede the State laws upon that subject.<sup>1</sup>

**2. Penalty for Taking Excessive Interest—Only Penalty Prescribed.**—Under the national bank act the only penalty for the taking of usurious interest is the forfeiture of all interest stipulated for, and, where the interest has been paid, the recovery back of twice the amount of such interest;<sup>2</sup> and the act does not declare void the contract under which the usurious interest is paid.<sup>3</sup>

**Jurisdiction of State Courts.**—The decided weight of the more recent decisions is in favor of sustaining the jurisdiction of the State courts in actions against national banks for penalties and forfeitures for exacting and receiving usurious interest.<sup>4</sup>

**Forfeiture of Entire Interest.**—The provision of the federal statute to the effect that the reserving, etc., of usury upon a note shall be held a forfeiture of the entire interest which the note carries with it, applies to a discount of the note at a usurious rate;<sup>5</sup> and also to interest accruing by law upon nonpayment after maturity.<sup>6</sup> The forfeiture, under the later phraseology of the act, is of the interest stipulated for, but not of the debt itself;<sup>7</sup> and it is the doctrine of the authorities in general that this

1. *Davis v. Randall*, 115 Mass. 547; s. c., 15 Am. Rep. 146; s. c., 1 Nat. Bank Cas. 600; *First Nat. Bank v. Childs*, 133 Mass. 248; s. c., 43 Am. Rep. 509; s. c., 3 Nat. Bank Cas. 469; *Farmers' etc. Nat. Bank v. Dearing*, 91 U. S. 29; s. c., 1 Nat. Bank Cas. 117; *First Nat. Bank v. Childs*, 130 Mass. 519; s. c., 39 Am. Rep. 474; *Hambright v. Cleveland Nat. Bank*, 3 Lea (U. S.) 40; s. c., 31 Am. Rep. 629; s. c., 2 Nat. Bank Cas. 419. overruling *Stedman v. Redfield*, 8 Baxt. (Tenn.) 337.

See also *First Nat. Bank v. Garlinghouse*, 22 Ohio St. 492; s. c., 10 Am. Rep. 751; *Merchants' etc. Nat. Bank v. Myers*, 74 N. Car. 514.

*Contra*, see *First Nat. Bank v. Lamb*, 50 N. Y. 95; s. c., 10 Am. Rep. 438, overruled with *Farmers' Bank v. Hale*, 59 N. Y. 53, in *Hintermister v. First Nat. Bank*, 64 N. Y. 212; s. c., 1 Nat. Bank Cas. 741.

Compare also *In re Wild*, 11 Blatchf. (U. S.) 243; s. c., 1 Nat. Bank Cas. 246.

2. *Farmers' etc. Nat. Bank v. Dearing*, 91 U. S. 29; s. c., 1 Nat. Bank Cas. 117; *Barnet v. Muncie Nat. Bank*, 98 U. S. 555; s. c., 2 Nat. Bank Cas. 18 [discussed in *First Nat. Bank v. Childs*, 133 Mass. 248; s. c. 43 Am. Rep. 509]; *Lebanon Nat. Bank v. Karmany*, 98 Pa. St. 65; s. c., 3 Nat. Bank Cas. 746.

See also *Schuyler Nat. Bank v. Bulong*, 24 Neb. 825; s. c., 3 Nat. Bank Cas. 561; *Merchants' etc. Nat. Bank v.*

*Meyers*, 74 N. Car. 514; *Wiley v. Starbuck*, 44 Ind. 298; s. c., 1 Nat. Bank Cas. 436; *National Bank v. Eyre*, 52 Iowa 114; s. c., 2 Nat. Bank Cas. 234; *National Exch. Bank v. Moore*, 2 Bond (U. S.) 176; *National Bank v. Davis*, 8 Biss. (U. S.) 100; s. c., 1 Nat. Bank Cas. 350; *Hill v. National Bank*, 15 Fed. Rep. 432. The provisions of the act of 1864 are quoted in *Hade v. McVay*, 31 Ohio St. 231; s. c., 2 Nat. Bank Cas. 353.

3. *Oates v. First Nat. Bank*, 100 U. S. 239; s. c., 2 Nat. Bank Cas. 35. See also *Lazar v. National Union Bank*, 52 Md. 78; s. c., 36 Am. Rep. 355; and as to fraud on creditors, *Appeal of Second Nat. Bank*, 96 Pa. St. 460; s. c., 3 Nat. Bank Cas. 739.

4. SNYDER, J., in *Lynch v. Merchants' Nat. Bank*, 22 W. Va. 554; s. c., 46 Am. Rep. 520. The authorities upon this subject will be given later in discussing the forfeiture and penalty prescribed by the act of congress.

5. *National Bank v. Lewis*, 81 N. Y. 15; s. c., 3 Nat. Bank Cas. 587.

6. *Alves v. Henderson Nat. Bank* (Ky. 1888), 9 S. W. Rep. 504; s. c., 3 Nat. Bank Cas. 452; *First Nat. Bank v. Stauffer*, 1 Fed. Rep. 187; s. c., 2 Nat. Bank Cas. 178.

7. *Farmers' etc. Nat. Bank v. Dearing*, 91 U. S. 29; s. c., 1 Nat. Bank Cas. 117; *First Nat. Bank v. Garlinghouse*, 22 Ohio St. 492; s. c., 10 Am. Rep. 751,

forfeiture, relating only to interest reserved and not to that received, refers to the enforcement of the contract by judicial process, in which case the ground of forfeiture may be set up as a defence and the bank can recover only the sum actually loaned or advanced without any interest at all;<sup>1</sup> but the later view holds that the forfeiture is not available by way of set-off or counterclaim to an action on the note;<sup>2</sup> nor, in *Pennsylvania*, where there is a series of renewal notes, bearing usurious interest, given for the continuation of the same original loan or advance, is the defendant, sued upon one of them, entitled to defalk the usurious interest on another which is not in suit;<sup>3</sup> and in *Ohio* the penalty for receiving usurious interest on other and independent loans is also held not available as a set-off.<sup>4</sup> The party with whom the bank had the usurious transaction is the party to whom the forfeiture of interest is to be adjudged, and the rights and liabilities of other parties are not affected.<sup>5</sup> The forfeiture of the interest can be invoked, according to the great preponderance of authority, in an action in the State court, as well as in the United States court;<sup>6</sup> and the bank will be charged with the knowledge

National Exch. Bank v. Moore, 2 Bond (U. S.) 170; Wiley v. Starbuck, 44 Ind. 298; s. c., 1 Nat. Bank Cas. 436, merely quoting this point at p. 445; Malone v. Falls, noted in report of Cheek v. Merchants' Nat. Bank, 10 Heisk. (Tenn.) 618 (which does not pass upon question); Hade v. McVay, 31 Ohio St. 231; s. c., 2 Nat. Bank Cas. 353; Bank of Cadiz v. Slemmons, 34 Ohio St. 142; s. c., 32 Am. Rep. 364; SHARSWOOD, J., in Overholt v. National Bank, 82 Pa. St. 490; s. c., 1 Nat. Bank Cas. 883; Citizens' Nat. Bank v. Leming, 8 Int. Rev. Rec. 132; National Bank v. Davis, 8 Biss. (U. S.) 100; s. c., 1 Nat. Bank Cas. 350; First Nat. Bank v. Gish, 72 Pa. St. 13.

1. SHARSWOOD, J., in Brown v. Second Nat. Bank, 72 Pa. St. 209; s. c., 1 Nat. Bank Cas. 849. See also Overholt v. National Bank, 82 Pa. St. 490; s. c., 1 Nat. Bank Cas. 883; Lucas v. Government Nat. Bank, 78 Pa. St. 228; s. c., 21 Am. Rep. 17; Third Nat. Bank v. Miller, 90 Pa. St. 241; s. c., 2 Nat. Bank Cas. 378; Guthrie v. Reid, 107 Pa. St. 251; s. c., 3 Nat. Bank Cas. 751; First Nat. Bank v. Childs, 130 Mass. 519, 522; s. c., 39 Am. Rep. 474; Hinthorn v. First Nat. Bank, 64 N. Y. 212; s. c., 1 Nat. Bank Cas. 741.

2. National Bank v. Lewis, 81 N. Y. 15; s. c., 3 Nat. Bank Cas. 588; overruling on this point National Bank v. Lewis, 75 N. Y. 516; s. c., 2 Nat. Bank

Cas. 305; s. c., 31 Am. Rep. 484. See also Barnett v. Muncie Nat. Bank, 98 U. S. 555; s. c., 2 Nat. Bank Cas. 18; First Nat. Bank v. Gruber, 91 Pa. St. 377; s. c., 2 Nat. Bank Cas. 395; First Nat. Bank v. Childs, 133 Mass. 248; s. c., 43 Am. Rep. 509.

3. Overholt v. National Bank, 82 Pa. St. 490; s. c., 1 Nat. Bank Cas. 883, distinguishing Brown v. Second Nat. Bank, 72 Pa. St. 209; s. c., 1 Nat. Bank Cas. 849, and Lucas v. Government Nat. Bank, 78 Pa. St. 228; s. c., 21 Am. Rep. 17.

4. Hade v. McVay, 31 Ohio St. 231; s. c., 2 Nat. Bank Cas. 353.

5. Smith v. Exchange Bank, 26 Ohio St. 141; s. c., 1 Nat. Bank Cas. 836. See also Lazler v. Nat. Union Bank, 52 Md. 78; s. c., 36 Am. Rep. 355. But compare Guthrie v. Reid, 107 Pa. St. 251; s. c., 3 Nat. Bank Cas. 751.

6. First Nat. Bank v. Childs, 130 Mass. 519; s. c., 39 Am. Rep. 474; Pickett v. Merchants' Nat. Bank, 32 Ark. 346; s. c., 2 Nat. Bank Cas. 209; Lynch v. Merchants' Nat. Bank, 22 W. Va. 554; s. c., 46 Am. Rep. 520. See also National Bank v. Eyre, 52 Iowa 114; s. c., 2 Nat. Bank Cas. 234. Contra, Newell v. National Bank, 12 Bush (Ky.) 37; s. c., 1 Nat. Bank Cas. 501. As to what constitutes usurious transactions so as to be a subject of forfeiture, and who may set up the usury, see Pickett v. Merchants' Nat. Bank, 32 Ark. 346; s. c., 2 Nat. Bank Cas. 209.

of its president.<sup>1</sup>

*Recovery of Double Interest.*—It is almost uniformly held that in an action against a national bank which has received usurious interest for twice the interest paid, the recovery is of twice the entire interest paid and not merely of double the excess of interest over the legal rate,<sup>2</sup> and it is now quite as well settled that a claim for such double interest cannot be made by way of set-off or counter-claim to an action brought by the national bank,<sup>3</sup> but that the remedy given by the statute is a penal suit, and that redress can be had in no other mode or form of procedure,<sup>4</sup> nor does a bill in equity lie to recover usury against a national bank pursuant to a State law.<sup>5</sup> The person paying usurious interest may recover twice its amount, although the principal is not paid,<sup>6</sup> and the bank cannot set off a judgment held by it against the plaintiff,<sup>7</sup> nor can it successfully defend against a party who obtains from it, by endorsement, a discount of paper of other parties, even though such transaction would not be usurious, as between natural persons in the State in which the bank is located.<sup>8</sup> It is necessary to allege in the petition that the act was knowingly done.<sup>9</sup>

### 3. Action to Recover Double Interest—Who May Bring.—Not

1. *Newport Nat. Bank v. Tweed*, 4 *Houst. (Del.)* 225.

2. *Crocker v. First Nat. Bank*, 4 *Dill. (U. S.)* 358; s. c., 1 *Nat. Bank Cas.* 377; *National Bank v. Davis*, 8 *Biss. (U. S.)* 100; s. c., 1 *Nat. Bank Cas.* 350; *Hill v. National Bank*, 15 *Fed. Rep.* 432; *Lebanon Nat. Bank v. Karmany*, 98 *Pa. St.* 65; s. c., 3 *Nat. Bank Cas.* 746; *National Bank v. Trimble*, 40 *Ohio St.* 629; *Schuyler Nat. Bank v. Bullong*, 24 *Neb.* 825; s. c., 3 *Nat. Bank Cas.* 561. *Contra*, *Hintermister v. First Nat. Bank*, 64 *N. Y.* 212; s. c., 1 *Nat. Bank Cas.* 741. There was a recovery of twice the excess only—though the point is not discussed, in *Johnson v. National Bank*, 74 *N. Y.* 329; s. c., 30 *Am. Rep.* 302; affirmed in *National Bank v. Johnson*, 104 *U. S.* 271; s. c., 3 *Nat. Bank Cas.* 25.

3. *Barnet v. Muncie Nat. Bank*, 98 *U. S.* 555; s. c., 2 *Nat. Bank Cas.* 18; *Ellis v. First Nat. Bank*, 11 *Ill. App.* 275; s. c., 3 *Nat. Bank Cas.* 378; *First Nat. Bank v. Gruber*, 91 *Pa. St.* 377; s. c., 2 *Nat. Bank Cas.* 395; *National Bank v. Dushane*, 96 *Pa. St.* 340; s. c., 3 *Nat. Bank Cas.* 739 (overruling in this regard *Lucas v. Government Nat. Bank*, 78 *Pa. St.* 228; s. c., 21 *Am. Rep.* 17, and *Overholt v. National Bank*, 82 *Pa. St.* 490; s. c., 1 *Nat. Bank Cas.* 883); *First Nat. Bank v. Childs*, 133 *Mass.* 248; s. c., 43 *Am. Rep.* 509; *Old-*

*ham v. Wilmington Bank*, 85 *N. Car.* 240; s. c., 3 *Nat. Bank Cas.* 688; *Fraker v. Cullum*, 24 *Kan.* 679.

4. *Barnet v. Muncie Nat. Bank*, 98 *U. S.* 555; s. c., 2 *Nat. Bank Cas.* 18. See also *Oldham v. Wilmington Bank*, 85 *N. Car.* 240; s. c., 3 *Nat. Bank Cas.* 688.

5. *Hambright v. Cleveland Nat. Bank*, 3 *Lea (Tenn.)* 40; s. c., 31 *Am. Rep.* 629, overruling *Steadman v. Redfield*, 8 *Baxt. (Tenn.)* 337, and followed in *Barrett v. National Bank*, 85 *Tenn.* 426. As to want of standing in court of equity before waiver of penalty, see *Oldham v. Wilmington Bank*, 85 *N. Car.* 240; s. c., 3 *Nat. Bank Cas.* 688.

6. *Lebanon Nat. Bank v. Karmany*, 98 *Pa. St.* 65; s. c., 3 *Nat. Bank Cas.* 746; *Monongahela Nat. Bank v. Overholt*, 96 *Pa. St.* 327; s. c., 3 *Nat. Bank Cas.* 735; *Stout v. Ennis Nat. Bank*, 69 *Tex.* 384.

7. *Lebanon Nat. Bank v. Karmany*, 98 *Pa. St.* 65; s. c., 3 *Nat. Bank Cas.* 746. As to agreement constituting good defence to action, see *Morehouse v. Second Nat. Bank*, 98 *N. Y.* 503; s. c., 3 *Nat. Bank Cas.* 631; reversing 30 *Hun (N. Y.)* 628.

8. *National Bank v. Johnson*, 104 *U. S.* 271; s. c., 3 *Nat. Bank Cas.* 25.

9. *Schuyler Nat. Bank v. Bullong*, 24 *Neb.* 821; s. c., 3 *Nat. Bank Cas.* 558.

only may the person paying the interest bring suit to recover double the amount paid, but also his legal representatives, such as an assignee in bankruptcy of the borrower,<sup>1</sup> or the receiver of an insolvent national bank,<sup>2</sup> but a judgment creditor of the borrower cannot maintain such an action, as he is in no sense the debtor's legal representative.<sup>3</sup>

*Jurisdiction of State Courts.*—State courts, according to the view generally maintained, have jurisdiction in actions against national banks to recover back the penalty imposed upon such banks for taking usurious interest.<sup>4</sup>

*Time to Commence.*—The allowance of a recovery of double interest, under the national bank act, is subject to the proviso that the action be commenced within two years from the time the usurious transaction occurred.<sup>5</sup>

*When Limitation Begins to Run.*—This limitation of two years, within which an action for such penalty must be brought, commences to run from the actual payment of the usury,<sup>6</sup> and each payment of illegal interest must be regarded as a "transaction" within the intent of the statute, so that the limitation begins to run from the time such payment is actually made, and so on for each successive payment on renewals of the same loan;<sup>7</sup> but it has been held that where the usurious interest is reserved by way of discount, the period of limitation does not begin to run until

1. Crocker v. First Nat. Bank, 4 Dill. (U. S.) 358; s. c., 1 Nat. Bank Cas. 317; Wright v. First Nat. Bank, 8 Biss. (U. S.) 243; s. c., 2 Nat. Bank Cas. 138; National Bank v. Trimble, 40 Ohio St. 629; Monongahela Nat. Bank v. Overholt, 96 Pa. St. 327, 330; s. c., 3 Nat. Bank Cas. 735, 737.

2. Barbour v. National Exch. Bank, 45 Ohio St. 133; s. c., 17 Am. & Eng. Corp. Cas. 134.

3. Barrett v. National Bank, 85 Tenn. 426.

4. Lebanon Nat. Bank v. Karmany, 98 Pa. St. 65; s. c., 3 Nat. Bank Cas. 746; Gruber v. First Nat. Bank, 87 Pa. St. 465; s. c., 2 Nat. Bank Cas. 382; Bletz v. Columbia Nat. Bank, 87 Pa. St. 87; s. c., 30 Am. Rep. 343; Dow v. Irasburgh Nat. Bank, 50 Vt. 112; s. c., 28 Am. Rep. 493, drawing distinction that action brought only for excess over illegal interest. Ordway v. Central Nat. Bank, 47 Md. 217; s. c., 28 Am. Rep. 455; Lynch v. Merchants' Nat. Bank, 22 W. Va. 554; s. c., 46 Am. Rep. 520; Hade v. McVay, 31 Ohio St. 231; s. c., 2 Nat. Bank Cas. 353; Kinser v. Farmers' Nat. Bank, 58 Iowa 728; Pickett v. Merchants' Nat. Bank, 32 Ark. 346; s. c., 2 Nat. Bank Cas. 209; Schuyler Nat. Bank v.

Bullong, 24 Neb. 825; s. c., 3 Nat. Bank Cas. 561; Schuyler Nat. Bank v. Bollong, 24 Neb. 821; s. c., 3 Nat. Bank Cas. 558; First Nat. Bank v. Overman, 22 Neb. 116; s. c., 3 Nat. Bank Cas. 556. *Contra*, Newell v. National Bank, 12 Bush (Ky.) 57; s. c., 1 Nat. Bank Cas. 501. *Compare* Missouri R. Tel. Co. v. First Nat. Bank, 74 Ill. 217; s. c., 1 Nat. Bank Cas. 401.

5. Higley v. First Nat. Bank, 26 Ohio St. 75; s. c., 1 Nat. Bank Cas. 833; s. c., 20 Am. Rep. 759; National Bank v. Davis, 8 Biss. (U. S.) 100; s. c., 1 Nat. Bank Cas. 350. See also Nat. State Bank v. Boylan, 2 Abb. N. Cas. (N. Y.) 216; s. c., 1 Nat. Bank Cas. 798.

6. Brown v. Second Nat. Bank, 72 Pa. St. 209; s. c., 1 Nat. Bank Cas. 849, 853; Stephens v. Monongahela Nat. Bank, 88 Pa. St. 157; s. c., 32 Am. Rep. 438; s. c., 2 Nat. Bank Cas. 308; Shinkle v. First Nat. Bank, 22 Ohio St. 516; s. c., 1 Nat. Bank Cas. 824, 828; Hintermister v. First Nat. Bank, 64 N. Y. 212; s. c., 1 Nat. Bank Cas. 741, 744.

7. Lynch v. Merchants' Nat. Bank, 22 W. Va. 554; s. c., 46 Am. Rep. 520. See also Hintermister v. First Nat. Bank, 64 N. Y. 212; s. c., 1 Nat. Bank Cas. 741.

the principal has been paid or a judgment entered for the full amount thereof.<sup>1</sup>

**4. Usurious Interest on Series of Renewal Notes—Credit for Interest Paid from Beginning.**—It is the doctrine declared by various authorities that where there has been a series of renewal notes given for the continuation of the same original loan, a taint of usury in the first transaction follows down through the whole,<sup>2</sup> and in an action by a national bank, on the last of the series, the borrower is entitled to credit for all the interest he has paid from the beginning.<sup>3</sup>

**No Set-Off of Interest on Prior Notes.**—But later cases hold that usurious interest paid a national bank on successive renewals of a series of notes cannot be set-off in an action by the bank on the last of them.<sup>4</sup>

**Renewal Without Additional Usury.**—It is also settled<sup>5</sup> that the receipt of usurious interest on a note by a national bank works a forfeiture of the interest accruing after the maturity of the note as well as before maturity,<sup>6</sup> and that such forfeiture and usury are not purged by settlements and renewal notes without additional usury.<sup>7</sup>

**Limitation Inapplicable to Defence of Usury.**—Nor does the limitation of two years, provided by the statute for the recovery of forfeitures for usury, apply to the defence of usury.<sup>8</sup>

1. *Duncan v. First Nat. Bank*, 11 Bank. Mag. 787; s. c., 1 Nat. Bank Cas. 360. But see against any limitation in such cases *First Nat. Bank v. Childs*, 133 Mass. 248; s. c., 43 Am. Rep. 509; s. c., 3 Nat. Bank Cas. 469.

2. See *Farmers' & Mechanics' Bank v. Hoagland*, 7 Fed. Rep. 159, 161.

3. *SNYDER, J.*, in *Lynch v. Merchants' Nat. Bank*, 22 W. Va. 554; s. c., 46 Am. Rep. 520; *Cake v. First Nat. Bank*, 86 Pa. St. 303; s. c., 1 Nat. Bank Cas. 890; *Overholt v. National Bank*, 82 Pa. St. 490; s. c., 1 Nat. Bank Cas. 883; *Stephens v. Monongahela Nat. Bank*, 88 Pa. St. 157; s. c., 32 Am. Rep. 438; s. c., 2 Nat. Bank Cas. 398. See also *National Bank v. Lewis*, 75 N. Y. 516; s. c., 2 Nat. Bank Cas. 305; s. c., 31 Am. Rep. 484; *Moniteau Nat. Bank v. Miller*, 73 Mo. 187; *National Bank v. Davis*, 8 Biss. (U. S.) 100; s. c., 1 Nat. Bank Cas. 350.

4. *Driesbach v. National Bank*, 104 U. S. 52; s. c., 3 Nat. Bank Cas. 19; *Barnet v. Muncie Nat. Bank*, 98 U. S. 555; s. c., 2 Nat. Bank Cas. 18; *Farmers' etc. Bank v. Hoagland*, 7 Fed. Rep. 159, 161; *National Exch. Bank v. Boylen*, 26 W. Va. 554; s. c., 53 Am. Rep. 113; *First Nat. Bank v. Childs*, 133 Mass. 248; s. c., 43 Am. Rep. 509;

s. c., 3 Nat. Bank Cas. 469; *National Bank v. Lewis*, 81 N. Y. 15; s. c., 3 Nat. Bank Cas. 587; modifying same case in 75 N. Y. 516, or 31 Am. Rep. 484, or 2 Nat. Bank Cas. 305; *National Bank v. Dushane*, 96 Pa. St. 340; s. c., 3 Nat. Bank Cas. 719; *First Nat. Bank v. Gruber*, 91 Pa. St. 377; s. c., 2 Nat. Bank Cas. 395 (which last two cases must be regarded as overruling *Overholt v. National Bank*, 82 Pa. St. 490; s. c., 1 Nat. Bank Cas. 883); *Oldham v. Wilmington Bank*, 85 N. Car. 240; s. c., 3 Nat. Bank Cas. 688.

5. *Lynch v. Merchants' Nat. Bank*, 22 W. Va. 554; s. c., 46 Am. Rep. 520.

6. See *Moniteau Nat. Bank v. Miller*, 73 Mo. 187, 191.

7. *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; s. c., 2 Nat. Bank Cas. 209. See also *National Bank v. Eyre*, 52 Iowa 114; s. c., on other points, 2 Nat. Bank Cas. 234; *Farmers' etc. Bank v. Hoagland*, 7 Fed. Rep. 159.

8. *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; s. c., 2 Nat. Bank Cas. 209, 215; *Lynch v. Merchants' Nat. Bank*, 22 W. Va. 554; s. c., 46 Am. Rep. 520; *First Nat. Bank v. Childs*, 133 Mass. 248; s. c., 43 Am. Rep. 509; s. c., 3 Nat. Bank Cas. 469; *First Nat. Bank v. Childs*, 130 Mass. 519; s. c., 39

**VII. TAXATION—1. Taxation in General—Design of Provision Concerning.**—The provision of the national bank act, which authorizes the taxation by State authority of the shares of stock in a national bank,<sup>1</sup> was not intended to curtail the power of the States on the subject of taxation, but to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power,<sup>2</sup> nor was it intended to prohibit the exemption of particular kinds of property or particular classes of persons.<sup>3</sup>

**Imposed Only Upon Shares.**—Ordinarily, the capital of a bank is its property, and is liable to taxation, unless specially exempted;<sup>4</sup> but the view of the federal legislation, which has been adopted, is, that congress has limited the States to taxation upon the shares in national banks, as distinguished from taxation of the banks *eo nomine* upon their property or capital.<sup>5</sup>

**When Capital Invested in Federal Securities.**—And the stockholders of a national bank may be taxed on their stock or shares by the States, although all the capital of the bank be invested in federal securities, provided the taxation does not violate the rule

Am. Rep. 474; s. c., 3 Nat. Bank Cas. 465; *Ellis v. First Nat. Bank*, 11 Ill. App. 275; s. c., 3 Nat. Bank Cas. 378; *Moniteau Nat. Bank v. Miller*, 73 Mo. 187.

1. See statement of original provision in *Frazier v. Siebern*, 16 Ohio St. 614, 617; s. c. noted on other points, 1 Nat. Bank Cas. 936. This provision is contained in 13 U. S. Stat. at Large 99; Rev. Stat. U. S., § 5219. Of change therein in *Richmond v. Scott*, 48 Ind. 568; s. c., 1 Nat. Bank Cas. 445.

2. *Adams v. Nashville*, 95 U. S. 19; s. c., 1 Nat. Bank Cas. 148.

3. *Adams v. Nashville*, 95 U. S. 19; s. c., 1 Nat. Bank Cas. 148. Compare *Hepburn v. School Directors*, 23 Wall. (U. S.) 480, 485; s. c., 1 Nat. Bank Cas. 213, 116. And see comments on these cases in *Boyer v. Boyer*, 113 U. S. 689; s. c., 3 Nat. Bank Cas. 151.

**For Internal Revenue Purposes.**—National banks were not exempt from examination by internal revenue officers. *United States v. Rhawn*, 11 Phila. (Pa.) 521; s. c., 1 Nat. Bank Cas. 358. Interest paid and dividends declared were held taxable in *Blake v. National Banks*, 23 Wall. (U. S.) 307. See also *United States v. Central Nat. Bank*, 24 Fed. Rep. 577, reversing 15 Fed. Rep. 222; *United States v. State Nat. Bank*, 1 McCrary (U. S.) 183.

4. *New Orleans v. Peoples' Bank*, 27 La. An. 646. See as to doctrine that a tax on shares of bank stock is merely a

mode of taxing the property of the bank, *Wright v. Stiltz*, 27 Ind. 338.

5. *St. Louis Nat. Bank v. Papin*, 4 Dill. (U. S.) 29; s. c., 1 Nat. Bank Cas. 326; *Collins v. Chicago*, 4 Biss. (U. S.) 472; s. c., 1 Nat. Bank Cas. 191; *Van Allen v. Assessors*, 3 Wall. (U. S.) 573, 585-88; s. c., 1 Nat. Bank Cas. 1, 6-8; *Bradley v. People*, 4 Wall. (U. S.) 459, 462; s. c., 1 Nat. Bank Cas. 14; *Nat. Commercial Bank v. Mayor etc. of Mobile*, 62 Ala. 284; s. c., 34 Am. Rep. 15; s. c., 2 Nat. Bank Cas. 440; *Sumner Co. v. Gainesville Bank*, 62 Ala. 464; s. c., 34 Am. Rep. 30; s. c., 2 Nat. Bank Cas. 449, 450; *Maguire v. Board of Revenue*, 71 Ala. 401; s. c., 6 Am. & Eng. Corp. Cas. 452. See also *Frederick Co. v. Farmers' etc. Nat. Bank*, 48 Md. 117; s. c., 2 Nat. Bank Cas. 252, 253; *Stetson v. Bangor*, 56 Me. 274; s. c., on other points, 1 Nat. Bank Cas. 520; *First Nat. Bank v. Com.*, 9 Wall. (U. S.) 353; s. c., 1 Nat. Bank Cas. 34; *First Nat. Bank v. Smith*, 65 Ill. 44, 47; s. c., 1 Nat. Bank Cas. 390, 391 (referring to status of *Utica v. Churchill*, 33 N. Y. 161, and *People v. Bradley*, 39 Ill. 130, under the rulings of the United States Supreme Court); *Carthage v. First Nat. Bank*, 71 Mo. 503; s. c., 36 Am. Rep. 494; s. c., 2 Nat. Bank Cas. 279; *Hubbard v. Johnson Co.*, 23 Iowa 130, 144; s. c., noted, 1 Nat. Bank Cas. 932; *Morseman v. Younkin*, 27 Iowa 350, *et seq.*; s. c., 1 Nat. Bank Cas. 460, 461,



that it shall not exceed the rate imposed upon the shares of State banks established where the national bank is located;<sup>1</sup> and it is immaterial that the tax is collected from the bank through its cashier, instead of directly from the individual shareholders.<sup>2</sup>

*Real Estate.*—Real estate owned by a national bank is taxable by State authority<sup>3</sup> in the township where it is situated.<sup>4</sup>

**2. Authority of State to Tax—Provision Giving Such Authority.**—The National Bank act provides that the shares of stock in national banks may be subjected to taxation under the laws of the State,<sup>5</sup> with other personal property, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by nonresidents of any State shall be taxed in the city or town where the bank is located, and not elsewhere.<sup>6</sup>

*Congressional Basis of Authority.*—It is said to have been many times held, by the Supreme Court of the United States, that the authority of the States to tax the shares of national bank stock is derived wholly from the act of congress, and that without the consent of congress these bank stock shares could not be taxed

*et seq.*; *Smith v. First Nat. Bank*, 17 Mich. 479; *Curtis v. Ward*, 58 Mo. 295; *First Nat. Bank v. Meredith*, 44 Mo. 500; *Lionberger v. Rowse*, 43 Mo. 67; *Pittsburgh v. First Nat. Bank*, 55 Pa. St. 45; *McLaughlin v. Chadwell*, 7 Heisk. (Tenn.) 389; *Packard v. Lewiston*, 55 Me. 456; *People v. Nat. Gold Bank*, 51 Cal. 508; *Salt Lake City Bank v. Golding*, 2 Utah 100; *Waco Nat. Bank v. Rogers*, 51 Tex. 606; *Harrison v. Vines*, 46 Tex. 15.

1. MILLER, J., in *First Nat. Bank v. Com.*, 9 Wall. (U. S.) 353; s. c., 1 Nat. Bank Cas. 34. See *Van Allen v. Assessors*, 3 Wall. (U. S.) 573; s. c., 1 Nat. Bank Cas. 1; *People v. Commissioners of Taxes etc.*, 4 Wall. (U. S.) 244; s. c., 1 Nat. Bank Cas. 9; *Wright v. Stiltz*, 27 Ind. 338; reversing *Whitney v. Madison*, 23 Ind. 331. Consult also *Stetson v. Bangor*, 56 Me. 274; s. c., on other points, 1 Nat. Bank Cas. 520, 521; *Williams v. Weaver*, 75 N. Y. 30; *Hubbard v. Johnson Co.*, 23 Iowa 130; *First Nat. Bank v. Board of Reviewers*, 41 La. An. 181; *McLaughlin v. Chadwell*, 7 Heisk. (Tenn.) 389; *Exchange Nat. Bank v. Miller*, 19 Fed. Rep. 372; *First Nat. Bank v. Farwell*, 10 Biss. (U. S.) 270; *People v. Commissioners of Taxes etc.*, 8 Hun (N. Y.) 536; *Harrison v. Vines*, 46 Tex. 15. Compare *Salt Lake Bank v. Golding*, 2 Utah 1; *State v. Hart*, 31 N. J. L. 434.

2. *First Nat. Bank v. Com.*, 9 Wall.

(U. S.) 353; s. c., 1 Nat. Bank Cas. 36.

3. *National Commercial Bank v. Mayor etc. of Mobile*, 62 Ala. 284; s. c., 34 Am. Rep. 15; s. c., 2 Nat. Bank Cas. 440; *Second Nat. Bank v. Caldwell*, 13 Fed. Rep. 429, 432. But see *Rosenberg v. Weeks*, 67 Tex. 578; s. c., 18 Am. & Eng. Corp. Cas. 140.

4. *Loftin v. Citizens' Nat. Bank*, 85 Ind. 341. But against assessment of banking-office and lot as real estate *eo nomine*, see *Rice Co. v. Citizens' Nat. Bank*, 23 Minn. 280, 281; s. c., 1 Nat. Bank Cas. 629, 630. As to taxing banking-house by tax on shares, see *Lackawanna Co. v. First Nat. Bank*, 94 Pa. St. 221.

5. This authority was held not exercised in Minnesota in *County Treasurer v. Webb*, 11 Minn. 500, 502; s. c., noted 1 Nat. Bank Cas. 935.

6. U. S. Rev. Stat., § 5219. Almost identical limitations upon the taxation of national bank shares are imposed by the Indiana statute (Rev. Stat. 1881, §§ 6306, 6307). *Wasson v. First Nat. Bank*, 107 Ind. 206; s. c., 3 Nat. Bank Cas. 419. The authority of the States to tax national bank shares is treated as settled in *Packard v. Lewiston*, 55 Me. 456; *McIver v. Robinson*, 53 Ala. 456; s. c., 1 Nat. Bank Cas. 372, discussing grounds for not exempting such shares; *Hubbard v. Johnson Co.*, 23 Iowa 130. See also *Mintzer v. Montgomery Co.*, 54 Pa. St. 139.

by State authorities at all;<sup>1</sup> but such authority on the part of the States has sometimes been upheld as existing prior to the enactment of the foregoing provision.<sup>2</sup>

*Congressional Control of Taxation.*—The power possessed by the States to tax national banks can be exercised only in the manner and on the conditions prescribed by congress.<sup>3</sup>

*State Bank Converted Into National Bank.*—An enabling act is valid which required a State bank to pay all taxes imposed upon it by State laws up to the date of its becoming a national bank.<sup>4</sup>

**3. Discrimination as Compared with Other Moneyed Capital.**—*In General.*—National bank shares may not be subjected to State taxation, where a very material relative part of other moneyed capital in the hands of individual citizens within the same jurisdiction or taxing district is exempted from such taxation.<sup>5</sup>

*Credits Are "Moneyed Capital."*—And all credits of whatever nature, including the credits from which the taxpayer may deduct his *bona fide* debts, whether interest bearing or not,<sup>6</sup> are "moneyed capital" in the sense in which that term is used in the act of congress.<sup>7</sup>

*Deduction of Bona Fide Debts.*—Accordingly, State statutes

1. ZOLLARS, J., in *Wasson v. First Nat. Bank*, 107 Ind. 206; s. c., 3 Nat. Bank Cas. 419. See *People v. Weaver*, 100 U. S. 539; s. c., 2 Nat. Bank Cas. 57, 61, and cases there cited, which arose prior to the present National Bank act; also *Austin v. Aldermen*, 7 Wall. (U. S.) 694; s. c., 1 Nat. Bank Cas. 15; *Rich v. Packard Nat. Bank*, 138 Mass. 527; *Bressler v. Wayne Co.*, 25 Neb. 668; s. c., 25 Am. & Eng. Corp. Cas. 301; s. c., 3 Nat. Bank Cas. 564; *Maguire v. Board of Revenue*, 71 Ala. 401; s. c., 6 Am. & Eng. Corp. Cas. 452; *State v. Haight*, 31 N. J. L. 399; *Carthage v. First Nat. Bank*, 71 Mo. 508; s. c., 36 Am. Rep. 494; s. c., 2 Nat. Bank Cas. 279; *Pittsburgh v. First Nat. Bank*, 55 Pa. St. 45; *First Nat. Bank v. St. Joseph*, 46 Mich. 526. But compare *Pollard v. State*, 65 Ala. 628; *Raffin v. Board of Commrs.*, 69 N. Car. 498; s. c., 1 Nat. Bank Cas. 806.

2. *Stetson v. City of Bangor*, 56 Me. 274, 282-283; s. c., on other points, 1 Nat. Bank Cas. 520, 521.

3. *Pollard v. State*, 65 Ala. 628; *Maguire v. Board of Revenue*, 71 Ala. 401; s. c., 6 Am. & Eng. Corp. Cas. 452. See also *National Commercial Bank v. Mayor etc. of Mobile*, 62 Ala. 284; s. c., 34 Am. Rep. 15; s. c., 2 Nat. Bank Cas. 440; *Sumter Co. v. Gainesville Nat. Bank*, 62 Ala. 464; s. c., 34 Am. Rep. 30; s. c., 2 Nat. Bank Cas. 440; *Pittsburgh v. First Nat. Bank*, 55 Pa. St.

45; *Com. v. Girard Bank*, 1 Pearson (Pa.) 323.

4. *Manufacturers' etc. Bank v. Com.*, 72 Pa. St. 70; s. c., noted 1 Nat. Bank Cas. 937; affirming 2 Pa. (Pearson's Dec.) 386, 389. Enabling act held to apply only to banks which availed themselves of its provisions. *Mintzer v. Montgomery Co.*, 54 Pa. St. 139; s. c., noted 1 Nat. Bank Cas. 936. As to bonus which, after reorganization of State bank, could only be exacted as a tax, which the State had no right to impose, see *State v. National Bank*, 33 Md. 75; s. c., 1 Nat. Bank Cas. 527.

5. *Boyer v. Boyer*, 113 U. S. 689; s. c., 3 Nat. Bank Cas. 151. What constitutes discrimination as compared with other moneyed capital is discussed in *Providence Inst. v. Boston*, 101 Mass. 575; s. c., 3 Am. Rep. 407; s. c., 1 Nat. Bank Cas. 578; in *Lemley v. Forsyth Co.*, 85 N. Car. 379; in *First Nat. Bank v. Richmond*, 25 Am. & Eng. Corp. Cas. 298, note; in *Mercantile Nat. Bank v. Mayor etc. of N. Y.*, 121 U. S. 138; s. c., 18 Am. & Eng. Corp. Cas. 92; s. c., 3 Nat. Bank Cas. 243; and in the note to *Nat. Newark Banking Co. v. Mayor etc. of Newark*, 121 U. S. 163; 18 Am. & Eng. Corp. Cas. 116, 120.

6. See *Hepburn v. School Directors*, 23 Wall. (U. S.) 480, 484; s. c., 1 Nat. Bank Cas. 113, 115.

7. *Wasson v. First Nat. Bank*, 107 Ind. 206; s. c., 3 Nat. Bank Cas. 419.

which allow the taxpayer to deduct his debts from such moneyed capital and deny this right to the holders of shares of national bank stock, must yield to the paramount act of congress, which inhibits such discrimination.<sup>1</sup> But where the statute makes no provision for deducting debts from the assessed value of shares of national bank stock, and yet allows such deduction from a portion of other moneyed capital, thereby discriminating against national bank stock, the question whether that discrimination is so material and serious that the owners of such shares of stock are entitled to deduct their debts, notwithstanding the statute, depends upon the amount of the moneyed capital from which the debts of the taxpayer may be deducted, as compared with the whole of the moneyed capital of the State.<sup>2</sup>

*"No Incorporated Banks" Not Standard of Comparison.*—Nor does the act of congress, which protects national banks from injurious discrimination, limit the standard of comparison to the "moneyed capital" invested in the "incorporated banks" of a State, but it extends to all moneyed capital "in the hands of individual citizens," and to equalize the shares of national banks as to a part only of that moneyed capital is not to equalize them as to the whole, which is necessary to comply with the federal statute.<sup>3</sup>

*Equality Between State and National Banks Not Required.*—Indeed, the provision of the national bank act respecting the taxation of national banks, does not require perfect equality between State and national banks, but only that the system of taxation in a State shall not work a discrimination favorable to its own citizens and corporations and unfavorable to holders of shares in national banks.<sup>4</sup>

*Where Shares of Various Companies Escape Taxation.*—It seems, furthermore, that a State statute taxing national bank shares is not necessarily subject to the objection that it discriminates unfavorably against national banks, even if there be no law of the State imposing a tax upon shares of transportation, insurance, trading and other miscellaneous companies or upon deposits in savings banks,<sup>5</sup> for investments in such companies are distin-

1. *Wasson v. First Nat. Bank*, as just cited. See *Bressler v. Wayne Co.*, 25 Neb. 468, 472; s. c., 3 Nat. Bank Cas. 564, 567; s. c., 25 Am. & Eng. Corp. Cas. 301. Compare *Maguire v. Board of Revenue*, 71 Ala. 401, 415; s. c., 6 Am. & Eng. Corp. Cas. 452.

2. See concerning extent of discrimination *Wasson v. First Nat. Bank*, 107 Ind. 206; s. c., 3 Nat. Bank Cas. 419; *Boyer v. Boyer*, 113 U. S. 689; s. c., 3 Nat. Bank Cas. 151; *People v. Weaver*, 100 U. S. 539; s. c., 2 Nat. Bank Cas. 57; *City Nat. Bank v. Paducah*, 2 Flip. (U. S.) 61; s. c., 1 Nat. Bank Cas. 300.

3. *First Nat. Bank v. Lucas Co.*, 25 Fed. Rep. 749.

4. *Davenport Nat. Bank v. Davenport Board of Equalization*, 123 U. S. 83; s. c., 3 Nat. Bank Cas. 285; s. c., 18 Am. & Eng. Corp. Cas. 154, ruling that there is no case to hold a State statute unconstitutional if the system of taxation created by it does not, on the face of the statute, in the necessary usual or probable effect of the system, discriminate against national banks, and no evidence is given of the intention of the legislature to make such a discrimination, nor any proof that it works an actual and material discrimination.

5. *McMahon v. Palmer*, 102 N. Y. 176; s. c., 3 Nat. Bank Cas. 636; s. c.,

guishable from moneyed capital in the hands of individuals.<sup>1</sup>

*Uniformity Among Municipalities Not Required.*—So the uniformity required has been considered not to be between different municipalities of States or Territories, but to merely exact that wherever the shares of national banks are taxed, whether for State, territorial, county, school, town or city purposes, the assessment should not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such State.<sup>2</sup>

**4. Exemption of Portion of Other Moneyed Capital—Partial Exemption for Local Purposes.**—It has been held, in effect, that a partial exemption by a State, for local purposes, of moneyed capital in the hands of individuals, does not of itself, and without reference to the aggregate amount of moneyed capital, not so exempted, establish the right to a similar exemption<sup>3</sup> in favor of national bank shares held by persons within the same jurisdiction.<sup>4</sup>

*Exemption of Relatively Material Part of Other Moneyed Capital.*—But national bank shares may not be subjected to local taxation when a very material part, relatively, of other moneyed capital in the hands of individual citizens within the jurisdiction or taxing district is exempt from such taxation.<sup>5</sup>

*Exemption of Mortgages, Judgments, etc.*—And where the State of Pennsylvania had exempted from local taxation, for county

55 Am. Rep. 796; s. c., 12 Am. & Eng. Corp. Cas. 297.

1. *McMahon v. Palmer*, just cited. Nor is the New York act declaring that the stockholders in banks organized under the authority of the State, or of the United States, shall be assessed for the value of their share of stock (Act of July 1st, 1882, § 312) inconsistent with the provision of the National Bank act, forbidding the taxes on national bank shares to be higher than those assessed on other moneyed capital in the hands of individual citizens of the State (U. S. Rev. Stat., § 5219), although the assessment rolls showed that taxation was virtually escaped by the securities of life insurance companies, the stock of locally incorporated companies and corporations of extra-State incorporations owned in the State, the stock of trust companies, and the deposits of savings banks. *Mercantile Nat. Bank v. Mayor etc. of N. Y.*, 121 U. S. 138, 145; s. c., 18 Am. & Eng. Corp. Cas. 92; s. c., 3 Nat. Bank Cas. 243, fully discussing scope of restriction in National Bank act, and purporting to reconcile rule of decision in *Van Allen v. Assessors*, 3 Wall. (U.

S.) 573; s. c., 1 Nat. Bank Cas. 1, with that in *People v. Commrs.*, 4 Wall. (U. S.) 244; s. c., 1 Nat. Bank Cas. 9, and followed in *National Newark Banking Co. v. Mayor etc. of Newark*, 121 U. S. 163, 165; s. c., 18 Am. & Eng. Corp. Cas. 114; s. c., 3 Nat. Bank Cas. 265. See also *Maguire v. Board of Revenue*, 71 Ala. 401; s. c., 6 Am. & Eng. Corp. Cas. 452; *Silver Bow Co. v. Davis*, 6 Mont. 306; s. c., 3 Nat. Bank Cas. 546; *First Nat. Bank v. Waters*, 19 Blatchf. (U. S.) 242.

2. *People v. Moore*, 1 Idaho (U. S.) 504.

3. As to tax not amounting to an entire exemption of National Bank shares, see *Lackawanna Co. v. First Nat. Bank of Scranton*, 94 Pa. St. 221, 224.

4. *Hepburn v. School Directors*, 23 Wall. (U. S.) 480, 485; s. c., 1 Nat. Bank Cas. 113. See also *McLaughlin v. Chadwell*, 7 Heisk. (Tenn.) 389; s. c., noted, 1 Nat. Bank Cas. 938; *Gorgas's Appeal*, 79 Pa. St. 149; s. c., noted 1 Nat. Bank Cas. 937; *Everett's Appeal*, 71 Pa. St. 216; s. c., noted 1 Nat. Bank Cas. 937.

5. *Boyer v. Boyer*, 113 U. S. 689; s. c., 3 Nat. Bank Cas. 151.

purposes, mortgages, judgments, etc., and imposed such local taxes upon the shares of national bank stock, it was held<sup>1</sup> that the result was a material inequality, and that the bank stock could not be taxed for such local purposes.<sup>2</sup>

*Savings Banks Deposits.*—Yet, however much the amount of moneyed capital in the hands of individuals in the shape of deposits in savings banks, which the policy of the State exempts for its own purposes, that exemption cannot affect the validity of the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens, otherwise subject to taxation.<sup>3</sup>

**5. Deduction of Bona Fide Debts**—From “No Credits,” etc., Includes *National Bank Shares*.—In the assessment and taxation of shares of national bank stock, the owners thereof, if they have no other credits or moneyed capital from which to deduct their *bona fide* debts, are entitled to deduct them from the assessed value of such shares of stock where the State statute provides that in the assessment and taxation of what is denominated credits, the individual taxpayer, as owner thereof, may deduct therefrom his *bona fide* debts, except debts of certain designated classes.<sup>4</sup> So where the State statute provides that the taxpayer's permitted deduction of indebtedness may be from his “credits or money at interest,” from “all other demands against persons or bodies corporate,” and from the “total amount of all credits,” the shares in a national bank are covered by these terms so as to allow a deduction of indebtedness therefrom.<sup>5</sup>

*General Doctrine.*—Indeed, in general, a State law which permits individual citizens to deduct their just debts from the valuation of their personal property of every kind, other than national bank shares, or which permits the taxpayer to deduct from the sum of his credits, money at interest or other demands to the extent of his *bona fide* indebtedness, leaving the remainder to be taxed, while it denies the same right of deduction from the cash value of bank shares, operates to tax the latter at a greater rate than other moneyed capital.<sup>6</sup>

1. *Hepburn v. School Directors*, 23 Wall. (U. S.) 480.

2. *Wasson v. First Nat. Bank*, 107 Ind. 206; s. c., 3 Nat. Bank Cas. 419.

3. *Mercantile Nat. Bank v. Mayor etc.* of N. Y., 121 U. S. 138, 161; s. c., 3 Nat. Bank Cas. 243, 264; s. c., 18 Am. & Eng. Corp. Cas. 92, 112. See also as following this case, *Davenport Nat. Bank v. Davenport Board of Equalization*, 123 U. S. 83; s. c., 18 Am. & Eng. Corp. Cas. 154; s. c., 3 Nat. Bank Cas. 285; *National Bank v. Boston*, 125 U. S. 60; s. c., 3 Nat. Bank Cas. 300; s. c., 20 Am. & Eng. Corp. Cas. 572. Con-

sult further, *Richards v. Rock Rapids*, 31 Fed. Rep. 505; *Davenport Nat. Bank v. Mittelbuscher*, 15 Fed. Rep. 225.

4. *Wasson v. First Nat. Bank*, 107 Ind. 206; s. c., 3 Nat. Bank Cas. 419.

5. *Evansville Nat. Bank v. Britton*, 105 U. S. 322; s. c., 3 Nat. Bank Cas. 48.

6. *Boyer v. Boyer*, 113 U. S. 689; s. c., 3 Nat. Bank Cas. 151. See also *People v. Weaver*, 100 U. S. 539; s. c., 2 Nat. Bank Cas. 57; *Bressler v. Wayne Co.*, 25 Neb. 468; s. c., 3 Nat. Bank Cas. 564; s. c., 25 Am. & Eng. Corp.

*Rulings Under Doctrine.*—To conform to this doctrine the value of stock in a national bank must be considered part of the "debts due or to become due" a taxpayer, from which he is entitled, by a State statute, to deduct the amount of his *bona fide* and unconditional indebtedness, in listing his property for taxation.<sup>1</sup> Pursuant, also, to such doctrine, where a statute provides that in assessing solvent debts not secured by mortgage or trust deed, a deduction therefrom shall be made of "debts due to *bona fide* residents of the State," but does not allow a like deduction from the assessed value of national bank stock, such statute, so far as it denies the deduction to the holders of national bank stock, is in conflict with the act of congress.<sup>2</sup>

**6. Deductions in General—Value of Real Estate.**—The National Bank act, while authorizing taxation of national bank shares, does not permit taxation of any property belonging to the bank except its real estate,<sup>3</sup> and under the laws of the States, there is a want of uniformity in a tax against a national bank, if no provision is made for the deduction of the value of the real estate from the aggregate value of the shares.<sup>4</sup>

*Investments in United States Bonds, etc.*—But a statutory rule fixing the true money value of shares in national banks, which does not permit a deduction therefrom for the amount of United States bonds or other nontaxable securities held by the bank, has been sustained as not in conflict with the constitution of Ohio, nor with the law of congress authorizing taxation on such shares.<sup>5</sup>

Cas. 301; *McAden v. Mecklenberg Co.*, 97 N. Car. 355; s. c., 3 Nat. Bank Cas. 604. Consult and compare *Hills v. National Albany Exch. Bank*, 105 U. S. 319; s. c., 3 Nat. Bank Cas. 45; reversing *National Albany Exch. Bank v. Hills*, 5 Fed. Rep. 248; s. c., 2 Nat. Bank Cas. 456\*; *Stanley v. Albany Co.*, 121 U. S. 535; s. c., 3 Nat. Bank Cas. 268; *Rosenberg v. Weekes*, 67 Tex. 578; s. c., 18 Am. & Eng. Corp. Cas. 140; *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193; s. c., 3 Nat. Bank Cas. 309; s. c., 20 Am. & Eng. Corp. Cas. 582, 587; *City Nat. Bank v. Paducah*, 2 *Flip.* (U. S.) 61; s. c., 1 Nat. Bank Cas. 300; *Maguire v. Board of Revenue*, 71 Ala. 401; s. c., 6 Am. & Eng. Corp. Cas. 452; *First Nat. Bank v. St. Joseph*, 46 Mich. 526; *McVeagh v. Chicago*, 49 Ill. 318; s. c., 1 Nat. Bank Cas. 381; *Richards v. Rock Rapids*, 31 Fed. Rep. 505; *National Albany Exch. Bank v. Wells*, 18 Blatchf. (U. S.) 478; *People v. Ryan*, 88 N. Y. 142.

<sup>1</sup> *Ruggles v. Fond du Lac*, 53 Wis. 436.

<sup>2</sup> *Miller v. Heilbron*, 58 Cal. 133; s. c., 3 Nat. Bank Cas. 330.

As to assessor's refusal to allow such deductions, see *Indianapolis v. Vajen*, 111 Ind. 240; s. c., 18 Am. & Eng. Corp. Cas. 146, 150. As to selectmen's like refusal, see *Peavey v. Town of Greenfield*, 64 N. H. 284; citing *Weston v. Manchester*, 62 N. H.

<sup>3</sup> *Covington City Nat. Bank v. Covington*, 21 Fed. Rep. 484.

<sup>4</sup> *City Nat. Bank v. Paducah*, 2 *Flip.* 61; s. c., 1 Nat. Bank Cas. 300, holding that there is double taxation in such a case. See also *Rice Co. Citizens' Nat. Bank*, 23 Minn. 280; s. c., 1 Nat. Bank Cas. 629, 630; *Lancaster Co. v. Lancaster Co. Nat. Bank*, 7 W. N. C. (Pa.) 29, 31; s. c., 2 Nat. Bank Cas. 415; *People v. Commrs. of Taxes*, 69 N. Y. 91; s. c., 1 Nat. Bank Cas. 752, 753; *Matter of Farmers' Nat. Bank*, 1 *Thomp. & C.* (N. Y.) 383; *People v. Commrs. of Taxes*, 80 N. Y. 573.

<sup>5</sup> *Exchange Nat. Bank v. Miller*, 19 Fed. Rep. 372. See also *People v. Commrs. of Taxes etc.*, 4 Wall. (U. S.) 244; s. c., 1 Nat. Bank Cas. 9.

7. *Inequalities in Valuation, etc.—Where Fixed Percentage the Same.*—The words, “at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens,” used in the National Bank act, refer to the entire process of assessment, which, in the case of national bank shares, includes both their valuation and the rate of percentage on such valuation,<sup>1</sup> so that the act of congress is violated<sup>2</sup> if in connection with a fixed percentage applicable to the valuation alike of national bank shares and of other moneyed investments of capital, the State law establishes or permits a mode of assessment by which such shares are valued higher in proportion to their real value than is other moneyed capital.<sup>3</sup>

*Relief in Equity Against Discrimination.*—When the inequality of valuation is the result of a State statute which is designed to discriminate injuriously against any class of persons or species of property, a court of equity will give appropriate relief.<sup>4</sup>

*Inequality in Rule of Valuation.*—So the court will give relief where, though the law itself is unobjectionable, the officers who are appointed to make assessments combine together and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate.<sup>5</sup> But the rule must be applied not solely to one individual but to a large class of individuals or corporations,<sup>6</sup> and no relief will be granted where the bill alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor, but relies on numerous instances of partial and unequal valuations which establish no rule on the subject.<sup>7</sup>

*Adoption of Most Practicable Mode of Valuation.*—Nor is the assessment invalid merely because all bank shares were assessed at par, where any discrimination that may have existed arose from the difficulty of devising any other mode of assessment which would work out greater equality and uniformity in the valuation of different kinds of moneyed capital.<sup>8</sup>

*Inequalities Must Indicate Intentional Discrimination.*—Indeed, inequalities in valuation afford no ground for relief, unless it be

1. See *People v. Weaver*, 100 U. S. 539; s. c., 2 Nat. Bank Cas. 57.

2. See *Pelton v. Commercial Nat. Bank*, 101 U. S. 143; s. c., 2 Nat. Bank Cas. 85.

3. *Boyer v. Boyer*, 113 U. S. 689; s. c., 3 Nat. Bank Cas. 151. As to statute not objectionable for want of proportion, see *Providence Inst. v. Boston*, 101 Mass. 575; s. c., 3 Am. Rep. 407; s. c., 1 Nat. Bank Cas. 578. As to imposition of higher percentage on national banks, see *First Nat. Bank v. Lucas Co.*, 25 Fed. Rep. 749.

4. *German Nat. Bank v. Kimball*,

103 U. S. 732; s. c., 3 Nat. Bank Cas. 9.

5. *German Nat. Bank v. Kimball*, 103 U. S. 732; s. c., 3 Nat. Bank Cas. 9, 12.

6. *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153; s. c., 2 Nat. Bank Cas. 74, 78.

7. *German Nat. Bank v. Kimball*, just cited. See also *Hills v. National Albany Exch. Bank*, 105 U. S. 319; s. c., 3 Nat. Bank Cas. 45; *Wagoner v. Loomis*, 37 Ohio St. 571.

8. *Williams v. Albany Co.*, 122 U. S. 154; s. c., 18 Am. & Eng. Corp. Cas. 133; s. c., 3 Nat. Bank Cas. 278; affirming 21 Fed. Rep. 99.

made to appear that they result not merely from error in judgment on the part of the assessing officer, but that there was intentional discrimination, which may be established by proof of inequalities so gross as to lead the court to the conclusion that they were designed.<sup>1</sup>

8. *Place of Taxation—Place of Location of Bank.*—Soon after the passage of the National Bank act, a controversy arose as to the true meaning of the clause which permitted shares to be taxed under State authority "at the place where the bank is located and not elsewhere." In some of the States it was held<sup>2</sup> that the restriction confined the exercise of the taxing power to the town or district in which the corporation conducted its business. But in others it was decided that the clause in question applied to the State and not to any of its territorial divisions, and that such tax could be assessed upon a resident stockholder at the place of his residence<sup>3</sup> wherever it might be within the State.<sup>4</sup> The controversy was solved by an amendatory act, passed in 1868, declaring the word "place" to mean the "State" wherein the bank is located.<sup>5</sup> The only restraints imposed upon a State, under the altered wording of the enactment in the exercise of its taxing power over shares in national banks, have been considered to be: (1) That such tax shall not be at a greater rate than is assessed upon other moneyed capital in the hands of the individual citizens of the State. (2) That the tax on shares of nonresident owners shall be imposed in the city or town<sup>6</sup> where the bank is located.<sup>7</sup> Subject to these limitations, it is left to the legislature of a State to "determine and direct the manner and place of taxing all the shares" of banking associations within its

1. *Exchange Nat. Bank v. Miller*, 19 Fed. Rep. 372. Compare *First Nat. Bank v. Lucas Co.*, 25 Fed. Rep. 749.

*Inequalities in General.*—Valuation alleged to be made with regard to wrong date. *McVeagh v. Chicago*, 49 Ill. 318; s. c., 1 Nat. Bank Cas. 381.

2. See *Opinion of the Justices*, 53 Me. 594; *Abbott v. Bangor*, 54 Me. 540; s. c., noted 1 Nat. Bank Cas. 933; *Packard v. Lewiston*, 55 Me. 456; s. c., noted 1 Nat. Bank Cas. 933 (affirmed in *Abbott v. Bangor*, 56 Me. 310; s. c., noted, 1 Nat. Bank Cas. 934). Consult also reference in *Austin v. Board of Aldermen*, 14 Allen (Mass.) 359, to a ruling in New Hampshire in the case of *First Nat. Bank v. Portsmouth*. Compare further *Utica v. Churchill*, 33 N. Y. 161; *State v. Haight*, 31 N. J. L. 399; *State v. Hart*, 31 N. J. L. 434.

3. *Austin v. Board of Aldermen*, 14 Allen (Mass.) 359; s. c., noted 1 Nat. Bank Cas. 934; s. c., affirmed on other

grounds in *Austin v. Aldermen*, 7 Wall. (U. S.) 604, or 1 Nat. Bank Cas. 15, 16; *Clapp v. Burlington*, 42 Vt. 579; s. c., noted 1 Nat. Bank Cas. 938; s. c., 1 Am. Rep. 355; *Markoe v. Hartranft*, 6 Am. L. Reg., N. S. 487, 490.

4. *SMITH, C. J.*, in *Bule v. Fayetteville*, 79 N. Car. 267; s. c., 2 Nat. Bank Cas. 343. But the State could not tax shares owned by its residents in a national bank located in another State. *Flint v. Board of Aldermen*, 99 Mass. 141; s. c., 1 Nat. Bank Cas. 571, 572; s. c., 96 Am. Dec. 713.

5. See *First Nat. Bank v. Smith*, 65 Ill. 44; s. c., 1 Nat. Bank Cas. 390; *City Nat. Bank v. Paducah*, 2 Flip. (U. S.) 61; s. c., 1 Nat. Bank Cas. 300.

6. See *People v. Moore*, 1 Idaho (U. S.) 504.

7. See *Kyle v. Mayor of etc. Fayetteville*, 75 N. Car. 445; s. c., 1 Nat. Bank Cas. 808. Compare *First Nat. Bank v. Smith*, 65 Ill. 44; s. c., 1 Nat. Bank Cas. 390.



limits.<sup>1</sup> It follows, therefore, that a State may, under the restraints mentioned, prescribe and regulate as well the place as the manner of making its assessments upon this kind of property according to its own discretion.<sup>2</sup>

**Owner's Residence Immaterial.**—Indeed, a State legislature may provide for the taxation of the owners of national bank shares at the particular place within the State where the bank is located,<sup>3</sup> without regard to the places of residence of the owners,<sup>4</sup> whether at such place, or elsewhere within the State, or entirely outside of the State.<sup>5</sup> But an assessment of a tax on the stock of a national banking association in *New Jersey*, which stock is owned by a stockholder residing in the city in which the association is located, cannot be sustained by the presumption that the stockholder resided in the ward in which the association was located.<sup>6</sup>

1. U. S. Rev. Stats., § 5219.

2. SMITH, C. J., in *Buile v. Fayetteville*, 79 N. Car. 267; s. c., 2 Nat. Bank Cas. 343.

3. See *Providence Inst. v. Boston*, 101 Mass. 575; s. c., 3 Am. Rep. 407; s. c., 1 Nat. Bank Cas. 578.

4. See *McIver v. Robinson*, 53 Ala. 456; s. c., 1 Nat. Bank Cas. 372; *State v. Cook*, 32 N. J. L. 347.

5. *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 490; s. c., 1 Nat. Bank Cas. 100. The ruling in this case is referred to in *Williams v. Weaver*, 75 N. Y. 30. See to same effect, *First Nat. Bank v. Smith*, 65 Ill. 54; s. c., 1 Nat. Bank Cas. 390; *Baker v. First Nat. Bank*, 67 Ill. 297; *Curtis v. Ward*, 58 Mo. 295; s. c., noted 1 Nat. Bank Cas. 935. Compare *Whitney v. Ragsdale*, 33 Ind. 107; s. c., 5 Am. Rep. 185; s. c., 1 Nat. Bank Cas. 429. *Contra*, *Union Nat. Bank v. Chicago*, 3 Biss. (U. S.) 82.

**Extra-State National Bank as Owner.**

—It is immaterial that the owner of national bank shares subjected to taxation in one State is a national bank and not an individual located in another State. *National Bank v. Boston*, 125 U. S. 60; s. c., 3 Nat. Bank Cas. 300; s. c., 20 Am. & Eng. Corp. Cas. 572.

6. *State v. Newark*, 40 N. J. L. 558; s. c., 2 Nat. Bank Cas. 290, reversing same case, 39 N. J. L. 380, or 1 Nat. Bank Cas. 672.

**Mistake as to Town of Owner's Residence.**—An owner of national bank shares is, in Massachusetts, rightfully taxed upon them in the town in which she resides, although in a statement made under the local statute, she has by an honest mistake notified the cashier of the bank that her residence is in a

different town. *Goldsbury v. Warwick*, 112 Mass. 384; s. c., 1 Nat. Bank Cas. 592.

**Legislation as to Township of Taxation.**—The legislation of *Michigan* is valid, which provides for the taxation of national bank stock in the township where the bank is located, except that where a stockholder resides in another township in the same county, he is taxable in his own township. *Howell v. Cassopolis*, 35 Mich. 471; s. c., 1 Nat. Bank Cas. 627.

**Changes in Tennessee Statute.**—In *Tennessee*, before the act of March 1st, 1869, bank stocks, whether in national or other banks, were taxable only in the county of the owner's residence. *Mayor of Nashville v. Thomas*, 5 Coldw. 600; s. c., noted 1 Nat. Bank Cas. 938; *Union Bank v. State*, 9 Yerg. (Tenn.) 490. But section 9 of that act changed the law in this regard, and made them taxable at the place where the bank might be situated. *McLaughlin v. Chadwell*, 7 Heisk. (Tenn.) 389; s. c., noted 1 Nat. Bank Cas. 938.

**In General.**—Mode of assessment in *New York* where owner does not reside in ward where bank is located. *McMahon v. Palmer*, 102 N. Y. 176; s. c., 55 Am. Rep. 796; s. c., 12 Am. & Eng. Corp. Cas. 297; s. c., 3 Nat. Bank Cas. 636, 638-39. Taxation for fire, district purposes, in *Massachusetts*. *Rich v. Packard Nat. Bank*, 138 Mass. 527. For school district purposes. *Little v. Little*, 131 Mass. 367. Question concerning validity of statute for taxing elsewhere than at place of location of bank, held not raised in *Wait v. Dowley*, 94 U. S. 527; s. c., 1 Nat. Bank Cas. 137.

**9. Limits of Taxation—Shares Taxable Above Par Value.**—National bank shares may be taxed at an amount above their par value.<sup>1</sup>

**On Shares in Name.**—The tax imposed must, however, be upon the shares in name.<sup>2</sup>

**No Assessment on Personal Property as Such.**—But no revenue can be collected by a State, county, or municipality from national banks, except by assessments upon their shares and real estate;<sup>3</sup> and an assessment on personal property, apparently based on the capital stock, is illegal.<sup>4</sup>

**Shares of National Bank Located in a Territory Are Taxable.**—The shares of national banks located and doing business in a Territory are subject to taxation as well as those of like banks established in a State.<sup>5</sup>

**Taxation of Surplus Capital.**—And where the shares of national banks are by statute required to be taxed at their par value, the surplus fund of such banks, in excess of the amount they are required by law to keep on hand, has been held taxable by the States in which the banks are located.<sup>6</sup>

**New Shares Before Comptroller's Approval of Increase of Capital Stock.**—But new shares of a national bank are not the subject of taxation before the comptroller of the currency has approved the increase of the capital stock.<sup>7</sup>

**Conducting Business in Another State.**

—A national bank located in *New Jersey*, which kept a clerk in Philadelphia to receive deposits for the convenience of persons in that city, did not become located in *Pennsylvania* so as to be taxable there. *National State Bank v. Pierce*, 18 Abb. L. J. 16; s. c., 2 Nat. Bank Cas. 177.

1. *Hepburn v. School Directors*, 23 Wall. (U. S.) 480; s. c., 1 Nat. Bank Cas. 113; *People v. Commrs. of Taxes*, 94 U. S. 415; s. c., 1 Nat. Bank Cas. 130. *Contra*, *Union Nat. Bank v. Chicago*, 3 Biss. U. S. 82.

2. *People v. Moore*, 1 Idaho (U. S.) 504.

3. See *National Commercial Bank v. Mayor etc. of Mobile*, 62 Ala. 284; s. c., 34 Am. Rep. 15; s. c., 2 Nat. Bank Cas. 440.

4. *National State Bank v. Young*, 25 Iowa 311; s. c., 1 Nat. Bank Cas. 451, 452.

Nor can a tax on shares of national banks be authorized by a State statute where the laws of the State merely provide for the taxation of the capital stock of its own banks, and not of the shares held therein. *Hubbard v. Johnson Co.*, 23 Iowa 130. As to new statute with valid provisions for taxing national

banks, see *Morseman v. Younkin*, 27 Iowa 350, 352; s. c., 1 Nat. Bank Cas. 460.

In *Texas*, under the revised statutes of 1879, the real estate of national banks could not be taxed. *Rosenberg v. Weekes*, 67 Tex. 578; s. c., 18 Am. & Eng. Corp. Cas. 140. In *Maryland*, a tax not only on the shares of a national bank but also on the banking house, lot and furniture is illegal. *Frederick Co. v. Farmers' etc. Nat. Bank*, 48 Md. 117-119, *et seq.*; s. c., 2 Nat. Bank Cas. 252, *et seq.*

5. *Silver Bow. Co. v. Davis*, 6 Mont. 306; s. c., 3 Nat. Bank Cas. 546; *Salt Lake City Bank v. Golding*, 2 Utah 1; *People v. Moore*, 1 Idaho (U. S.) 504.

6. *First Nat. Bank v. Peterborough*, 56 N. H. 38; s. c., 22 Am. Rep. 416; s. c., 1 Nat. Bank Cas. 658. See also *Strafford Nat. Bank v. Dover*, 58 N. H. 316; s. c., 2 Nat. Bank Cas. 296; *Concord Bank v. Concord*, 59 N. H. 75; *State v. Newark*, 39 N. J. L. 380; s. c., 1 Nat. Bank Cas. 672 (s. c., on appeal, 40 N. J. L. 558, or 2 Nat. Bank Cas. 290). But see *Covington City Nat. Bank v. Covington*, 21 Fed. Rep. 484.

7. *Charleston v. Peoples' Nat. Bank*, 5 S. Car. 103; s. c., 22 Am. Rep. 1, 4; s. c., 1 Nat. Bank Cas. 898.

**10. Exemptions from Taxation in General—Under Proviso Requiring Like Taxation of State Banks.**—The proviso, in the National Bank act, that the tax imposed by State laws on shares in national banks "shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located," which has reference to State banks of issue, did not exempt national bank shares from taxation, if the State complied with the proviso so far as it had the ability to do so.<sup>1</sup>

**Where City Banks Exempted Under Abrogated Ordinance.**—And an asserted exemption of interest bearing bonds of a city from municipal taxation, under an ordinance of the city which was abrogated by subsequent legislation, does not operate to exempt from like taxation the shares in a national bank located in the same city.<sup>2</sup>

**Personal Property of Insolvent National Bank.**—The personal property of an insolvent national bank, in the hands of a receiver, under the provision of National Bank act, is, however, exempt from taxation under State laws.<sup>3</sup>

**Where Corporation Required to List Property for Taxation.**—A statutory exemption of "all shares of the capital stock of any company or corporation which is required to list its property for taxation," has been held inapplicable to national bank shares.<sup>4</sup>

**Circulating Notes.**—The circulating notes of national banks, known as "national currency," are likewise not exempt from taxation by a State.<sup>5</sup>

1. *Lionberger v. Rouse*, 9 Wall. (U. S.) 468; s. c., 1 Nat. Bank Cas. 41; explained in *Boyer v. Boyer*, 113 U. S. 689; s. c., 3 Nat. Bank Cas. 151. See further concerning this former proviso of the act, *Mercantile Nat. Bank v. Mayor etc. of N. Y.*, 121 U. S. 138; s. c., 3 Nat. Bank Cas. 243; *Van Allen v. Assessors*, 3 Wall. (U. S.) 573, 581; s. c., 1 Nat. Bank Cas. 1, 2; *Richmond v. Scott*, 48 Ind. 568; s. c., 1 Nat. Bank Cas. 445; *Van Slyke v. State*, 23 Wis. 655; s. c., noted 1 Nat. Bank Cas. 939; affirmed in *Bagnall v. State*, 25 Wis. 112; *Frazer v. Siebern*, 16 Ohio St. 614; s. c., noted 1 Nat. Bank Cas. 936; *Smith v. Webb*, 11 Minn. 500; s. c., noted 1 Nat. Bank Cas. 935; *Hubbard v. Johnson Co.*, 23 Iowa 130; s. c., noted 1 Nat. Bank Cas. 932.

2. *Adams v. Nashville*, 95 U. S. 19; s. c., 1 Nat. Bank Cas. 148; stated in *Boyer v. Boyer*, 113 U. S. 689; s. c., 3 Nat. Bank Cas. 151.

3. *Rosenblatt v. Johnson*, 104 U. S. 462; s. c., 3 Nat. Bank Cas. 32. See also as to levy subsequently to insol-

vency of bank, *Woodward v. Ellsworth*, 4 Colo. 580; s. c., 2 Nat. Bank Cas. 216; and further as to taxation of insolvent national bank, *Jackson v. United States*, 20 Ct. of Cl. 298.

4. *McIver v. Robinson*, 53 Ala. 456; s. c., 1 Nat. Bank Cas. 372.

5. *Montgomery Co. v. Elston*, 32 Ind. 27; s. c., 2 Am. Rep. 327; s. c., 1 Nat. Bank Cas. 425. See also *Lilly v. Commrs.*, 69 N. Car. 300; *Ruffin v. Board of Commrs.*, 69 N. Car. 498; s. c., 1 Nat. Bank Cas. 806. *Contra*, *Horne v. Green*, 52 Miss. 452; s. c., 1 Nat. Bank Cas. 643.

**Tax on Municipal Notes Paid Out.**—The provision of the Revised Statutes is not unconstitutional whereby it is enacted that every national banking association . . . shall pay a tax of ten per centum on the amount of notes of any town, city, or municipal corporation paid out by them." *Merchants' Nat. Bank v. United States*, 101 U. S. 1; s. c., 2 Nat. Bank Cas. 430; following *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533; s. c., 1 Nat. Bank Cas. 22.

**11. Restrictions Upon Municipal Taxation—Municipal Officers Must Have State Law as Authority.**—Before municipal officers can rightly assess a tax upon the shares of national banks, they must be authorized to do so by some law of the State.<sup>1</sup>

*Where No Like Tax Imposed on State Banks.*—And as the act of congress forbids any discrimination against the shares of national banks in taxation, such shares cannot be taxed by a State for municipal purposes or otherwise, where no such tax is imposed upon the State bank or upon other banks organized under the authority of the State.<sup>2</sup>

*No Tax Upon Business, etc.*—National banks are not liable to a privilege tax imposed by a city ordinance;<sup>3</sup> nor, in view of the fact that the shares alone are taxable, to any tax upon their business, imposed by the municipal authorities of the city where the bank is located.<sup>4</sup>

**12. Mode of Assessment—Without Personal Examination by Assessor.**—Where a party was assessed upon national bank shares, the number and estimated value of which was furnished by him to the assessment officers, and such officers, upon the information thus obtained, with that derived from other sources, appraised the shares at their actual value, it was held that personal examination by the officers was not necessary, under the New York statute, as the requirement of such examination under that statute applied to real estate only.<sup>5</sup>

*Entry on Separate List or Book.*—Nor is the assessment rendered void because it is entered upon a list or book separate from other assessments for personal property against individuals in the same city.<sup>6</sup>

1. *Stetson v. Bangor*, 56 Me. 274; s. c., 1 Nat. Bank Cas. 520. But municipal taxes were held to be imposed by State authority on national bank shares in *McLaughlin v. Chadwell*, 7 Heisk. (Tenn.) 389; s. c., noted 1 Nat. Bank Cas. 938. As to tax—held not levied for municipal purposes, in Indiana. See *Root v. Erdelmeyer*, 37 Ind. 225; s. c., 1 Nat. Bank Cas. 432.

2. *Craft v. Tuttle*, 27 Ind., 332; s. c., noted 1 Nat. Bank Cas. 932; *Wright v. Stiltz*, 27 Ind. 338. See also *Evansville v. Bayard*, 39 Ind. 450; s. c., noted 1 Nat. Bank Cas. 932. But compare *Richmond v. Scott*, 48 Ind. 568; s. c., 1 Nat. Bank Cas. 445, followed in *Stilz v. Tutewiler*, 48 Ind. 600; s. c., noted 1 Nat. Bank Cas. 932.

3. *National Bank of Chattanooga v. Mayor etc.*, 8 Heisk. (Tenn.) 814, 815, 816.

4. *Mayor etc. of Macon v. First Nat. Bank*, 59 Ga. 648. See also *Pittsburgh v. First Nat. Bank*, 55 Pa. St. 45; s. c., noted 1 Nat. Bank Cas. 936. A city, therefore, has no power to exact a

licence fee from a national bank. *Carthage v. First Nat. Bank*, 71 Mo. 508; s. c., 36 Am. Rep. 494; s. c., 2 Nat. Bank Cas. 279. But the ordinance, though unconstitutional, may not give a right to equitable relief by injunction. *Second Nat. Bank v. Caldwell*, 13 Fed. Rep. 429. As to exemption of furniture and real estate of a national bank from taxation in Kentucky, see *Covington City Nat. Bank v. Covington*, 21 Fed. Rep. 484. And as to invalidity, in same State, of *ad valorem* taxes levied on the banking-house and lot of a national bank, see *City Nat. Bank v. Paducah* (Ky. 1888), 9 S. W. Rep. 218; s. c., 27 Cent. L. J. 398.

5. *McMahon v. Palmer*, 102 N. Y. 176, 182; s. c., 3 Nat. Bank Cas. 636, 638; s. c., on other points, 55 Am. Rep. 796; s. c., 2 Am. & Eng. Corp. Cas. 297, 298-99, affirming 11 Daly (N. Y.) 214, and treating this view of the statute as assumed in *Brevoort v. Brooklyn*, 89 N. Y. 128.

6. *McMahon v. Palmer*, 102 N. Y.

*Curing Irregularities.*—Irregularities, in the mode of assessment, may be cured by a validating act.<sup>1</sup>

*Listing of Shares.*—But there is no authority in the statutes of Ohio nor of the United States for listing and valuing the shares in a national bank in the aggregate, and placing such aggregate on the tax list in the name of the bank.<sup>2</sup>

**13. Inspecting Powers of State Authorities, etc.—Production of Books by National Bank.**—Neither restrictions upon visitatorial power, contained in the National Bank act, nor other considerations as to the exposure of private business, etc., preclude the enforcement by the State courts of an order for the production of its books by a national bank, to determine whether any deposits therein are liable to escape taxation.<sup>3</sup>

*Refusal to Furnish List of Shareholders, etc.*—But the fact that the officers of a national bank violate the law by refusing to furnish the assessor with a list of the shareholders, does not authorize him to make an assessment otherwise than against the stockholders personally.<sup>4</sup>

**14. Collection of Taxes on Shares—Seizure of Property of Bank.**—An assessment against a shareholder in a national bank does not, in *Iowa*, authorize the seizure of the property of the bank to satisfy such assessment;<sup>5</sup> but the statute of Nebraska expressly

176; s. c., 3 Nat. Bank Cas. 636; s. c., 55 Am. Rep. 796; s. c., 12 Am. & Eng. Corp. Cas. 297, holding (102 N. Y. 184) that such mode of registering the assessment does not contravene the provision of the U. S. Rev. Stat. which permits the inclusion, for purposes of State assessment of taxes, of shares of national banks in the valuation of the owner's personal property.

The opinion distinguishes *Albany City Nat. Bank v. Maher*, 19 Blatchf. (U. S.) 175, as applicable only to cases where the assessment of both real and personal property is required by statute to be made on the same book or roll; and relies upon *Foster v. Van Wyck*, 2 Abb. App. Dec. (N. Y.) 167, which relates to the judicial character of the action of the assessing officers; and upon *Williams v. Weaver*, 75 N. Y. 30, which considers an assessment of national bank shares not invalid because their valuation was placed in a separate item, and itself relies upon *People v. Dolan*, 36 N. Y. 59 (by PARKER, J., whose opinion is not given in 1 Nat. Bank Cas. 684).

1. *Williams v. Albany Co.*, 122 U. S. 154; s. c., 18 Am. & Eng. Corp. Cas. 133; s. c., 3 Nat. Bank Cas. 278, affirming 21 Fed. Rep. 99. For validating act held void, see *Albany City Nat. Bank v. Maher*, 20 Blatchf. (U. S.) 341.

2. *Miller v. First Nat. Bank*, 46 Ohio St. 424; s. c., 25 Am. & Eng. Corp. Cas. 289; s. c., 3 Nat. Bank Cas. 711.

**Irregularities in Mode of Assessment.**—See *First Nat. Bank v. St. Joseph*, 46 Mich. 526; *McVeagh v. Chicago*, 49 Ill. 318; s. c., 1 Nat. Bank Cas. 381; *Nickerson v. Kimball*, 1 Chic. Law. J. 42; s. c., 1 Nat. Bank Cas. 409.

**Jurisdiction of Assessors, etc.**—See *National Bank v. Elmira*, 53 N. Y. 49; s. c., 1 Nat. Bank Cas. 715.

3. *First Nat. Bank v. Hughes*, 6 Fed. Rep. 737; s. c., otherwise noted, 2 Nat. Bank Cas. 176.

4. *Springfield v. First Nat. Bank*, 87 Mo. 441; s. c., 14 Am. & Eng. Corp. Cas. 342; s. c., 3 Nat. Bank Cas. 524. See also, as to validity of State statute requiring list of shareholders to be furnished, *Waite v. Dowley*, 94 U. S. 527; s. c., 1 Nat. Bank Cas. 137.

As to defective declaration against national bank cashier for refusing to permit collector of proper district to examine bank checks, see *United States v. Mann*, 95 U. S. 580; s. c., 1 Nat. Bank Cas. 154.

5. *First Nat. Bank v. Hershire*, 31 Iowa 18; s. c., 1 Nat. Bank Cas. 465.

Under the statute of that State, a national bank is not liable for the tax assessed against a shareholder unless it

provides that the taxes on the shares "shall be paid by the bank," and their collection by distraint is upheld by the federal court.<sup>1</sup>

**Remedy Where Collection Enforced Against Bank.**—In *Missouri* it is held that, under the National Bank act, the county collector should make the assessment against the shareholders personally, and has no right to collect the tax by selling the property of the bank or the shares or other property of nondelinquent shareholders;<sup>2</sup> but that, if he does so, the proper remedy is not an injunction on behalf of the bank.<sup>3</sup> In *New York*, however, it is ruled that an assessment upon the capital stock of a national bank and a tax against the bank, in violation of the State statute, which prohibits the assessment of a tax upon such capital stock, is void, and that an action will lie on behalf of the bank against a municipal corporation to recover the amount collected by it upon such an assessment for municipal taxes.<sup>4</sup>

**VIII. STOCK AND STOCKHOLDERS—1. Stockholders in General—Of Bank Which Has Gone Into Liquidation.**—Where a national bank has gone into voluntary liquidation, in pursuance of the vote of all its stockholders, and all but one of them have united in organizing a new national bank under a different name, and the omitted stockholder has accepted dividends from the proceeds of nearly the entire assets of the new bank, he cannot claim to be a stockholder in the new bank nor a right to share in its earnings.<sup>5</sup>

**Appraisal of Shares, etc.**—A committee appointed under the provisions of the act of congress of July 12th, 1882, to appraise the value of the shares of stockholders of a national bank who do

have under its control dividends or property belonging to such shareholder. *Hershire v. First Nat. Bank*, 35 Iowa 272; s. c., 1 Nat. Bank Cas. 476.

1. *First Nat. Bank v. Douglas Co.*, 3 Dill. (U. S.) 330; s. c. 1 Nat. Bank Cas. 268, 271.

A statute of Kentucky, requiring the cashier of a bank whose stock is taxed to pay the amount of the tax due, was held valid as a tax on the shares, in *First Nat. Bank v. Com.*, 9 Wall. (U. S.) 353; s. c., 1 Nat. Bank Cas. 34. Apparently affirming, *Com. v. First Nat. Bank*, 4 Bush (Ky.) 98; s. c., 96 Am. Dec. 285; and followed as to a less exacting statute of Vermont in *Waite v. Dowley*, 94 U. S. 527; s. c., 1 Nat. Bank Cas. 137. See also, as to requirement that tax be paid by the corporations instead of by the shareholders, *Lionberger v. Rouse*, 9 Wall. (U. S.) 468; s. c., 1 Nat. Bank Cas. 41, and as to N. Y. doctrine, *First Nat. Bank v. Fancher*, 48 N. Y. 524; s. c., 1 Nat. Bank Cas. 697.

2. *First Nat. Bank v. Meredith*, 44 App. 440.  
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Mo. 500. See also *Springfield v. First Nat. Bank*, 87 Mo. 441; s. c., 14 Am. & Eng. Corp. Cas. 342, 344-45; s. c., 3 Nat. Bank Cas. 524, holding that the refusal of the officers of the bank to furnish the assessor with a list of shareholders does not justify making and enforcing the assessment against the property of the bank. See Cook on Stock, § 572a.

3. *First Nat. Bank v. Meredith*, 44 Mo. 500.

4. *National Bank v. Elmira*, 53 N. Y. 49 et seq.; s. c., 1 Nat. Bank Cas. 715 et seq.

**Irregularities in Collection.**—See *First Nat. Bank v. St. Joseph*, 46 Mich. 526; *McVeagh v. Chicago*, 49 Ill. 318; s. c., 1 Nat. Bank Cas. 381; *Weld v. Bangor*, 59 Me. 416; s. c., 1 Nat. Bank Cas. 521.

**Lien on Shares.**—As to lien on national bank shares, continuing until taxes paid, under Wisconsin law, see *Simmons v. Aldrich*, 41 Wis. 241; s. c., 1 Nat. Bank Cas. 921.

5. *First Nat. Bank v. Marshall*, 26 Ill.

not assent to amendments to the articles of association, and who have signified their intention to withdraw, may amend a mere clerical error in their award, at any time before appeal therefrom to the comptroller of the currency, although the shareholder has been notified of the award, and has accepted it in its original form.<sup>1</sup>

**2. Rights of Stockholders—*Inspection of Books and Papers.***—The Alabama statute giving to the stockholders of private corporations reasonable access to the books and papers of such corporations, and inspection and examination thereof, applies to national banks located within the State, and is not in conflict with the federal provision restricting visitatorial powers over national banks.<sup>2</sup>

***Right of Action.***—A stockholder in a national bank cannot maintain an action against the president and directors for their neglect and mismanagement of the affairs of the bank, whereby insolvency ensued and the stock became worthless.<sup>3</sup>

**3. Stockholder's Right to Vote—*Only Stockholders of Record at Time of Proceeding to Wind Up.***—Shares of stock in a national bank cease to be transferable as such upon its proceeding, at the end of the original period for which it was organized, to wind up its affairs under the statutory provision therefor;<sup>4</sup> and only stockholders of record at that time have the right to vote for directors to settle its affairs, or are eligible for election as such.<sup>5</sup>

***Liability Disqualifying from Voting.***—The past due and unpaid liability of a shareholder, which, under the National Bank act, disqualifies him from voting at an election of directors of a national bank, is limited to his liability for unpaid subscriptions to stock.<sup>6</sup>

**4. Liabilities of Stockholders—*For Costs.***—In proceedings against the stockholders of a national bank that has gone into liquidation to ascertain and recover assessments for indebtedness, the stockholders are liable for costs as if they were codefendants in any ordinary action.<sup>7</sup>

1. First Nat. Bank v. Brenneman, 114 Pa. St. 315.

**Suits Concerning.**—As to bill in equity against stockholders, see Richmond v. Irons, 121 U. S. 27; s. c., 3 Nat. Bank Cas. 211. As to want of authority for suit by receiver at same time, see Harvey v. Lord, 11 Biss. (U. S.) 144. As to bill by stockholder against president and directors, see Ackerman v. Halsey, 37 N. J. Eq. 356; s. c. 1 Am. & Eng. Corp. Cas. 239.

2. Winter v. Baldwin, 89 Ala. 483.

3. Conway v. Halsey, 44 N. J. L. 462; s. c., 3 Nat. Bank Cas. 571. But a stockholder of a national bank was held to have legal capacity to sue the corporation for misappropriation of the stockholder's funds, as in Wilson v. First Nat. Bank, 1 Wyoming 108; and a

stockholder who has been forced to meet his individual liability may maintain an action on behalf of the stockholders in general against the directors for losses resulting in the insolvency of the bank, and due to their negligence and misconduct, if the receiver refuses to bring such action and the comptroller of the currency refuses to sanction the action. Nelson v. Burrows, 9 Abb. N. Cas. (N. Y.) 280.

4. U. S. Stat. of July 12th, 1882, § 7.

5. Richards v. Attleborough Nat. Bank, 148 Mass. 187; s. c., 3 Nat. Bank Cas. 495.

6. United States v. Barry, 36 Fed. Rep. 246.

7. Irons v. Manufacturers' Nat. Bank, 36 Fed. Rep. 843.

**Married Women.**—Nor does the fact that a person was a married woman at the time of the transfer of her stock in a savings bank to a national bank created therefrom, and also at the time the bank failed, exempt her from liability as a shareholder in the national bank.<sup>1</sup>

**Attachment of Shares.**—A national bank may attach the shares of a stockholder therein for his debt due the bank.<sup>2</sup>

**5. Individual Liability of Stockholders—Extent of, etc.**—Under the National Bank act, in case of the insolvency of a national bank and a deficit, each stockholder may be assessed such sum (not exceeding an amount equal to the par value of his stock) as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank, at its par value, and the inability of some of the stockholders to contribute to the assessment will not increase the amount of his liability.<sup>3</sup>

**Where Shares Held as Collateral Security.**—It is also immaterial, in regard to the individual liability of the stockholder of a national bank for his proportionate share of its debts, that he holds the shares as collateral security for a loan.<sup>4</sup>

1. *Keyser v. Hitz*, 133 U. S. 138, affirming 2 Mackey (D. C.) 473; 3 Nat. Bank Cas. 340. See also, in favor of married woman's liability as stockholder of a national bank, *Witters v. Sowles*, 32 Fed. Rep. 767; s. c., 16 Am. & Eng. Corp. Cas. 318, followed in 36 Fed. Rep. 640; *Anderson v. Line*, 14 Fed. Rep. 405; *Bundy v. Cocke*, 128 U. S. 185; s. c., 3 Nat. Bank Cas. 316.

In an action against a married woman to enforce her liability as a stockholder of a national bank, the question of fraud in procuring transfers, etc., has been held immaterial, and so have the facts that the proceeds went to her husband as consul general and the failure to issue new certificates to her on the change from a savings bank. *Keyser v. Hitz*, 133 U. S. 138.

2. *Hagar v. Union Nat. Bank*, 63 Me. 509; s. c., 1 Nat. Bank Cas. 523.

3. *United States v. Knox*, 102 U. S. 422; s. c., 3 Nat. Bank Cas. 1.

**Cessation of.**—Upon a reasonable construction of the statute imposing liability upon shareholders for the debts of national banks, and in view of the objects thereby intended to be accomplished, it was held that the responsibility of the defendants ceased upon the surrender of certain stock certificates to the bank, and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, as that officer knew, a transfer of the stock on

the books of the association to the purchaser, although such transfer was not in fact made. *Whitney v. Butler*, 118 U. S. 655; s. c., 3 Nat. Bank Cas. 177.

**Nature of.**—The individual liability of a stockholder in a national bank is not such a "bad or doubtful debt" as the court can order to be "sold or compounded." *Price v. Yates*, 7 W. N. C. (Pa.) 51, 52; s. c., 19 Alb. L. J. 295; s. c., 25 Int. Rev. Rec. 113; s. c., 2 Nat. Bank Cas. 204.

4. *Hale v. Walker*, 31 Iowa 344; s. c., 7 Am. Rep. 137; s. c., 1 Nat. Bank Cas. 471; *Wheelock v. Kost*, 77 Ill. 296; s. c., 1 Nat. Bank Cas. 406; *Magruder v. Colston*, 44 Md. 349; s. c., 22 Am. Rep. 47; s. c., 1 Nat. Bank Cas. 554, 556-57; *Bowdell v. Farmers' etc. Nat. Bank*, 14 Bank Mag. 387; s. c., 2 Nat. Bank Cas. 146. See also *Germania Nat. Bank v. Case*, 99 U. S. 628; s. c., 2 Nat. Bank Cas. 25; *Moore v. Jones*, 3 Woods (U. S.) 53; s. c., 2 Nat. Bank Cas. 144; also PLEDGE AND COLLATERAL SECURITY.

As to brokers' implied authority to pledge stocks, etc., see *Talmage v. Third Nat. Bank*, 91 N. Y. 531; s. c., 3 Nat. Bank Cas. 603.

As to validity of sale by national bank to its directors of corporate stock held as collateral for loans, see *Hayward v. Eliot Nat. Bank*, 96 U. S. 611; s. c., 2 Nat. Bank Cas. 1.



*Preference to Creditor Illegal.*—The act of congress, of 1876,<sup>1</sup> provides that the individual liability of shareholders of an insolvent national bank, fixed by the revised statutes,<sup>2</sup> "may be enforced by any creditor of such association by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and all other creditors;" and as the liability is enforceable only in behalf of all creditors, any voluntary discharge or security given for the payment thereof should likewise be for the equal benefit of all the creditors, and any effort to give a preference should be deemed illegal.<sup>3</sup>

*Liability of Representatives or Estates of Decedents.*—So under the provision of the revised statutes of the United States rendering shareholders individually responsible for the liabilities of a national bank to the value of their stock, and the further provision that the estate of a shareholder in the hands of the executor shall be liable in like manner and to the same extent that the testator would be if living,<sup>4</sup> assets which have been transferred to devisees or legatees cannot be subjected to liabilities of the bank accruing after the transfer.<sup>5</sup>

*Enforcement Where Bank in Voluntary Liquidation.*—A national bank in voluntary liquidation may still sue and be sued by its name for the purpose of closing its business, and a creditor may maintain a suit upon a disputed claim although he has filed a bill to enforce the individual liability of stockholders.<sup>6</sup>

**6. Assessment Upon Stockholders—Receiver's Right of Suit for.**—The receiver, appointed by the comptroller of the currency, for a national bank located in another State, is not to be treated as a foreign receiver, and may sue in the courts of New York for an assessment levied on the shareholders of the bank, independently of the doctrine of comity.<sup>7</sup>

*Voluntary Assessment.*—An assessment upon national bank stockholders by their own vote, to restore their lost capital, so as to continue in business and avoid liquidation,<sup>8</sup> will not satisfy the requirement of the statute,<sup>9</sup> that they shall individually discharge their proportion of the bank's liabilities.<sup>10</sup>

1. Act June 30th, 1876, 19 Stat. at Large, p. 63.

2. U. S. Rev. Stat., § 5151.

3. Gatch v. Fitch, 34 Fed. Rep. 566.

4. U. S. Rev. Stat., §§ 5151, 5152. See also as to construction of latter section, Irons v. Manufacturers' Nat. Bank, 21 Fed. Rep. 197; s. c., 6 Am. & Eng. Corp. Cas. 333; and consult Richmond v. Irons, 121 U. S. 27; s. c., 17 Am. & Eng. Corp. Cas. 71; s. c., 3 Nat. Bank Cas. 211. As to word "trustees" in latter section, see Welles v. Larrabee, 36 Fed. Rep. 866; Davis v. Essex Baptist Soc., 44 Conn. 582; s. c., 2 Nat. Bank Cas. 110.

5. Witters v. Sowles, 32 Fed. Rep.

130. But see in favor of liability of administrator after distribution of estate, Davis v. Weed, 44 Conn. 569; s. c., 2 Nat. Bank Cas. 115, 119, distinguished in preceding case.

6. Central Nat. Bank v. Connecticut Mut. L. Ins. Co., 104 U. S. 54; s. c., 3 Nat. Bank Cas. 20.

7. Peters v. Foster, 10 N. Y. Supp. 389. As to concurrent jurisdiction of federal courts, see Price v. Abbott, 17 Fed. Rep. 506, and cases cited.

8. Under U. S. Rev. Stat., § 5205.

9. U. S. Rev. Stat., § 5151.

10. Delano v. Butler, 118 U. S. 634; s. c., 16 Am. & Eng. Corp. Cas. 343; s. c., 3 Nat. Bank Cas. 163.

**7 Recovery of Assessments—Necessary Allegations.**—In an action by the receiver of a national bank against a shareholder, to recover an assessment ordered by the comptroller, it must be averred in the petition, in terms or in effect, that the comptroller decides that necessity existed for the enforcement of the liability of the shareholder, and it must similarly be alleged that the amount of the assessment has not been paid.<sup>1</sup>

**Right of Set-Off, etc.**—The right of set-off in such an action may be allowed if the facts pleaded show that the claim sought to be set off is of such a nature that the holder thereof is entitled to receive the full amount thereof from the receiver before distribution in the way of dividends can be made to the general creditors.<sup>2</sup>

**8. Specifications of Capital Stock, etc., at Formation of Bank.**—For the formation of a national bank it is necessary that a certificate should be prepared and filed with the comptroller of the currency at Washington, which should contain, among other things, a specification of the amount of its capital stock, and the number of shares into which it was to be divided. This is the evidence of the amount of its capital stock and its distribution into shares, and these last are then fixed, designated and known at the bureau of currency by the record preserved in the proper office thereof.<sup>3</sup>

**9. Increase of Capital Stock—Provision Concerning.**—The National Bank act provides that "no increase of capital stock shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the comptroller of the currency, and his certificate obtained, specifying the amount."<sup>4</sup>

**Reduction of Increase.**—This provision is not violated where the proposed increase is reduced to the amount actually paid in, and the latter is the amount of increase specified in the notice.<sup>5</sup>

**Comptroller's Approval of Increase.**—But there can be no increase of the capital stock, so as to subject the new shares to taxation, until the prescribed approval by the comptroller of the currency and the issuance of his certificate.<sup>6</sup>

**Subscriptions to Increase.**—Where a shareholder of a national bank subscribes to a certain increase of stock and pays for the

1. *Welles v. Stout*, 38 Fed. Rep. 67.

2. *Welles v. Stout*, 38 Fed. Rep. 807. Against set-off of individual claim of stockholder against association, see *Hobart v. Gould*, 8 Fed. Rep. 57. As to when neither the statute of frauds nor the statute of limitations can be interposed as a defence to the action, see *Baily v. Schroyer*, 1 Atl. Rep. (Pa.) 717, 718.

3. *Charleston v. Peoples' Nat. Bank*, 5 S. Car. 103; s. c., 22 Am. Rep. 1; s. c., 1 Nat. Bank Cas. 898. The terms of the National Bank act as to division into shares, etc., are quoted in *Weyer*

*v. Second Nat. Bank*, 57 Ind. 198.

4. U. S. Rev. Stat., § 5142. The requisites of the section are analyzed in *Delano v. Butler*, 118 U. S. 634; s. c., 16 Am. & Eng. Corp. Cas. 343; s. c., 3 Nat. Bank Cas. 163, which is quoted in *Winters v. Armstrong*, 37 Fed. Rep. 508.

5. *Aspinwall v. Butler*, 133 U. S. 595. See also *Delano v. Butler*, 118 U. S. 634; s. c., 16 Am. & Eng. Corp. Cas. 343; s. c., 3 Nat. Bank Cas. 163.

6. *Charleston v. People's Nat. Bank*, 5 S. Car. 103; s. c., 22 Am. Rep. 1; s. c., 1 Nat. Bank Cas. 898

same, and the bank afterwards reduces the amount of the increase, and he pays on his new stock an assessment declared by the bank, after it has become insolvent, to prevent its business being closed under the prescribed notice of the comptroller of the currency,<sup>1</sup> such shareholder is estopped to deny his liability as a subscriber to the reduced amount.<sup>2</sup> But where an increase is attempted to be made without obtaining the consent of the holders of two-thirds of the stock, the payment in full of the amount of such increase, and the certificate and approval of the comptroller of the currency, as required by the federal statutes, the proceedings are invalid, and preliminary subscriptions to such increase cannot be enforced.<sup>3</sup>

**10. Reduction of Capital Stock—In General.**—A national banking association may, within limits, reduce its capital stock.<sup>4</sup>

*In Order to Avoid Threatened Assessment.*—And where the stockholders in a national banking association, the capital of which has become impaired by reason of past due and suspended claims, in order to avoid a threatened assessment by the comptroller upon the stock to make good the deficiency, lawfully reduce the capital stock in an amount equal thereto, a stockholder cannot, in case the suspended claims are subsequently realized upon and carried into the account as assets, compel the bank to distribute a share of the money so realized in proportion to the amount of stock surrendered by him.<sup>5</sup>

**11. Transfer of Stock in General—Assignment Without Transfer on Books.**—The assignment of national bank shares, without a transfer on the books of the bank, does not constitute a complete transfer in merely legal contemplation, so as to effect an actual substitution of shareholders binding upon the corporation.<sup>6</sup> But as between the immediate parties to the transaction, the assignment is effectual, and would be recognized and enforced, at least in equity, as against all parties not showing a superior right.<sup>7</sup>

1. Provided for in U. S. Rev. Stat., § 5205.

2. *Delano v. Butler*, 118 U. S. 634; s. c., 16 Am. & Eng. Corp. Cas. 343; s. c., 3 Nat. Bank Cas. 163. See also *Aspinwall v. Butler*, 133 U. S. 595. Compare *Eaton v. Pacific Nat. Bank*, 144 Mass. 260; s. c., 3 Nat. Bank Cas. 483; *Schierenberg v. Stephens*, 32 Mo. App. 314, *et seq.*; s. c., 3 Nat. Bank Cas. 528, *et seq.*; followed in *Nichols v. Stephens*, 32 Mo. App. 330, or 3 Nat. Bank Cas. 539.

3. *Winters v. Armstrong*, 37 Fed. Rep. 508.

4. *McCann v. First Nat. Bank*, 112 Ind. 354; s. c., 19 Am. & Eng. Corp. Cas. 365; s. c., 3 Nat. Bank Cas. 434.

5. *McCann v. First Nat. Bank*, 112 Ind. 354; s. c., 19 Am. & Eng. Corp. Cas. 365; s. c., 3 Nat. Bank Cas. 434.

followed in *Wools v. First Nat. Bank*, 112 Ind. 600, and distinguishing *Seeley v. New York Nat. Exchange Bank*, 8 Daly (N. Y.) 400; s. c., 1 Nat. Bank Cas. 804.

6. *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85; s. c., 8 Am. St. Rep. 643. See also *Koons v. First Nat. Bank*, 89 Ind. 178; s. c., 3 Am. & Eng. Corp. Cas. 176, 180; *Brown v. Adams*, 5 Biss. (U. S.) 181, where stock, by its terms, transferable only on the books of the company. *Dickinson v. Central Nat. Bank*, 129 Mass. 279; s. c., 37 Am. Rep. 351; *Moore v. Citizens' Nat. Bank*, 111 U. S. 156; s. c., 3 Nat. Bank Cas. 110, as to stock transferable on books only on surrender of certificate where false representations by cashier.

7. *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85; s. c., 8 Am. St. Rep. 643.

**Transfer Not Illegal as Made to Bank.**—Nor can a sale of national bank shares to a broker be impeached as in violation of the provision forbidding the purchase by a national bank of its own shares, because the broker purchased the shares for the president of the bank, who was secretly acting in its behalf, and the latter filled in the blank power of attorney with the name of his aiding clerk, who then transferred the shares to the president, as trustee, on the bank's official stock register.<sup>1</sup>

**Transfer by Foreign Executor.**—In the absence of any provision in the by-laws or articles of association of a national bank to the contrary, such a bank is bound, under the laws of Pennsylvania, to recognize a transfer of its stock by a foreign executor duly appointed in another State.<sup>2</sup>

**Specific Performance of Contract to Sell.**—Specific performance of a contract to sell national bank shares will not be enforced where it appears that the shares were desired to give control of the bank.<sup>3</sup>

**Pledged Stock.**—A stockholder's indebtedness against a national bank cannot be set off against the claims of a pledgee of the stock of the former, who received it in pledge to secure the payment of a loan made on the faith of such pledge, without knowledge of the claims of the bank, or that it was insolvent.<sup>4</sup>

**12. Failure to Make Transfer on Books—As Preventing Change in Stockholder's Individual Liability.**—In nearly all the cases relating to national banks, announcing the general principles which govern where the issue was between the receiver representing the creditors and the person standing on the register of the bank as a shareholder, it is said generally<sup>5</sup> that the creditors of a national bank are entitled to know who, as shareholders, have pledged their individual liability as security for its debts, engagements and contracts, that if a person permits his name to appear and

See also *Johnston v. Laffin*, 103 U. S. 800; s. c., 3 Nat. Bank Cas. 13; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. Rep. 369.

1. *Johnston v. Laffin*, 103 U. S. 800, 803-4; s. c., 3 Nat. Bank Cas. 13, affirming same case, 5 Dill. (U. S.) 65; or 1 Nat. Bank Cas. 331; *Scott v. Pequonock Nat. Bank*, 15 Fed. Rep. 494, 499, 501, discussing like preceding case and next two cases, unrecorded transfer as against attaching creditor. *Berney Nat. Bank v. Pinckard*, 87 Ala. 577; *Hazard v. National Exchange Bank*, 26 Fed. Rep. 94.

As to right of national bank to obtain transfer of stock of private bank, see *National Bank v. Watsonstown Bank*, 105 U. S. 217; and as to right of national banks to restrain transfer of stocks by one indebted to the bank, see *Lee v. Citizens' Nat. Bank*, 2

Cin. Super. Ct. 298; s. c., noted and discredited, 1 Nat. Bank Cas. 936.

2. *Hobbs v. Western Nat. Bank*, 8 W. N. C. (Pa.) 131; s. c., 2 Nat. Bank Cas. 187.

3. *Falls Appeal*, 91 Pa. St. 434; s. c., 36 Am. Rep. 671 *et seq.*; s. c., 2 Nat. Bank Cas. 411.

4. *McConville v. Means*, 22 W. L. Bull. 193.

As to rights of pledgee of national bank shares to have a transfer on the books, etc., see *Dayton Nat. Bank v. Merchants' Nat. Bank*, 37 Ohio St. 208; and as to compelling access to books of bank to transfer stock sold on execution, see *State v. First Nat. Bank*, 89 Ind. 302.

5. According to *HARLAN, J.*, in *Whitney v. Butler*, 118 U. S. 655; s. c., 3 Nat. Bank Cas. 177.

remain in its outstanding certificates of stock, and on its register, as a shareholder, he is estopped, as between himself and the creditors of the bank, to deny that he is a shareholder; and that his individual liability continues until there is a transfer of the stock on the books of the bank, even where he has in good faith previously sold it, and delivered to the buyer the certificate of stock, with a power of attorney in such form as to enable the transfer to be made.<sup>1</sup>

*Buyer's Fraudulent or Negligent Failure.*—Some of the cases hold<sup>2</sup> that the seller is liable as a shareholder even where the buyer agreed to have the transfer made on the books of the bank, but fraudulently or negligently failed to do so.

*Surrender of Certificates with Power of Attorney.*—But in none of them does it appear that the precaution was taken, after the sale of the stock, to surrender the certificates therefor to the bank itself, accompanied (where such surrender was not by the shareholder in person) by a power of attorney, which would enable its officers to make the transfer on the register.<sup>3</sup>

*Bank's Failure to Observe Its By-laws.*—Yet a party will not escape his individual liability as a stockholder where he takes and holds shares, the certificates of which were issued to him by a national bank in lieu of the certificates of the prior owner and seller, because the bank failed to observe its by-laws in regard to a transfer on the books.<sup>4</sup>

**13. Evasive or Colorable Transfers—Invalidity as to Creditors.**—It is well settled that while one who allows himself to appear on the books of a national bank as an owner of its stock is liable to creditors as a shareholder,<sup>5</sup> whether he be an absolute owner or a pledgee only, yet the transaction is void as to creditors<sup>6</sup> if a regis-

1. The cases referred to in this connection, and which bear out the text in various particulars, comprise *Davis v. Essex Baptist Soc.*, 44 Conn. 582; s. c., 2 Nat. Bank Cas. 110; *Adderly v. Storm*, 6 Hill (N. Y.) 624. Relating to corporate stock in general. *Bowden v. Farmers' etc. Nat. Bank*, 1 Hughes (U. S.) 307; s. c., 14 Bank Mag. 387; s. c., 2 Nat. Bank Cas. 146, 147, 148; *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479; s. c., 3 Nat. Bank Cas. 122; *Johnson v. Laffin*, 103 U. S. 800; s. c., 3 Nat. Bank Cas. 13. Making qualifications as to other cases. *Turnbull v. Payson*, 95 U. S. 418, which also relates to corporate stock in general. *Brown v. Adams*, 5 Biss. (U. S.) 181; *Davis v. Stevens*, 17 Blatchf. (U. S.) 259; s. c., 2 Nat. Bank Cas. 158; and *Irons v. Manufacturers' Nat. Bank*, 27 Fed. Rep. 591 (reversed on other points in *Richmond v. Irons*, 121 U. S. 27; s. c., 17 Am. & Eng. Corp. Cas. 71; s. c., 3

Nat. Bank Cas. 211). See also *Moore v. Jones*, 3 Woods (U. S.) 53; s. c., 2 Nat. Bank Cas. 144, 145.

Concerning the transfer of stock to a director without his knowledge, and his failure to repudiate the transaction, etc., see *Brown v. Finn*, 34 Fed. Rep. 124.

2. *HARLAN, J.*, in *Whitney v. Butler*, 118 U. S. 655, 661; s. c., 3 Nat. Bank Cas. 177, 182.

3. *Whitney v. Butler*, 118 U. S. 655; s. c., 3 Nat. Bank Cas. 177. See also *Hayes v. Shoemaker*, 39 Fed. Rep. 319. But compare *Richmond v. Irons*, 121 U. S. 27; s. c., 17 Am. & Eng. Corp. Cas. 71, 94; s. c., 3 Nat. Bank Cas. 211.

4. *Laing v. Burley*, 101 Ill. 591; s. c., 3 Nat. Bank Cas. 369.

5. See *Whitney v. Butler*, 118 U. S. 655, 660; s. c., 3 Nat. Bank Cas. 177, 181.

6. See *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479; s. c., 3 Nat. Bank Cas. 122.

tered owner, acting in bad faith, transfers his stock in a failing national bank to an irresponsible person for the purpose of escaping liability,<sup>1</sup> or if his transfer is colorable only,<sup>2</sup> or is not an out and out transfer, but made with the understanding that there shall be a retransfer on request.<sup>3</sup>

**Stock Taken in Name of Irresponsible Party.**—It is also undoubtedly true that the beneficial owner of stock registered in the name of an irresponsible owner may, under some circumstances, be liable as the real shareholder; but a mere pledgee of stock in a national bank is not chargeable where he is not registered as owner, and exercises none of the rights or powers of a stockholder, if he takes the security for his benefit in the name of an irresponsible trustee in good faith and with no fraudulent intent, though for the avowed purpose of avoiding individual liability as shareholder.<sup>4</sup>

**14. Loans by Bank on Its Stock, or Purchase Thereof.**—The National Bank act imposes special restrictions upon national banks in regard to making loans upon the security of shares of their own stock or purchasing such stock;<sup>5</sup> and it is generally held that the by-laws of the bank cannot be so worded as to contravene such prohibition.<sup>6</sup>

**15. Lien by Bank on Its Stock.**—A national bank cannot, according to what seems to be the present preponderating doctrine, even by provisions framed with a direct view to that effect in its articles of association and by-laws, acquire a lien on its own stock held by persons who are its debtors.<sup>7</sup>

**IX. OFFICERS**—1. **Officers in General**—*Compensation, Removal, etc.*—The officers of a national bank are not, in the absence of special

1. *Bowden v. Johnson*, 107 U. S. 251; s. c., 1 Am. & Eng. Corp. Cas. 630, 640; s. c., 3 Nat. Bank Cas. 55, 64; *Davis v. Stevens*, 17 Blatchf. (U. S.) 259, 260, *et seq.*; s. c., 2 Nat. Bank Cas. 158, 160. See also *Bowden v. Santos*, 1 Hughes (U. S.) 158; s. c., 1 Nat. Bank Cas. 271.

2. *Germania Nat. Bank v. Case*, 99 U. S. 628; s. c., 2 Nat. Bank Cas. 25. See *Davis v. Stevens*, 17 Blatchf. (U. S.) 259, *Witters v. Sowles*, 25 Fed. Rep. 168, 169; s. c., 32 Fed. Rep. 130, 136; *Case v. Small*, 4 Woods (U. S.) 78, 80, 81.

3. *Germania Nat. Bank v. Case*, 99 U. S. 628; s. c., 2 Nat. Bank Cas. 25. See also as to sale of stock in a national bank while it is a going concern, *Lesassier v. Kennedy*, 36 La. An. 539, 542; s. c., on other points, 123 U. S. 521; or 3 Nat. Bank Cas. 288.

4. *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479; s. c., 3 Nat. Bank Cas. 122. See also *Welles v. Larrabee*, 36 Fed. Rep. 866.

As to when national bank cannot be charged as owner of stock purchased by its president, see *Prosser v. First Nat. Bank*, 106 N. Y. 677; s. c., more fully stated, 3 Nat. Bank Cas. 646. As to estoppel of shareholder placing parts of his shares in the hands of a third party to hold for him, under a secret declaration of trust, see *Young v. Yough*, 23 N. J. Eq. 325.

5. Nat. Bank act, § 36; U. S. Rev. Stat., § 5201.

6. See *Fechthelmer v. National Exchange Bank*, 79 Va. 80; s. c., 5 Am. & Eng. Corp. Cas. 156; *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85; s. c., 8 Am. St. Rep. 643.

As to fictitious sale of stock purchased in violation of such restrictions, see *Bundy v. Jackson*, 24 Fed. Rep. 628.

7. *Bullard v. National Eagle Bank*, 18 Wall. (U. S.) 580; s. c., 2 Nat. Bank Cas. 93; *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85; s. c., 8 Am. St. Rep. 643. But see *contra*, *Lockwood v.*

agreement, entitled to compensation for their ordinary services;<sup>1</sup> and are subject to removal if they fail to perform the duties required of them.<sup>2</sup>

*Liabilities Imposed or Incurred by.*—A national bank is liable for its officers' misrepresentations made to depositors concerning the character or scope of written instruments,<sup>3</sup> but the officers of an insolvent national bank cannot be held personally responsible on loans and discounts merely because they turn out to be injudicious.<sup>4</sup>

*Criminal Liabilities.*—The National Bank act, whose interpretation in this respect has been the subject of much judicial consideration, makes special provision for such criminal offences by officers of national banks as false entries<sup>5</sup> and embezzlement, either alone<sup>6</sup> or in conjunction with kindred offences,<sup>7</sup> such as misapplication of funds.<sup>8</sup> But there is a conflict in the authori-

Mechanics' Nat. Bank, 9 R. I. 308; s. c., 11 Am. Rep. 253; *In re Bigelow*, 2 Ben. (U. S.) 469. Consult further *supra*, PRESCRIBING BY-LAWS.

1. See *Citizens' Nat. Bank v. Elliott*, 55 Iowa 104. Compare *First Nat. Bank v. Drake*, 29 Kan. 311; s. c., 1 Am. & Eng. Corp. Cas. 210.

2. *Harrington v. First Nat. Bank*, 1 Thomp. & C. (N. Y.) 361; s. c., 1 Nat. Bank Cas. 760, sustaining such removal though salary for balance of unexpired term unpaid. See also *Taylor v. Hutton*, 43 Barb. (N. Y.) 195; s. c., 1 Nat. Bank Cas. 755, sustaining removal before by-laws legally adopted.

*Proceedings by.*—As to requisites of verification of complaint by national bank officers, see *Commercial Nat. Bank v. Hutchison*, 87 N. Car. 22; s. c., 5 Am. & Eng. Corp. Cas. 288; and to objections to depositions by national bank officers, see *First Nat. Bank v. First Nat. Bank*, 114 Pa. St. 1, 7.

3. *Steckel v. First Nat. Bank*, 93 Pa. St. 376; s. c., 39 Am. Rep. 758-60; s. c., 3 Nat. Bank Cas. 719; *Ziegler v. First Nat. Bank*, 93 Pa. St. 393; s. c., 3 Nat. Bank Cas. 721; s. c., 39 Am. Rep. 758. See also *Resh v. First Nat. Bank*, 93 Pa. St. 397; s. c., 3 Nat. Bank Cas. 724; *West v. First Nat. Bank*, 20 Hun (N. Y.) 408. But compare *First Nat. Bank v. Williams*, 100 Pa. St. 123.

4. *Witters v. Sowles*, 31 Fed. Rep. 12; s. c., 24 Blatchf. (U. S.) 332. See also *Movius v. Lee*, 30 Fed. Rep. 298, 303; s. c., 24 Blatchf. (U. S.) 291; *United States v. Harper*, 33 Fed. Rep. 471; *Clews v. Bardon*, 36 Fed. Rep. 617. Compare *United States v. Fish*, 24 Fed. Rep. 585, 588; s. c., 10 Am. &

Eng. Corp. Cas. 283. Consult also in favor of right of officer of national bank to borrow money therefrom, *Blair v. First National Bank of Mansfield*, 10 Ohio Leg. News 84; s. c., 2 Nat. Bank Cas. 173, 175.

5. See *United States v. Britton*, 107 U. S. 655; s. c., 3 Nat. Bank Cas. 76, 83; *United States v. Creclius*, 34 Fed. Rep. 30; *In re Van Campen*, 2 Ben. (U. S.) 419; s. c., 1 Nat. Bank Cas. 185, 188; *United States v. Patterson*, 29 Fed. Rep. 775. Concerning a false declaration or statement in a report concerning the affairs of the bank, see *United States v. Curtis*, 107 U. S. 671; s. c., 3 Nat. Bank Cas. 91. Compare *United States v. Barton*, 20 Blatchf. (U. S.) 351. See also *United States v. Allen*, 10 Bliss. (U. S.) 90.

6. See *United States v. Conant*, 9 Cent. L. J. 129; s. c., 2 Nat. Bank Cas. 148. As to embezzlement by corporate officers in general, see 6 Am. & Eng. Encyc. of Law 477.

7. See *United States v. Northway*, 120 U. S. 327; s. c., 3 Nat. Bank Cas. 199; *United States v. Harper*, 33 Fed. Rep. 471; *United States v. Taintor*, 11 Blatchf. (U. S.) 374; s. c., 1 Nat. Bank Cas. 256; *United States v. Lee*, 12 Fed. Rep. 816; *United States v. Voorhees*, 9 Fed. Rep. 143; *In re Van Campen*, 2 Ben. (U. S.) 419; s. c., 1 Nat. Bank Cas.

8. See, concerning this offence, *United States v. Britton*, 107 U. S. 655; s. c., 3 Nat. Bank Cas. 76; *United States v. Britton*, 108 U. S. 193; s. c., 3 Nat. Bank Cas. 99; *United States v. Fish*, 24 Fed. Rep. 585; s. c., 10 Am. & Eng. Corp. Cas. 283.

ties, largely affected by changes in the National Bank act and the nature of the particular offence charged, as to whether the State as well as the federal courts have jurisdiction in such cases.<sup>1</sup>

**2. President.**—The president of a national or other bank must, like other agents, act within the scope of his authority, in order to bind his principal in the absence of ratification;<sup>2</sup> but the president may perform such known and approved managerial functions as to justify him, without special authority in the by-laws, in purchasing real estate in satisfaction of suspended paper or a doubtful debt due a national bank;<sup>3</sup> and such bank may be bound by his acts, within the apparent scope of his authority, although performed away from the place where the bank is situated.<sup>4</sup>

**3. Cashier—Authority.**—The extent of the authority of a cashier of a national bank may not, under certain circumstances, be questioned by the bank.<sup>5</sup> The decisions upon the question of the authority of such a cashier or other officer to receive special deposits, have already been cited in discussing the powers of national banks, and their liability for the loss of such deposits.<sup>6</sup>

**Functions, etc.**—The functions of a cashier of a national bank, his rights and duties, and the liabilities incurred by or imposed upon him under various circumstances, are considered in the cases cited in the note below.<sup>7</sup>

1. See, in favor of State jurisdiction, *Hoke v. People*, 122 Ill. 511; s. c., 3 Nat. Bank Cas. 372; *State v. Cross*, 101 N. Car. 770; *Com. v. Luberger*, 94 Pa. St. 85; s. c., probably, 2 Nat. Bank Cas. 408; *State v. Tuller*, 34 Conn. 280; s. c., 1 Nat. Bank Cas. 375; *Com. v. Tenny*, 97 Mass. 50; s. c., 1 Nat. Bank Cas. 568. *Contra*, see *People v. Fonda*, 62 Mich. 401; s. c., 3 Nat. Bank Cas. 501; *United States v. Buskey*, 38 Fed. Rep. 99, discussing *Com. v. Felton*, 101 Mass. 204; s. c., 1 Nat. Bank Cas. 573, and *Com. v. Barry*, 116 Mass. 1; s. c., 1 Nat. Bank Cas. 605. Compare as to passing counterfeit bank notes, *Ex parte Houghton*, 8 Fed. Rep. 897.

2. *Kennedy v. Otoe Co. Nat. Bank*, 7 Neb. 59.

3. *Libby v. Union Nat. Bank*, 99 Ill. 622, s. c., 3 Nat. Bank Cas. 358. Concerning unauthorized sale of national bank's property by president, see *First Nat. Bank v. Lucas*, 21 Neb. 280, 285. As to effect of long acquiescence by bank in acts of its president binding it to his release of a judgment lien, see *Winton v. Little*, 94 Pa. St. 64; s. c., 3 Nat. Bank Cas. 725. As to bank's right to profit on resale to himself by president of property purchased for it by him, see *National Bank v. Seward*, 106 Ind. 264.

In favor of right of president to borrow from bank, see *Blair v. First Nat. Bank*, 10 Chic. Legal News 84; s. c., 2 Nat. Bank Cas. 173.

4. *Burton v. Burley*, 9 Biss. (U. S.) 253; s. c., 2 Nat. Bank Cas. 134. For circumstances under which a loan was held to be a loan to a national bank, and not to its president, individually, see *Eastern Townships Bank v. Vermont Nat. Bank*, 22 Fed. Rep. 186. As to when national bank, reorganized out of State bank, may maintain an action against the president for money had and received, see *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; s. c., 2 Nat. Bank Cas. 454. As to application to president of a national bank of Texas, statute requiring sworn statement as to shares, see *Downs v. State*, 22 Tex. App. 393.

**Vice President.**—As to liability of national bank on guaranty by its vice president, see *Peoples' Bank v. Manufacturer's Nat. Bank*, 101 U. S. 181, s. c., 2 Nat. Bank Cas. 97.

5. See *Cocheco Nat. Bank v. Haskell*, 51 N. H. 116; s. c., 12 Am. Rep. 67; *Cooper v. First Nat. Bank*, 40 Kan. 5.

6. See paragraph on GENERAL AND INCIDENTAL POWERS.

7. See *Parkhurst v. Citizens' Nat. Bank*, 61 Md. 254; s. c., 3 Nat. Bank



**Bond.**—Sureties on the official bond of a national bank cashier are not liable where they were induced to become such sureties through a statement published by the directors, according to law, which showed the affairs of the bank to be well managed.<sup>1</sup>

**4. Teller.**—In regard to the teller of a national bank, the decisions have dealt with his bond,<sup>2</sup> his criminal liability,<sup>3</sup> and the liability of the bank for the teller's acts.<sup>4</sup>

**5. Directors—Action as Board.**—To bind a national bank, the directors must act together as a board; and their separate individual assent is insufficient.<sup>5</sup>

**Eligibility.**—A transferee of stock in a national bank, which decides not to extend its corporate existence, is not eligible as a director during the period while the bank is winding up its existence.<sup>6</sup>

**Authority.**—The powers of the directors of a national bank are not regulated by the strict principles of a special trust; for though they act in a fiduciary capacity, yet they are clothed by the federal statute with a power to manage the affairs of the bank, and this implies a considerable element of discretion.<sup>7</sup>

Cas. 463; s. c., 3 Am. & Eng. Corp. Cas. 346; Second Nat. Bank v. Burt, 93 N. Y. 233; s. c., 3 Nat. Bank Cas. 609; Norton v. Derry Nat. Bank, 61 N. H. 589; s. c., 60 Am. Rep. 334; s. c., 3 Nat. Bank Cas. 568; Holmes v. Boyd, 90 Ind. 332; s. c., 3 Nat. Bank Cas. 414; Allen v. First Nat. Bank, 127 Pa. St. 51; Clews v. Bardon, 36 Fed. Rep. 617; Wilson v. Second Nat. Bank (Pa.), 7 Atl. Rep. 145; Crystal Plate Glass Co. v. Livingston Bank, 6 Mont. 303; Cooke v. State Nat. Bank, 52 N. Y. 96; s. c., 11 Am. Rep. 667; s. c., 1 Nat. Bank Cas. 698; Fisher v. National Bank, 48 N. J. L. 390; Fishkill Sav. Inst. v. National Bank, 80 N. Y. 162; s. c., 36 Am. Rep. 595; First Nat. Bank v. Dunbar, 118 Ill. 625; First Nat. Bank v. Brooks, 22 Ill. App. 238; s. c., 3 Nat. Bank Cas. 387; Houghton v. First Nat. Bank, 26 Wis. 663; s. c., 7 Am. Rep. 107; Allen's Appeal, 119 Pa. St. 192, following Com. v. Ketner, 92 Pa. St. 372, or 2 Nat. Bank Cas. 404; United States v. Taintor, 11 Blatchf. (U. S.) 374; s. c., 1 Nat. Bank Cas. 256; Pepper v. Planters' Nat. Bank (Ky.), 1 Am. & Eng. Corp. Cas. 252; First Nat. Bank v. Drake, 29 Kan. 311; s. c., 1 Am. & Eng. Corp. Cas. 210; Second Nat. Bank v. Burt, 93 N. Y. 233; s. c., 3 Am. & Eng. Corp. Cas. 315.

1. Graves v. Lebanon Nat. Bank, 10 Bush (Ky.) 23; s. c., 19 Am. Rep. 50; s. c., 1 Nat. Bank Cas. 493. But against discharge of surety because cashier was

a defaulter at time of giving of bond, and bank neglected to ascertain that fact, see Bowne v. Mount Holly Nat. Bank, 45 N. J. L. 360; s. c., 3 Am. & Eng. Corp. Cas. 339; Tapley v. Martin, 116 Mass. 275; s. c., 1 Nat. Bank Cas. 611. See also, as to teller or officers in general, Wayne v. Commercial Nat. Bank, 52 Pa. St. 343.

2. See New Orleans Nat. Bank v. Wells, 28 La. An. 736; s. c., 26 Am. Rep. 107; Wayne v. Commercial Nat. Bank, 52 Pa. St. 343.

3. See State v. Tuller, 34 Conn. 280; s. c., 1 Nat. Bank Cas. 375.

4. See Steckel v. First Nat. Bank, 93 Pa. St. 376; s. c., 3 Nat. Bank Cas. 319; Weckler v. First Nat. Bank, 42 Md. 581; s. c., 20 Am. Rep. 95; s. c., 1 Nat. Bank Cas. 533.

5. First Nat. Bank v. Drake, 35 Kan. 564; s. c., 57 Am. Rep. 193; s. c., 3 Nat. Bank Cas. 445.

6. Richards v. Attleborough Nat. Bank, 148 Mass. 187; s. c., 3 Nat. Bank Cas. 495. As to *ad interim* directors, pending conversion of State into National bank, see Lockwood v. Mechanics' Nat. Bank, 9 R. I. 308; s. c., 11 Am. Rep. 253; s. c., 1 Nat. Bank Cas. 895.

7. Keyser v. Hitz, 2 Mackey (D. C.) 513; s. c., 1 Am. & Eng. Corp. Cas. 231. As to power to submit claim to arbitration, see Richards v. Attleborough Nat. Bank, 148 Mass. 187; s. c., 3 Nat. Bank Cas. 497.

**Compensation.**—Where the directors of a national bank appoint one of their number to act as a ministerial officer of the corporation, he is *prima facie* entitled to reasonable compensation for his services as such officer; but an express contract to perform the services without any direct compensation in money controls.<sup>1</sup>

**Liabilities, etc.**—The directors of a national bank or other corporation are bound only to use reasonable diligence, such as men usually exercise in the management of their own affairs of a similar nature; but they are personally liable if they suffer the corporate funds or property to be wasted by gross negligence and inattention to the duties of their trust.<sup>2</sup>

**X. CIRCULATION—Bonds Deposited as Security for.**—The ordinary priority of the United States government over other creditors does not apply to bonds or funds designed for the redemption of the circulation of national banks.<sup>3</sup>

**National Bank Currency.**—The notes or bills issued by the national banks are included in the phrase, "United States currency."<sup>4</sup>

**Certificates of Deposit.**—But certificates of deposit in the ordinary form, issued by a national bank to depositors, are not "post-notes" designed or adapted to circulate as money, so as to come within the prohibition of the National Bank act.<sup>5</sup>

1. *First Nat. Bank v. Drake*, 29 Kan. 311; s. c., 1 Am. & Eng. Corp. Cas. 210. On validity of agreement by national bank president to give stock to a person becoming a director, see *Rich v. State Nat. Bank*, 7 Neb. 201; s. c. 29 Am. Rep. 382; s. c., 2 Nat. Bank Cas. 284.

2. *Ackerman v. Halsey*, 37 N. J. Eq. 356; s. c., 1 Nat. Bank Cas. 239. See also *Brinckerhoff v. Bostwick*, 88 N. Y. 52; s. c., 3 Nat. Bank Cas. 591; s. c., on other points, 105 N. Y. 567; *Hand v. Atlantic Nat. Bank*, 55 How. Pr. (N. Y.) 231; *Conway v. Halsey*, 44 N. J. L. 462. Consult further concerning liabilities of national bank directors, *Clews v. Bardon*, 36 Fed. Rep. 617; *Movius v. Lee*, 24 Blatchf. (U. S.) 291; *Witters v. Sowles*, 24 Blatchf. (U. S.) 332; *United States v. Neale*, 14 Fed. Rep. 767.

**Conduct in General.**—See *Mayor etc. of New York v. Tenth Nat. Bank*, 111 N. Y. 446; s. c., 3 Nat. Bank Cas. 655; *Hayward v. Elliot Nat. Bank*, 96 U. S. 611; s. c., 2 Nat. Bank Cas. 1.

**Knowledge.**—*First Nat. Bank v. Christopher*, 40 N. L. 435; s. c., 29 Am. Rep. 262. See also *Third Nat. Bank v. Harrison*, 3 McCrary (U. S.) 316; *Brown v. Firm*, 34 Fed. Rep. 124; *First Nat. Bank v. Drake*, 29 Kan. 311; s. c., 1 Am. & Eng. Corp. Cas. 210.

3. See *Cook Co. Nat. Bank v. United States*, 107 U. S. 445; s. c., 3 Nat. Bank Cas. 68; s. c., 1 Am. & Eng. Corp. Cas. 533; *Jackson v. United States*, 20 Ct. of Cl. 298. See also, as to conflicting claims to surplus of proceeds of such bonds, *Van Antwerp v. Hulburd*, 8 Blatchf. (U. S.) 282, 283; s. c., 1 Nat. Bank Cas. 219. As to priority of government over attaching creditor, see *Schmidt v. First Nat. Bank*, 22 La. An. 314; s. c., 1 Nat. Bank Cas. 505.

4. *State v. Gasting*, 23 La. An. 609; s. c., 1 Nat. Bank Cas. 508. See also, as to nature of such notes or bills, *Horne v. Greene*, 52 Miss. 452; s. c., 1 Nat. Bank Cas. 643 (opinion of PERRYTON, J., before reargument). As to right of congress to restrain the circulation of any notes not issued under its authority, *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533; s. c., 1 Nat. Bank Cas. 22. And as to validity of circulating notes of national banks, without the treasury seal, *United States v. Bennett*, 17 Blatchf. (U. S.) 357. The taxation of such currency has already been treated under EXEMPTION FROM TAXATION IN GENERAL.

5. *Riddle v. First Nat. Bank*, 27 Fed. Rep. 503. See also *Hunt's Appeal*, 141 Mass. 515; s. c., 3 Nat. Bank Cas. 474.

**XI. DEPOSITS**—*National Bank as Depository of Public Moneys.*—Designating a national bank as a depository of public moneys does not constitute it an agent of the government, or render the government liable for moneys lost by a failure of such bank.<sup>1</sup>

*Demand and Interest.*—Where, however, a national bank which holds deposits, refuses to pay the same on demand, and thereafter a receiver is appointed, the depositor is entitled to interest on his deposits from the date of the demand.<sup>2</sup>

*Set-off by Depositor.*—But there is a conflict in the authorities upon the question whether a depositor in a national bank which has failed and passed into the hands of a receiver, may set off the amount of his deposit against his debt to the bank.<sup>3</sup>

*Application of Deposits.*—A national bank which has received money from a depositor and credited him with it on its books, and thereby engaged to honor his checks, is estopped from alleging that the money belonged to another,<sup>4</sup> and cannot apply it to another's account.<sup>5</sup>

*Loss of Special Deposits.*—So a national bank which has been accustomed to receive United States bonds or other valuables as special deposits gratuitously, is, according to the doctrine now prevalent, liable for any loss thereof occurring through the want of that degree of care which good business men would expect in keeping property of such value.<sup>6</sup>

1. *Branch v. United States*, 12 Ct. of Cl. 281; s. c., 1 Nat. Bank Cas. 363. See also, as to deposit of trust funds with national banks, *State Nat. Bank v. Reilly*, 124 Ill. 464; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.*, 104 U. S. 54; *Third Nat. Bank v. Stillwater Gas Co.*, 36 Minn. 75.

2. *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437; s. c., 1 Nat. Bank Cas. 133. But see, as to when demand not a pre-requisite to recovery, *Chemical Nat. Bank v. Bailey*, 12 Blatchf. (U. S.) 480; s. c., 1 Nat. Bank Cas. 260. And further concerning demand, *Humphrey v. County Nat. Bank*, 113 Pa. St. 417; *Viets v. Union Nat. Bank*, 101 N. Y. 563; s. c., 54 Am. Rep. 743.

3. See, in favor of such set-off, *Platt v. Bentley*, 11 Am. L. Reg., N. S. 171; s. c., 1 Nat. Bank Cas. 758, and also as to savings bank, *New Amsterdam Sav. Bank v. Tartter*, 54 How. Pr. (N. Y.) 385. Against such set-off, see *Venango Nat. Bank v. Taylor*, 56 Pa. St. 14; s. c., 1 Nat. Bank Cas. 842, and compare also, as to savings bank, *Osborn v. Byrne*, 43 Conn. 155; s. c., 21 Am. Rep. 641. Concerning want of right of set-off upon dishonor of check given in payment to national bank by a holder of a note, see *Union Nat. Bank v. Can-*

*onsburg Iron Co.*, 6 Atl. Rep. (Pa.) 577.

4. *First Nat. Bank v. Mason*, 95 Pa. St. 113.

5. *Citizens' Nat. Bank v. Alexander*, 120 Pa. St. 476. See further, concerning application of deposits in various cases, *Flournoy v. First Nat. Bank*, 78 Ga. 222; *Continental Nat. Bank v. Weems*, 69 Tex. 489; s. c., 5 Am. St. Rep. 85; *Drovers' Nat. Bank v. O'Hare*, 119 Ill. 646; *Neff v. Green Co. Nat. Bank*, 89 Mo. 581; *National Bank v. Indiana Banking Co.*, 114 Ill. 483. Concerning note payable at bank, see *Grisson v. Commercial Nat. Bank*, 87 Tenn. 350, 354; s. c., 10 Am. St. Rep. 669. As to paying out deposits on checks, see *Lynch v. First Nat. Bank*, 107 N. Y. 179; s. c., 1 Am. St. Rep. 803. Also *Etna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; s. c., 7 Am. Rep. 314; *Merchants' Nat. Bank v. Nat. Bank*, 139 Mass. 513. And as to paying forged check, see *Weinstein v. Jefferson Bank*, 69 Tex. 38; s. c., 5 Am. St. Rep. 23. But compare *First Nat. Bank v. State Bank*, 22 Neb. 769; s. c., 3 Am. St. Rep. 294; *Commercial etc. Bank v. First Nat. Bank*, 30 Md. 11; s. c., 96 Am. Dec. 554; *Atlanta Nat. Bank v. Burke*, 81 Ga. 597.

6. *Bank v. Zent*, 39 Ohio St. 105;

*Certifying Checks, etc.*—The provision of the National Bank act declaring it to be unlawful for national banks to certify any check unless the drawer has the amount thereof on deposit, does not affect the validity of a check certified in violation thereof.<sup>1</sup>

**XII. COLLECTIONS**—*Liability of National Bank Concerning.*—Collecting commercial paper is a part of the regular business of banking, when carried on under national or under other bank charters;<sup>2</sup> and a national bank will be liable for negligence or misconduct therein, the same as any other bank, or agent.<sup>3</sup>

*Receipt for Collection Only or Otherwise.*—In the case of national as of other banks, there is a difference in liability, etc., according as negotiable paper is received for collection only, or for collection and credit, etc.<sup>4</sup>

*In Cash Only.*—A national or other bank, to which a check is entrusted for collection, has no right to accept anything in lieu of money, and if it accepts a cashier's check, or other obligation, in place of cash, its liability to the depositor becomes fixed.<sup>5</sup>

**XIII. PAYMENTS**—*In General.*—In the case of national as well as other banks, various questions have arisen out of payment of checks by national banks, and cognate matters.<sup>6</sup>

s. c., 3 Nat. Bank Cas. 698. The authorities on this subject have been cited under GENERAL AND INCIDENTAL POWERS. See also *White v. Commonwealth Nat. Bank*, 4 Brewst. (Pa.) 234; *First Nat. Bank v. Citizens' Bank*, 21 Int. Rev. Rec. 382. Consult further, for liability in various cases, *Anderkerk v. Central Nat. Bank*, 52 Hun (N. Y.) 1; *Saly v. Hibernia Nat. Bank*, 39 La. An. 90; *Cutler v. American Exchange Nat. Bank*, 113 N. Y. 593; *Fisk v. Germania Nat. Bank*, 40 La. An. 820; *Hughes v. First Nat. Bank*, 110 Pa. St. 428.

1. *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325; s. c., 3 Nat. Bank Cas. 663.

**Certificates of Deposit.**—As to right to issue, see under CIRCULATION. As to effect and transfer of certificate of deposit on national bank, see *First Nat. Bank v. Clark*, 42 Hun (N. Y.) 16.

2. *Mound City Paint & Color Co. v. Commercial Nat. Bank*, 4 Utah 353.

3. *Mound City Paint & Color Co. v. Commercial Nat. Bank*, 4 Utah 353. See, for implied recognition of such liability, *Exchange Nat. Bank v. Third Nat.* 112 U. S. 276; *Merchants' Nat. Bank v. Goodman*, 109 Pa. St. 422; s. c., 58 Am. Rep. 728. As to liability in various cases, see *Power v. First Nat. Bank*, 6 Mont. 251; *Harvey v. Girard Nat. Bank*, 119 Pa. St. 212; *Drovers' Nat. Bank v. Anglo-Ameri-*

*can Packing etc. Co.*, 117 Ill. 100; s. c., 57 Am. Rep. 855; *First Nat. Bank v. First Nat. Bank*, 114 Pa. St. 1.

4. Concerning rights of bank where receipt for collection only, see *Freeman v. Citizens' Nat. Bank*, 78 Iowa 150. But compare *Averell v. Second Nat. Bank*, 6 Mackey (D. C.) 358; *Stark v. United States Nat. Bank*, 41 Hun (N. Y.) 506. As to holding national bank as garnishee, see *First Nat. Bank v. Leppel*, 9 Colo. 594. And as to proceeds of collection, see *City Nat. Bank v. Martin*, 70 Tex. 643; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553. But compare with latter case, *First Nat. Bank v. Armstrong*, 39 Fed. Rep. 231.

Concerning "collection and return," see *Continental Bank v. Weems*, 69 Tex. 489; s. c., 5 Am. St. Rep. 85. And consult *Philadelphia Nat. Bank v. Dowd*, 38 Fed. Rep. 172. Compare as to special endorsement for collection, *First Nat. Bank v. Armstrong*, 36 Fed. Rep. 59; *Commercial Nat. Bank v. Armstrong*, 39 Fed. Rep. 684; *Fifth Nat. Bank v. Armstrong*, 40 Fed. Rep. 46. As to "collection and credit," see *First Nat. Bank v. Bank of Monroe*, 33 Fed. Rep. 408; *German Nat. Bank v. Burns*, 12 Colo. 539.

5. *Fifth Nat. Bank v. Ashworth*, 123 Pa. St. 212.

6. See generally, as to payment of checks, *Brennan v. Merchants' Nat.*

*Paying One of a Set of Checks.*—Payment by a national bank of one of a set of checks, as well as drafts, is a discharge of the whole set.<sup>1</sup>

**XIV. LOANS AND DISCOUNTS.**—Most matters concerning this topic have been already considered. Some miscellaneous decisions are cited in the note below.<sup>2</sup>

**XV. WINDING UP AND LIQUIDATION**—1. *Winding Up—How Far Provisions of National Bank Act Exclusive.*—National banks, if insolvent, can be wound up only in the mode provided by the National Bank act, and were not subject to the late National Bankrupt act;<sup>3</sup> but in cases not within the special provisions of the National Bank act, a national bank may be proceeded against in the same manner as any other debtor or corporation, and a receiver appointed when such a course is proper.<sup>4</sup>

*Effect of Appointment of Receiver.*—The appointment of a receiver under the National Bank act does not, however, work an absolute dissolution of the corporation, or prevent it from being subjected to suits,<sup>5</sup> or cause its property, outside of its shares, to

Bank, 62 Mich. 343; Citizens' Nat. Bank v. Importers' etc. Nat. Bank, 44 Hun (N. Y.) 386; Canonsburg Iron Co. v. Union Nat. Bank (Pa.), 6 Atl. Rep. 574; Armstrong v. Second Nat. Bank, 38 Fed. Rep. 883. As to payment of raised draft by national bank through mistake, see Nat. Park Bank v. Seaboard Bank, 114 N. Y. 28. As to settlements through clearing houses in which national banks are concerned, see National City Bank v. New York Exchange Bank, 101 N. Y. 595. As to effect of taking certified check, see Borne v. First Nat. Bank (Ind. 1890), 24 N. E. Rep. 173.

1. Merchants' Nat. Bank v. Ritzinger, 118 Ill. 484.

2. Concerning the scope of a guaranty of the "full and ultimate payment of all loans," see National Exchange Bank v. Gay, 57 Conn. 224. As to transaction which may be discount of paper or deposit of money, see First Nat. Bank v. Bank of Monroe, 33 Fed. Rep. 408. As to admissibility of proof of local custom of bankers to show that borrowing money was within the scope of the customary business of a national bank, see Crain v. First Nat. Bank, 114 Ill. 516, 523. As to when bank holds money as pledge for discounts of customer, see Humphrey v. County Nat. Bank, 113 Pa. St. 417.

As to loan or discount of negotiable paper, see subdivision of POWERS CONCERNING NEGOTIABLE INSTRUMENTS, STOCKS, ETC.

Concerning the authority of national banks to loan money on mortgages of real property, see subdivision on POWERS CONCERNING REAL ESTATE.

Concerning loans exceeding one-tenth of capital stock, see subdivision on LOANS WHICH ARE ULTRA VIRES.

As to general power of a national bank to take stocks or bonds as security, see subdivision on POWERS CONCERNING PERSONAL PROPERTY. And see same subdivision for power of a national bank to take pledges or mortgages of chattels.

3. *In re* Manufacturers' Nat. Bank, 5 Biss. (U. S.) 499; s. c., 1 Nat. Bank Cas. 192. So the dissolution of a national bank can be declared only in the mode prescribed by the National Bank act. Union Gold Mining Co. v. Rocky Mountain Nat. Bank, 1 Colo. 531; s. c., on other points, 90 U. S. 640, or 1 Nat. Bank Cas. 151.

4. Irons v. Manufacturers' Nat. Bank, 6 Biss. (U. S.) 301; s. c., 3 Myer's Fed. Dec. 201; s. c., 1 Nat. Bank Cas. 203.

5. Bank of Bethel v. Pahquioque Bank, 14 Wall. (U. S.) 383; s. c., 1 Nat. Bank Cas. 77; affirming 36 Conn. 325, or 4 Am. Rep. 80; Green v. Walkill Nat. Bank, 7 Hun (N. Y.) 63; s. c., 1 Nat. Bank Cas. 786. See also Security Bank v. National Bank, 4 Thomp. & C. (N. Y.) 518; s. c., 1 Nat. Bank Cas. 774; Chemical Nat. Bank v. Bailey, 12 Blatchf. (U. S.) 480; s. c., 1 Nat. Bank Cas. 260.

cease to be exempt from taxation.<sup>1</sup>

*Interest on Claims Pending Administration.*—Under that act, where a national bank is declared in default by the comptroller of the currency, he is authorized to appoint a receiver of its affairs, and to place such receiver in possession of its assets; and if a sufficient fund is realized from the assets to pay all claims against the bank, and to leave a surplus, the comptroller ought to allow interest on the claims, during the period of administration, before appropriating the surplus to the shareholders of the bank.<sup>2</sup>

*Voluntary Liquidation.*—Not only does such involuntary liquidation of a national bank fail to dissolve the corporation or render it free from liability to suit, but the same is true of the voluntary liquidation authorized by the National Bank act.<sup>3</sup>

*Forfeiture of Rights and Privileges.*—So a forfeiture of the rights and privileges of a national banking association, for violation of the provisions of the National Bank act, can be determined only in a suit instituted by the comptroller of the currency in his own name; and the association must stand until dissolved in that way.<sup>4</sup>

*Dissolution by Federal Court.*—Nor does dissolution of a national bank by a federal court affect rights of a creditor whose action against the bank was pending at the time in a State court.<sup>5</sup>

**2. Receiver—Relation to Government.**—A receiver appointed to wind up a national bank is an officer of the United States, so as to bring an action brought by him within the jurisdiction of a federal court;<sup>6</sup> but he does not represent the government so that

Rosenblatt v. Johnston, 104 U. S. 402; s. c., 3 Nat. Bank Cas. 32.

2. Chemical Nat. Bank v. Bailey, 12 Blatchf. (U. S.) 480; s. c., 1 Nat. Bank Cas. 260.

3. Ordway v. Central Nat. Bank, 47 Md. 217; s. c., 1 Nat. Bank Cas. 559; Central Nat. Bank v. Connecticut Mut. L. Ins. Co., 104 U. S. 54; s. c., 3 Nat. Bank Cas. 20. Concerning creditor's remedy against national bank in voluntary liquidation, see Merchants' etc. Nat. Bank v. Trustees of Masonic Hall, 65 Ga. 603. Concerning amendment to act providing for suit to enforce individual liability of stockholders in cases of voluntary liquidation, see Richmond v. Irons, 121 U. S. 27; s. c., 17 Am. & Eng. Corp. Cas. 71; s. c., 3 Nat. Bank Cas. 211; Harvey v. Lord, 11 Biss. (U. S.) 144; s. c., 10 Fed. Rep. 236; Central Nat. Bank v. Connecticut Mut. L. Ins. Co., 104 U. S. 54; s. c., 3 Nat. Bank Cas. 20. Concerning the powers of officers after the bank has gone into liquidation, see Shrader v. Manufacturers' Nat. Bank, 133 U. S.

67. Concerning officers or trustees chosen to effect the liquidation, see Richards v. Attleborough Nat. Bank, 148 Mass. 187; s. c., 3 Nat. Bank Cas. 495; Merchants' Nat. Bank v. Gaslin, 41 Minn. 552. Concerning successorship to a national bank which has gone into liquidation, see First Nat. Bank v. Marshall, 26 Ill. App. 440; s. c., 3 Nat. Bank Cas. 401; Eaus v. Exchange Bank, 79 Mo. 182.

4. Union Gold Mining Co. v. Rocky Mountain Nat. Bank, 1 Colo. 531; s. c., on other points, 96 U. S. 640, or 1 Nat. Bank Cas. 151. See also Stevens v. Monongahela Nat. Bank, 88 Pa. St. 157; s. c., 32 Am. Rep. 438. As to the nature of the violation required to cause forfeiture, see Brinckerhoff v. Bostwick, 88 N. Y. 52; s. c., 3 Nat. Bank Cas. 391.

5. Bank of Montreal v. Fidelity Nat. Bank, 1 N. Y. Supp. 852; s. c., *mem*, 49 Hun (N. Y.) 607.

6. Platt v. Beach, 2 Ben. (U. S.) 303; s. c., 1 Nat. Bank Cas. 182; Staunton v. Wilkeson, 8 Ben. (U. S.) 357; s. c., 2

a judgment can be rendered against it, because suit is brought against the receiver and the comptroller of the currency.<sup>1</sup>

*Suits by.*—The receiver so appointed may sue for demands due the bank, either in his own name as receiver, or in the name of the bank,<sup>2</sup> and in order to sue for an ordinary debt or claim, he need not obtain the order of the comptroller of the currency;<sup>3</sup> nor can the debtors, when sued by the receiver, enquire into the legality of his appointment;<sup>4</sup> but in determining to bring suit against the stockholders of the bank, to enforce their individual liability, the receiver is required to act under the direction of the comptroller, and subject to his decision of the matter.<sup>5</sup>

*Appointment.*—The ordinary appointment of a receiver, at the instance of the comptroller of the currency, to wind up the affairs of a national bank in default, and the effect of such appointment have already been indicated. So where a national bank is insolvent and in process of voluntary liquidation, and its affairs are being greatly mismanaged by its managing agents to the injury of its creditors and stockholders, some of whom are being favored at the expense of others, a receiver may be appointed at the instance of one of the stockholders not favored; and a provisional receiver may be appointed in such a case, even where the bank only has been made a defendant.<sup>6</sup>

Nat. Bank Cas. 162; *Frelinghuysen v. Baldwin*, 12 Fed. Rep. 395, 397, 398; *Price v. Abbott*, 17 Fed. Rep. 506; *Armstrong v. Ettleshon*, 56 Fed. Rep. 209. See also *Kennedy v. Gibson*, 8 Wall. (U. S.) 498; s. c., 1 Nat. Bank Cas. 17, 21.

1. *Case v. Terrell*, 11 Wall. (U. S.) 199; s. c., 1 Nat. Bank Cas. 67, holding that the receiver represents merely the bank, its stockholders and creditors. It is further ruled that such receiver holds only the estate and title of the bank in its assets, and has no greater rights in enforcing their collection than the bank itself would have had. *Casey v. La Société Credit Mobilier*, 2 Wood (U. S.) 77, 84; s. c., 1 Nat. Bank Cas. 285.

2. *National Bank v. Kennedy*, 17 Wall. (U. S.) 19; s. c., 1 Nat. Bank Cas. 87, 89; *Kennedy v. Gibson*, 8 Wall. (U. S.) 198; s. c., 1 Nat. Bank Cas. 17; *Movius v. Lee*, 30 Fed. Rep. 298; *Staunton v. Wilkeson*, 8 Ben. (U. S.) 357, 359; s. c., 2 Nat. Bank Cas. 162, 164; *Bank of Bethel v. Pahquiloque Bank*, 14 Wall. (U. S.) 383; s. c., 1 Nat. Bank Cas. 77; *Case v. Berwin*, 22 La. An. 321.

*Set-off* must have existed at time bank passed into hands of receiver. *Balch v. Wilson*, 25 Minn. 299; s. c., 33 Am. Rep. 467; s. c., 2 Nat. Bank Cas. 274; *Steph-*

*ens v. Schuchmann*, 32 Mo. App. 333; s. c., 3 Nat. Bank Cas. 540. And see, as to right to plead set-off in general, *Hade v. McVay*, 31 Ohio St. 231; s. c., 2 Nat. Bank Cas. 353.

3. *National Bank v. Kennedy*, 17 Wall. (U. S.) 19; s. c., 1 Nat. Bank Cas. 87.

4. *Cadle v. Baker*, 20 Wall. (U. S.) 650; s. c., 1 Nat. Bank.

5. *Kennedy v. Gibson*, 8 Wall. (U. S.) 498; s. c., 1 Nat. Bank Cas. 17, 20. The conclusiveness of the comptroller's determination is sustained in *Casey v. Galli*, 94 U. S. 673; s. c., 1 Nat. Bank Cas. 142; *Bailey v. Sawyer*, 4 Dill. (U. S.) 463; s. c., 1 Nat. Bank Cas. 356. As to exemption from bond on bringing writ of error or appeal to United States Supreme Court, see *Pacific Bank v. Mixter*, 114 U. S. 463, 464.

6. *Elwood v. First Nat. Bank*, 41 Kan. 475. See further, as to when a receiver will be appointed, *Merchants' etc. Nat. Bank v. Trustees of Mechanic's Hall*, 63 Ga. 549; s. c., 2 Nat. Bank Cas. 220, upholding power of State court to try and reach assets before appointment by federal court. *Irons v. Manufacturers' Nat. Bank*, 6 Biss. (U. S.) 301; s. c., 1 Nat. Bank Cas. 203; *Wright v. Merchants' Nat. Bank*, 1 Flipp. (U. S.) 568; s. c., 1 Nat. Bank

**Functions.**—The receiver of a national bank, appointed by the comptroller of the currency, is the agent of the United States, and is limited as to his functions by the object of the receivership, and the duties which it involves.<sup>1</sup>

**3. Insolvency—Effect of.**—When an association, organized under the National Bank act, becomes insolvent, and passes into the hands of a receiver under the provisions of that act, the respective rights and liabilities then existing between the bank and its creditors and debtors become fixed;<sup>2</sup> and all its property and assets thereupon become subject, after satisfying the prior claim, if any, of the government on account of its notes, to disposal and ratable distribution among all its general creditors upon the principle of equality;<sup>3</sup> nor can any subsequent lien be created, or right or preference obtained, in respect to any of the assets or property of the bank, which did not exist at that time.<sup>4</sup>

**What Constitutes.**—The term "act of insolvency," used in the National Bank act, has been considered to mean any act which would be an act of insolvency on the part of an individual banker,

Cas. 321. As to agent displacing receiver, see *McConville v. Gilmour*, 36 Fed. Rep. 277.

1. *Ellis v. Little*, 27 Kan. 707; s. c., 41 Am. Rep. 434; s. c., 3 Nat. Bank Cas. 440. See *Kennedy v. Gibson*, 8 Wall. (U. S.) 498; s. c., 1 Nat. Bank Cas. 17, 19, 20.

**Powers Concerning Property in General.**—Not to exchange instead of selling property. *Ellis v. Little*, 27 Kan. 707; s. c., 41 Am. Rep. 434; s. c., 3 Nat. Bank Cas. 440. Nor to withhold from owner property in custody of bank. *Corn Exchange Bank v. Blye*, 101 N. Y. 303; s. c., 3 Nat. Bank Cas. 634.

**Power to Compromise a Debt.**—The receiver may compromise doubtful debts on the order of a court of record of competent jurisdiction, such as a district court. *In re Platt*, 1 Ben. (U. S.) 534; s. c., 1 Nat. Bank Cas. 181, 182. As to when compromise will not be opened, see *Henderson v. Myers*, 11 Phila. (Pa.) 616; s. c., 3 Nat. Bank Cas. 759. As to want of authority to order composition of debts not bad nor doubtful, see *Pierce v. Yates*, 19 Alb. L. J. 295; s. c., 25 Int. Rev. Rec. 113; s. c., 2 Nat. Bank Cas. 204.

**Control over bonds deposited to secure circulation lacking.** *Van Antwerp v. Hulburd*, 8 Blatchf. (U. S.) 282; s. c., 1 Nat. Bank Cas. 219.

**Title to assets same as that of bank,** so that receiver cannot avoid a pledge which the bank itself could not avoid. *Casey v. La Société de Credit Mobilier*,

2 Wood (U. S.) 77, 84; s. c., 1 Nat. Bank Cas. 285.

**Sale by, under order of court when not set aside.** *In re Third Nat. Bank*, 9 Biss. (U. S.) 535.

**Claim Upon Proceeds of Collections.**—See *First Nat. Bank v. Armstrong*, 39 Fed. Rep. 231.

**Relation to Courts.**—Control of State court over. *Ocean Nat. Bank v. Carll*, 7 Hun (N. Y.) 237; s. c., with opinion, 1 Nat. Bank Cas. 792. Right of removal to federal court. *Bird v. Cockrem*, 2 Wood (U. S.) 32; s. c., 1 Nat. Bank Cas. 284. Application to federal court. *Harvey v. Allen*, 16 Blatchf. (U. S.) 29; s. c., 2 Nat. Bank Cas. \*439, relying upon *First Nat. Bank v. Colby*, 21 Wall. (U. S.) 609; s. c., 1 Nat. Bank Cas. 109. Rights where not a party to action, *People's Bank v. Mechanics' Nat. Bank*, 62 How. Pr. (N. Y.) 422, 424, 425; s. c., 3 Nat. Bank Cas. 670; *Tracy v. First Nat. Bank*, 37 N. Y. 523.

2. *Balch v. Wilson*, 25 Minn. 299; s. c., 33 Am. Rep. 467; s. c., 2 Nat. Bank Cas. 274.

3. See *First Nat. Bank v. Colby*, 21 Wall. (U. S.) 609; s. c., 1 Nat. Bank Cas. 109.

4. *Balch v. Wilson*, 25 Minn. 299; s. c., 33 Am. Rep. 467; s. c., 2 Nat. Bank Cas. 274. As to transfer of property to indemnify sureties, before insolvency, see *Price v. Coleman*, 22 Fed. Rep. 694, 696, 697. As to effect of insolvency on collections, see *Manu-*



and not simply such an act as authorizes the comptroller to appoint a receiver.<sup>1</sup>

**Remedies After.**—The property of a national bank, attached at the suit of an individual creditor after the bank has become insolvent, cannot be subjected to sale for the payment of his demand against the claim for the property by a receiver of the bank subsequently appointed.<sup>2</sup> Nor can an injunction issue before judgment against the receiver of a national bank.<sup>3</sup> And a tax levied on the property of a national bank subsequent to its insolvency is subordinate to the rights of a receiver appointed after such levy.<sup>4</sup>

**4. Preferences.—In General.**—The provision of the National Bank act which prohibits all transfers by any national banking association made after the commission of an act of insolvency, or in contemplation thereof, with a view to the preference of one creditor to another, is directed to a preference,<sup>5</sup> and not to the giving of security when a debt is created;<sup>6</sup> and if the transaction be free from fraud in fact, and is intended merely to adequately protect a loan made at the time, the creditor can retain property transferred to secure a loan until the debt is paid, though the debtor is insolvent, and the creditor has reason at the time to believe that to be the fact.<sup>7</sup> But it is sufficient to invalidate such a transfer, that it

facturers' Nat. Bank *v.* Continental Bank, 148 Mass. 553. Also Philadelphia Nat. Bank *v.* Dowd, 38 Fed. Rep. 172.

1. *Irons v. Manufacturers' Nat. Bank*, 6 Biss. (U. S.) 301; s. c., 1 Nat. Bank Cas. 203. See also to the effect that the word "insolvency," in such connection, is synonymous with the same word as used in the bankrupt act, *Case v. Citizens' Nat. Bank*, 2 Wood (U. S.) 23; s. c., 1 Nat. Bank Cas. 276. As to what is sufficient evidence of insolvency, see *Wheelock v. Kost*, 77 Ill. 296; s. c., 1 Nat. Bank Cas. 406.

2. *First Nat. Bank v. Colby*, 21 Wall. (U. S.) 609; s. c., 1 Nat. Bank Cas. 109. See also *Harvey v. Allen*, 16 Blatchf. (U. S.) 29; s. c., 2 Nat. Bank Cas. 439.

**Attachment.**—Indeed, according to a recent ruling of the Supreme Court of the United States, it seems that there can be no attachment of a national bank before judgment, whether it be insolvent or otherwise. *Pacific Nat. Bank v. Mixter*, 124 U. S. 721; s. c., as *Butler v. Coleman*, 3 Nat. Bank Cas. 201. Compare previous rulings in *Market Nat. Bank v. Pacific Nat. Bank*, 30 Hun (N. Y.) 50; s. c., 3 Nat. Bank Cas. 672; *National Shoe etc. Bank v. Mechanics' Nat. Bank*, 89 N. Y. 467; s. c., 3 Nat. Bank Cas. 607; *Raynor v.*

*Pacific Nat. Bank*, 93 N. Y. 371; s. c., 3 Nat. Bank Cas. 624.

3. *Warner v. Armstrong* (Cin. Super. Ct.), 21 W. L. Bull. 124.

4. *Woodward v. Ellsworth*, 4 Colo. 580. **No Priority to United States.**—See *Cook Co. Nat. Bank v. United States*, 107 U. S. 445; s. c., 1 Am. & Eng. Corp. Cas. 533; s. c., 3 Nat. Bank Cas. 68; reversing 9 Biss. (U. S.) 55, or 2 Nat. Bank Cas. 128. Consult also *Jackson v. United States*, 20 Ct. of Cl. 298. But compare *Schmidt v. First Nat. Bank*, 22 La. An. 314; s. c., 1 Nat. Bank Cas. 505.

**Set-off of Deposits.**—See under DEPOSITS.

**Control of Insolvent National Bank.**—See *Jackson v. United States*, 20 Ct. of Cl. 298, 305.

5. The object sought to be accomplished by the provision is the distribution of the assets of the bank fairly and without preferences. *Corn Exchange Bank v. Blye*, 101 N. Y. 303; s. c., 3 Nat. Bank Cas. 634. See *Robinson v. National Bank*, 81 N. Y. 385; s. c., 37 Am. Rep. 508.

6. See *Casey v. La Société de Credit Mobilier*, 2 Wood (U. S.) 77; s. c., 1 Nat. Bank Cas. 285.

7. *Armstrong v. Chemical Nat. Bank*, 41 Fed. Rep. 234, 238-39.

is made in contemplation of insolvency, and either with a view to prevent the application of the assets of the bank in the manner prescribed by the statute, or with a view to the preference of one creditor to another.<sup>1</sup>

*Party Who Must Know or Contemplate Insolvency.*—Yet to make transfers, assignments, deposits and payments void, under the National Bank act, it is only necessary that the insolvency should be in the contemplation of the bank making the transfers, etc., and not that it should also be known to or contemplated by the party to whom they are made.<sup>2</sup>

**5. Claims Against Suspended Bank—Not Confined to Strict Debts.**—The claims against an insolvent national bank on which a dividend may be declared, are not limited to debts in any strict sense, but include the claim of a person who has left United States bonds on special deposit for safekeeping, and has not been able to obtain them again.<sup>3</sup>

*Amount Paid on Claim.*—The payment of a creditor of an insolvent national bank by the comptroller must be based on the amount due on the adjudicated claim at the date of the failure, and not on the amount due when the claim is adjudicated.<sup>4</sup>

**XVI. SUITS AND REMEDIES—1. Jurisdiction Over Suits or Proceedings.**—The jurisdiction of the federal courts over actions concerning national bank, has been upheld in the case of a suit to quiet title to land brought by such a bank,<sup>5</sup> but not in an action brought by assignors of national bank against a receiver of the bank, because they had been compelled to contribute as owners of such

As to cashier's transfer of securities held a *bona fide* purchase and not a preference, see *Tuttle v. Frelinghuysen*, 38 N. J. Eq. 12; s. c., 3 Nat. Bank Cas. 576.

1. *National Security Bank v. Butler*, 129 U. S. 223; s. c., 3 Nat. Bank Cas. 320. As to transfers to national bank by its insolvent cashier by way of preference, see *Witters v. Sowles*, 32 Fed. Rep. 762. One creditor held not entitled to preference over the rest, where fraudulent wrecking of bank by its officers. *Citizens' Nat. Bank v. Dowd*, 35 Fed. Rep. 340. As to when depositor of draft with national bank which becomes insolvent may recover proceeds from collecting agent of bank, see *Craigie v. Smith*, 14 Abb. N. C. (N. Y.) 409. Mortgage of all his property by cashier and stockholder of insolvent national bank to secure a depositor, as amounting to a preference. *Gatch v. Fitch*, 34 Fed. Rep. 566, 569-70. As to allegations concerning transfers by bank, not open to objection as stating merely conclusions of law, see *Brown v. Carbonate Bank of Leadville*, 34

Fed. Rep. 776, 778. As to set-off by depositor's assignee, as amounting to a preference, see *Venango Nat. Bank v. Taylor*, 56 Pa. St. 14; s. c., 1 Nat. Bank Cas. 842.

2. *Case v. Citizens' Bank*, 2 Woods (U. S.) 23; s. c., 1 Nat. Bank Cas. 276. But compare *Roberts v. Hill*, 24 Fed. Rep. 571.

3. *Turner v. First Nat. Bank*, 26 Iowa 562, 565; s. c., 1 Nat. Bank Cas. 454, 457-8.

As to when action lies against receiver of suspended national bank by pledgee of stock for refusal to transfer it on books of bank, see *Case v. Bank*, 100 U. S. 446, 456; s. c., 3 Meyers' Fed. Dec. 231, 236; s. c., 2 Nat. Bank Cas. 47, 56.

4. *White v. Knox*, 111 U. S. 784; s. c., 3 Nat. Bank Cas. 128, 129. Concerning interest on claims, see *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437; s. c., 1 Nat. Bank Cas. 133; *Chemical Nat. Bank v. Bailey*, 12 Blatchf. (U. S.) 480; s. c., 1 Nat. Bank Cas. 260.

5. *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405; s. c., 3 Nat. Bank Cas. 131.

stock toward the liabilities of the bank, on account of the failure to fill in the name of the assignee in the transfer book of the bank.<sup>1</sup>

**2. Parties and Pleadings—Parties.**—In regard to actions by and against national banks, as in the case of other actions, the courts have been concerned with questions, not generally involving matters peculiar to the present subject, respecting necessary and proper parties,<sup>2</sup> real and nominal parties,<sup>3</sup> and joinder of parties.<sup>4</sup>

**Pleadings.**—Similarly in regard to pleadings in actions by and against national banks, the courts have passed upon the sufficiency of the allegations of the complaint,<sup>5</sup> the mode of making such allegations,<sup>6</sup> the denials in the answer<sup>7</sup> and the right of set-off or counterclaim.<sup>8</sup>

**3. Maintenance of Actions—In General.**—A State statute is not in conflict with the National Banking act where it authorizes the State banking institutions to become national banks and to continue to use their corporate names for the purpose of protecting and defending suits instituted by and against it.<sup>9</sup>

**Actions by National Banks.**—And a national bank may maintain an action in its own name against an endorser of a promissory note of which it is the purchaser or holder, irrespective of the question whether it was authorized to acquire title to notes by purchase or not.<sup>10</sup>

**Actions Against National Banks.**—But an assignee in bankruptcy cannot maintain an action against a national bank for the

1. *Le Sassier v. Kennedy*, 123 U. S. 521; s. c., 3 Nat. Bank Cas. 288.

**Against National Bank Officers.**—For note of the conflicting decisions in regard to the jurisdiction of State or Federal courts over offences committed by, see under OFFICERS IN GENERAL, discussion of their criminal liabilities.

As to jurisdiction of State court over an indictment for forgery against a book-keeper in a national bank, see *Hoke v. People*, 122 Ill. 511; s. c., 3 Nat. Bank Cas. 372.

**Receiver's Relation to.**—The receiver of a national bank in process of liquidation, is an officer of the United States, so as to be entitled to sue in the federal courts. *Armstrong v. Ettlesohn*, 36 Fed. Rep. 209. Nor does a receiver of a national bank estop himself from questioning the jurisdiction of the court by causing himself to be substituted as defendant in an action against the bank. *Cadle v. Tracy*, 11 Blatchf. (U. S.) 101. s. c., 1 Nat. Bank Cas. 230.

2. See *Cleveland v. Shoeman*, 40 Ohio St. 176; s. c., 3 Nat. Bank Cas. 701; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; s. c., 3 Nat. Bank Cas. 591; *Tur-*

*ner v. First Nat. Bank*, 26 Iowa 562; s. c., 1 Nat. Bank Cas. 458.

3. *Foss v. First Nat. Bank*, 1 McCrary (U. S.) 474; s. c., 2 Nat. Bank Cas. 104.

4. *Kennedy v. Gibson*, 8 Wall. (U. S.) 498; s. c., 1 Nat. Bank Cas. 17.

5. *Farmers & Mechanics' Nat. Bank v. Rogers*, 17 N. Y. St. Rep. 381; s. c., 3 Nat. Bank Cas. 683; *Bunday v. Cocke*, 128 U. S. 185; s. c., 3 Nat. Bank Cas. 316; *Movius v. Lee*, 30 Fed. Rep. 298; *Third Nat. Bank v. Teal*, 5 Fed. Rep. 503.

6. *Schuyler Nat. Bank v. Bullong*, 24 Neb. 821; s. c., 3 Nat. Bank Cas. 558.

7. *National Bank v. Orcutt*, 48 Barb. (N. Y.) 256.

8. *Welles v. Stout*, 38 Fed. Rep. 807; *Louis Snyder's Sons Co. v. Armstrong*, 37 Fed. Rep. 18; *Armstrong v. Warner*, 21 W. L. Bull. (Cin. Super. Ct.) 136.

9. *Thomas v. Farmers' Bank*, 46 Md. 43; s. c., 2 Nat. Bank Cas. 248. See also *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; s. c., 2 Nat. Bank Cas. 454.

10. *National Pemberton Bank v. Porter*, 125 Mass. 333; s. c., 28 Am. Rep. 235; s. c., 2 Nat. Bank Cas. 266. *Com-*

value of shares of its stock belonging to the bankrupt, which the bank, under claim of lien against the bankrupt, refused to transfer to the assignee.<sup>1</sup>

**Abatement of Actions.**—A suit against a national bank to enforce the collection of a demand is abated by a decree dissolving the corporation, and forfeiting its rights and privileges.<sup>2</sup>

**Removal of Causes.**—This subject has already been considered in discussing location and citizenship, and other topics.<sup>3</sup>

**4. Trials.**—The litigated matters concerning trials of action by and against national banks include dismissal,<sup>4</sup> verdict,<sup>5</sup> the attorney conducting the suit,<sup>6</sup> and the proof of the bank's corporate existence.<sup>7</sup>

**5. Appeals.**—In order to give the United States supreme court jurisdiction on appeal from a State supreme court, under the National Banking act, the "title, right, privilege or immunity specially set up or claimed," must be claimed by the plaintiff in error for himself, and not for a third person, in whose title he has no interest.<sup>8</sup>

**6. Remedies By and Against.**—The remedies by and against national banks, which have been the subject of adjudication in

*pare* Ticonic Nat. Bank v. Bagley, 68 Me. 249; s. c., 2 Nat. Bank Cas. 245.

1. Meyers v. Valley Nat. Bank, 18 Bankr. Reg. 34; s. c., 2 Nat. Bank Cas. 156. But *compare* generally, as to litigation by such assignee. See *In re* Duryea, 17 Bankr. Reg. 495; s. c., 2 Nat. Bank Cas. 170. The right of a borrower's assignee in bankruptcy to sue for double interest where usury is taken, has already been considered in discussing interest. As to right to maintain action against national bank on claim disallowed by receiver, see Bank of Bethel v. Pahquioque Nat. Bank, 14 Wall. (U. S.) 383; s. c., 1 Nat. Bank Cas. 77.

2. First Nat. Bank v. Colby, 21 Wall. (U. S.) 609; s. c., 1 Nat. Bank Cas. 109.

3. Against right of removal to federal court, of action against United States court commissioners for alleged illegal costs and fees, see Berchley v. Gilbert, 8 Blatchf. (U. S.) 147.

4. Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405; s. c., 3 Nat. Bank Cas. 131.

5. Logan Co. Nat. Bank v. Townsend (Ky. 1887), 3 S. W. Rep. 122; s. c., 3 Nat. Bank Cas. 448.

6. Kennedy v. Gibson, 8 Wall. (U. S.) 498; s. c., 1 Nat. Bank Cas. 17, 19.

7. Hungerford Nat. Bank v. Van Nostrand, 106 Mass. 559, 560. As to want of power of court to grant to re-

ceiver order compelling bank to pay money into court, see Balestier v. Metropolitan Nat. Bank, 43 Hun (N. Y.) 564.

8. Miller v. National Bank, 106 U. S. 542; s. c., 3 Nat. Bank Cas. 52, relying, in support of general principle, upon Owings v. Norwood, 5 Cranch (U. S.) 344; Montgomery v. Hernandez, 12 Wheat. (U. S.) 129; Henderson v. Tennessee, 10 How. (U. S.) 323; Wynn v. Morris, 20 How. (U. S.) 5; Hale v. Gaines, 22 How. (U. S.) 160; Verden v. Coleman, 1 Black (U. S.) 472, and Long v. Converse, 91 U. S. 105.

**Certificate of Division of Opinion.**—Concerning requisites for certificate of division of opinion to United States supreme court, see Williamsport Nat. Bank v. Knapp, 119 U. S. 357, 360; s. c., 3 Nat. Bank Cas. 184 (s. c., reported below, 15 Fed. Rep. 333), *citing* Saunders v. Gould, 4 Pet. (U. S.) 392; United States v. Bailey, 9 Pet. (U. S.) 267; Weeth v. New England Mortgage Security Co., 106 U. S. 605; California Cut Stone Paving Co. v. Monitor, 113 U. S. 609, and Waterville v. Van Slyke, 116 U. S. 699. For a question held too vague and general to be answered, see United States v. Northway, 120 U. S. 327; s. c., 3 Nat. Bank Cas. 199, 201.

**Review on Appeal.**—See Prosser v. First Nat. Bank, 106 N. Y. 677; s. c., 3 Nat. Bank Cas. 646, 648; Stanley v

the courts, include those arising on mistake in payment,<sup>1</sup> on information for forfeiture of charter,<sup>2</sup> or in case of voluntary liquidation,<sup>3</sup> or concerning garnishment<sup>4</sup> or injunction.<sup>5</sup>

**7. Attachment—Against National Banks.**—There has been much conflict upon the question of the right to the remedy by attachment against national banks, but the latest view, adopted by the Supreme Court of the United States and so likely to prevail, is that such remedy, since the act of 1873, cannot be invoked in the federal courts any more than in the State courts, and that its denial is not confined to cases of actual or contemplated insolvency on the part of the bank.<sup>6</sup>

**By National Banks.**—A national bank has been held entitled to attach the shares of a stockholder therein for his debt due the bank.<sup>7</sup>

**NATIONAL CORPORATIONS.**—(See CORPORATIONS, vol. 4, p. 184; FOREIGN CORPORATIONS, vol. 8, p. 329; FRANCHISES, vol. 8, p. 584; NATIONAL BANKS; TAXATION)—**Creation.**—Corporations may be created by act of congress, and, in order to distinguish these from the corporations existing under the laws of the States, the term national corporations has recently come into use. The constitution of the United States confers no direct power on congress to create corporations, but the power is conceded to exist whenever it is deemed an appropriate measure to carry into effect any of the powers expressly given by the constitution.<sup>8</sup> This power has been exercised in the creation

Albany Co., 121 U. S. 535; s. c., 3 Nat. Bank Cas. 268, 273.

**Point First Taken on Appeal.**—See *Fostier v. New Orleans Nat. Bank*, 112 U. S. 439; s. c., 3 Nat. Bank Cas. 140, 145.

1. See *Manufacturers' Nat. Bank v. Swift*, 70 Md. 515; s. c., 14 Am. St. Rep. 381, and note 387. Consult also *Oddie v. National City Bank*, 45 N. Y. 735; s. c., 6 Am. Rep. 160; *National Park Bank v. Seaboard Bank*, 114 N. Y. 28. But compare *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281; s. c., 100 Am. Dec. 120.

2. *Trenholm v. Commercial Nat. Bank*, 38 Fed. Rep. 323.

3. *Merchants' etc. Nat. Bank v. Trustees of Masonic Hall*, 65 Ga. 603.

4. *Havens v. National City Bank*, 6 Thomp. & C. (N. Y.) 346; s. c., 1 Nat. Bank Cas. 783.

5. *Shoemaker v. National Mechanics' Bank*, 2 Abb. (U. S.) 416; s. c., 1 Nat. Bank Cas. 169, 170.

6. *Pacific Nat. Bank v. Mixter*, 124 U. S. 721; s. c., as *Butler v. Coleman*, 3 Nat. Bank Cas. 291 (1888), followed in *Safford v. First Nat. Bank*, 61 Vt.

373, and in *Bank of Montreal v. Fidelity Nat. Bank*, 49 Hun (N. Y.) 607 *mem.*; s. c., 1 N. Y. Supp. 852. But compare *contra*, previously, *Continental Nat. Bank v. Folsom*, 78 Ga. 449; s. c., 3 Nat. Bank Cas. 350; *Peoples' Bank v. Mechanics' Nat. Bank*, 62 How. Pr. (N. Y.) 422; s. c., 3 Nat. Bank Cas. 672; *Raynor v. Pacific Nat. Bank*, 93 N. Y. 371; s. c., 3 Nat. Bank Cas. 624; *National Shoe etc. Bank v. Mechanics' Nat. Bank*, 89 N. Y. 467; s. c., 3 Nat. Bank Cas. 601. The constitutionality of the statutory provision on the subject is upheld in *Chesapeake Bank v. First Nat. Bank*, 40 Md. 269; s. c., 1 Nat. Bank Cas. 331.

7. *Hagar v. Union Nat. Bank*, 63 Me. 509, 513; s. c., 1 Nat. Bank Cas. 523.

8. 1 Kent Comm. 248; *Story Const.*, § 1259; *Hare Am. Const. Law* 115.

This principle was maintained in the discussions relating to the granting of charters by congress to the national banks, first in 1791 and again in 1816, and was established by the decision of the Supreme Court of the United States in construing the later of the above acts of incorporation. The earlier act was

of corporations intended to operate either within the United States generally,<sup>1</sup> or within the District of Columbia<sup>2</sup> and the Territories<sup>3</sup> alone, or outside the United States.<sup>4</sup> The power to

passed by the two houses of congress, and its constitutionality was earnestly objected to in the cabinet, but the act was approved by President Washington. The charter of the first bank of the United States having expired, the second was established by act of 1816, and in 1819 the constitutionality of the legislation came before the supreme court for decision in *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316. The powers of congress were considered by CHIEF JUSTICE MARSHALL, in delivering the opinion of the court, and it was held that the power of creating a corporation, though appertaining to sovereignty, was not an independent power, but merely a means by which other objects are accomplished; that the absence of a grant of the power to create a corporation did not mean a withholding of the power; that such power might be implied as a necessary means for the execution of the general powers of congress; that congress was to determine the necessity of the use of such means, and that the court, finding that the act was an appropriate measure and not prohibited, would not enquire into the degree of its necessity. In *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, it was admitted that congress could not create a corporation for its own sake or for private purposes; it could be created for national purposes only, though it would undoubtedly be capable of transacting private as well as public business.\* The charter of the second bank of the United States expired by limitation in 1836. The system of national banks under the general law was established in 1863. See NATIONAL BANKS. The subject has been repeatedly settled and the power sustained. Story Const., § 1271.

1. These are the national banks, railroads, telegraph companies, and corporations not created for profit. An example of such a railroad is the Union Pacific Railway Company. See *Pacific Railroad Removal Cases*, 115 U. S. 1; *California v. Railroad Co.'s*, 127 U. S. 1. The Northern Pacific Railroad Company was incorporated by act of congress of July 2nd, 1864, which provided that the previous consent of the legislature of each State should be required before constructing the road in that

State. 13 Stat. at L. 365, 372. The Atlantic & Pacific Railroad Co. was chartered by act of congress of July 27th, 1866. 14 Stat. at L. 292. And the Texas Pacific Railroad Co. was chartered by act of congress of March 3rd, 1871. 16 Stat. at L. 573. Powers to extend their lines over the public domain, post roads and navigable waters are conferred upon telegraph companies organized under State laws by Rev. Stat., §§ 5263, 5269. Congress has chartered such corporations as the Freedman's Saving and Trust Co. (13 Stat. at L. 510); National Asylum for Disabled Volunteer Soldiers (14 Stat. at L. 10); Centennial Board of Finance (17 Stat. at L. 203).

2. The right to exercise exclusive legislation is given by the Constitution, art. 1, § 8, cl. 18. This includes the granting of charters to corporations, and instances of such charters may be found in various statutes passed by congress relating to the District of Columbia.

3. 'The congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' Const. U. S., art. 3, § 3, cl. 2. The legislative assemblies of the Territories cannot grant special charters, but may by general laws permit corporations to be formed for mining, manufacturing and other industrial pursuits, or the construction or operation of railroads, wagon roads, irrigating ditches and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries or any benevolent, charitable or scientific association. Rev. St., § 1889. A corporation created by a territorial legislature becomes, after the admission of the Territory as a State, a corporation of the State. *Kansas Pac. R. Co. v. Atchison etc. R. Co.*, 112 U. S. 414.

4. In 1889 the Maritime Canal Co. of Nicaragua was incorporated for constructing and operating a ship canal between the Atlantic and Pacific Oceans through the territory of the Republics of Nicaragua and Costa Rica, with its principal office in the city of New York. Act of February 20th, 1889; 25 Stat. at L. 673.

grant many of these franchises is referred to the power to regulate commerce among the several States as well as to provide for postal accommodations and military exigencies.<sup>1</sup>

*Powers.*—In granting franchises to be exercised in the District of Columbia and the Territories, congress may probably confer powers on a corporation coextensive with those which it may confer on a natural person; but franchises which may be conferred on a corporation, to be exercised within the States, are limited to those which are the appropriate means to carry into execution the express powers of the general government.<sup>2</sup>

*Taxation.*—National corporations depending for their existence upon the fact that they are agencies of the federal government must be free to discharge the duties which they have undertaken to perform. Therefore, the question whether they are exempted from taxation by the States, depends upon the effect of the tax. A tax upon their *property* does not have the necessary effect of depriving them of the power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power, and may be imposed by the States. But not so a tax upon their *operations*, which is a direct obstruction to the exercise of federal powers.<sup>3</sup> It follows that their franchises cannot be

1. *California v. Central Pac. Railroad Co.*, 127 U. S. 1, in which BLATCHFORD, J., says: "The power to construct or to authorize individuals or corporations to construct national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or national road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products and the institution of railroads and locomotion by steam, land transportation has so vastly increased a sounder consideration of the subject has prevailed and led to the conclusion that congress has plenary power over the whole subject. Of course the authority of congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been undoubted. But the

wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of State as well as federal corporations."

2. Curtis' Note on National Corporations; 24 Am. & Eng. R. Cas. 21; 21 Am. Law Rev. 258.

3. In *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316, the tax imposed by the State of Maryland upon the notes of the Bank of the United States was held to be unconstitutional. "The institution was prohibited from issuing notes at all except upon stamped paper furnished by the State, and to be paid for on delivery, the stamp upon each note being proportioned to its denomination. The tax, therefore, was not upon any property of the bank, but upon one of its operations—in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in its nature and effect, from a tax on the property of the bank. No wonder, then, that it was held illegal. But even in that case the court carefully limited the effect of the decision. It does not extend, said the Chief Justice, to a tax paid by the real property of the bank in common

taxed by the States in which they may operate.<sup>1</sup>

*Jurisdiction in Suits.*—Except in the case of national banks, a suit by or against a corporation of the United States is a suit arising under the laws of the United States within the Jurisdiction act, and, therefore, is within the jurisdiction of the federal courts and removable thereto when brought originally in a State court.<sup>2</sup>

**NATIONAL GOVERNMENT.**—A “national government” is the government of the people of a single State, or nation, united as a community by what is termed the social compact, and possessing complete and perfect supremacy over persons and things so far as they can be made the lawful objects of civil government.<sup>3</sup>

**NATIONS, LAW OF.**—See INTERNATIONAL LAW, 11 Am. and Eng. Encyc. of Law 431; MILITARY LAW.

**NATURE; NATURAL.**—Are employed with little or no deviation from the vernacular meaning.<sup>4</sup>

with the other real property in the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in the institution in common with the other property of the same description throughout the State.” And see *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.) 5. The same distinction was made in the case of *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, in which the State of Ohio laid a tax on the operations of the bank. Where the tax is not imposed upon the franchise or right of the corporation to exist and perform the functions for which it was brought into being, but is exclusively upon its real and personal property, taxed in common with all other property in the State of a similar character, such property is not exempt. *Thompson v. Union Pac. R. Co.*, 9 Wall. (U. S.) 579; *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.) 5. A company incorporated by an act of congress is not a “foreign corporation,” within the meaning of the revenue act of Pennsylvania, and is not obliged to take out a licence and pay a tax for doing business in that State. *Commonwealth v. Texas etc. R. Co.*, 98 Pa. St. 90. The property of a telegraph company, chartered by a State but operating under Rev. Stat., §§ 5263-5269 (*ante* 2), is subject to taxation by a State as an individual’s would be; but an injunction restraining it from operating its lines over post roads until the tax is paid is void. *Telegraph Co. v. Atty. Gen.*, 125 U. S. 530.

1. The franchise is given for a public purpose, and to suffer a State to tax it would be a concession of the power to destroy it. This would be not only derogatory to the dignity, but subversive of the

powers of the government and repugnant to its paramount sovereignty. *California v. Central Pac. Railroad Co.*, 127 U. S. 1.

2. The exception in the case of national banks was made by U. S. act July 12th, 1882, since incorporated in the Jurisdiction and Removal acts of 1887 and 1888. The legal proposition on which the statement in the text is founded was announced by the U. S. Supreme Court in the *Pacific Railroad Removal Cases*, 115 U. S. 1. This decision was founded on *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, but the court was divided, WAITE, C. J., and MILLER, J., dissenting on the ground that the words “arising under the constitution or laws of the United States,” in the Jurisdiction act, should not have given them the broad meaning they had when used by Chief Justice Marshall in *Osborn v. Bank of the United States*.

**Eminent Domain.**—The right of eminent domain exists in the government of the United States, and may be exercised by it within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the constitution. *Kohl v. United States*, 91 U. S. 367. It seems to follow that this power may be delegated to national corporations; it has been so delegated to be exercised within the Territories. *Curtis’ Notes*, 24 Am. & Eng. R. Cas. 25; 21 Am. Law Rev. 262.

3. *Piqua Bank v. Knoup*, 6 Ohio St. 342-393.

A federal government is distinguished from a national government by its being the government of a community of independent and sovereign states united by compact. *Piqua Bank v. Knoup*, 6 Ohio St. 342-393.

4. And. L. Dict.



**NATURAL ALLEGIANCE.**—See also ALLEGIANCE, Vol. I, p. 490. That allegiance which is due from one in view of his birth within a country, as distinguished from local allegiance.<sup>1</sup>

**NATURAL AND ARTIFICIAL PERSON (Distinguished).**—See also PERSON. See note 2.

**NATURAL CHILDREN.**—See BASTARDY, 2 Am. & Eng. Encyc. of Law 129; CHILDREN, 3 Am. & Eng. Encyc. of Law 230.

**NATURAL GAS—I. NATURE AND CHARACTER.**—Inflammable gas is formed in great abundance within the earth in connection with

The words "without knowledge of the *nature* transaction," may be very ambiguous when embodied within an instruction to a jury. *King v. Ward*, 74 Me. 349.

"*Natural lives*" was construed to be equal to joint lives and the life of the survivor in *Douglas v. Parsons*, 22 Ohio St. 526. See also ANNUITY, 1 Am. & Eng. Encyc. of Law 592.

**Natural Presumptions.**—See PRESUMPTIONS.

**"Natural and Reasonable Wear and Tear Excepted."**—In an article of agreement for the sale of real estate, by which the vendor stipulates to deliver possession of the premises at a future day, in as good repair as they were at the time of the execution of the contract, "*natural and reasonable wear and tear excepted*," the exception covers only such decay or depreciation in value of the property as may arise from ordinary and reasonable use. An injury to the property by a freshet is not within the exception. *Green v. Kelly*, 20 N. J. L. 544.

1. Abbott's L. Dict.

2 *Semble*.—That the words "natural persons," in a statute, indicated a legislative intent not to include moneyed institutions or other than municipal corporations. *Wagenhurst v. Delaware Township*, 4 Pa. Co. Ct. Rep. 533.

**Natural Law.**—A rule which so necessarily agrees with the nature and state of man that, without observing its maxims, the peace and happiness of society can never be preserved. *Borden v. State*, 11 Ark. 527.

**"Natural rights of property"** must be rights which attach to property in its primitive state, and cannot, without contradiction in terms, be applied to an artificial subject matter like a house. *Angus v. Dalton*, 4 Q. B. D. 161.

**"Nature, substance and quality of the article demanded."** § 6, Sale of Food and Drugs act, 1875, 38 & 39 V. C. 63, means the nature or quality according as the article is ordinarily un-

derstood in the trade dealing with it; therefore when tincture of opium was demanded and a tincture was supplied one-third less in strength than the article according to the recognized standard (*i. e.*, the British Pharmacopœia), held that the article supplied was not of the "nature or quality" demanded (*White v. Bywater*, 19 Q. B. D. 582; 51 J. P. 821; 3 Times Rep. 631); but skimmed milk is a good supply for a demand of "milk" within this section. *Lane v. Collins*, 54 L. J. M. C. 76; 14 Q. B. D. 193.

**Nature of the Offence.**—Where by statute a sentence awarding punishment shall set forth the "nature of the offence," this does not mean that merely the name of the offence shall be given. "It means clearly a setting forth of the facts, shortly but intelligently, by which the offence was committed." *Soutar v. Stirling*, 25 Sc. L. Rep. 499.

**"Natural Oyster Bed."**—A natural, as distinguished from an artificial, oyster-bed is one not planted by man, and in any shoal, reef or bottom where oysters are to be found growing, not sparsely, or at intervals, but in a mass or stratum, and in sufficient quantities to be valuable to the public. *State v. Willis*, 104 N. Car. 764.

**"Natural State of" a Stream.**—The natural state of a stream is that in which the stream is under the ordinary operation of the physical laws which affect it. This may be different at different seasons of the year and yet be ordinary by the recurrence of the same condition about the same season every year. It may ordinarily be high a portion of the season and low at another portion; yet as these are ordinary by reason of their annual or frequent occurrence, so that a variance therefrom is an exception, they are the natural condition of the stream. *Dorman v. Ames*, 12 Minn. 451.

**"Natural stream"** properly signifies a river flowing from its source to the ocean, or an outlet between one interior

carbonaceous deposits, such as coal and petroleum; and similar accumulations not unfrequently occur in connection with deposits of rock salt. The gases from any of these sources, escaping by means of fissures or seams to the open air, may be collected and burned in suitable arrangements, and are commonly called "natural gas."<sup>1</sup> Though gas is a mineral, it is subject to the decisions governing ordinary minerals, with many qualifications; and is governed by rules analogous to those governing water percolating beneath the surface. Water, oil, and still more strongly, gas may be classed by themselves, and have been not inaptly termed minerals *feræ naturæ*.<sup>2</sup>

**II. PROPERTY IN NATURAL GAS.**—Natural gas is not subject to absolute ownership; it belongs to the owner of the land, and forms a part of it, so long as it is on the land, and subject to his control, but when it escapes and goes into other land, or comes under the control of another, his title is lost. Possession of the land is not necessarily possession of the gas. If an adjoining owner drills a well and taps your gas, so that it comes under his control, it is no longer yours, but his. From the nature of gas and gas operations, the grant of well rights is necessarily exclusive.<sup>3</sup>

sea or lake and another. The Young American, Newb. Adm. 106. See also SURFACE WATERS.

1. "Gas and gas lighting." Encyclopædia Britannica.

2. See Am. & Eng. Encyc. of Law; Westmoreland etc. Nat. Gas Co. v. De Witt, 130 Pa. St. 235; Wood Co. Petroleum Co. v. West Virginia Transp. Co., 28 W. Va. 210; s. c., 57 Am. Rep. 659.

By a conveyance of "mines and minerals" the grant does not embrace everything in the mineral kingdom, as distinguished from what belongs to the animal and vegetable; nor is such a grant confined to any one of the subordinate divisions into which the mineral kingdom is subdivided by chemists. Hartwell v. Camman, 10 N. J. Eq. 128.

As to whether natural gas is included in the words "other valuable volatile substance" when used in a lease in connection with the words petroleum, rock, or carbon oil, the court should order the issue tried by jury, as the words have no well-defined meaning and are ambiguous. Ford v. Buchanan, 111 Pa. St. 31.

**Distinguished from Oil.**—"Oil" is not synonymous with gas when used in a lease; accordingly the production of gas alone will not satisfy the conditions of the lease. Truby v. Palmer (Pa. 1886), 6 Atl. Rep. 74.

**Distinguished from Heat.**—Natural gas is not heat. Nor can a company,

incorporated under a statute providing for the creation of companies for supplying heat, furnish natural gas. Emerson v. Com., 108 Pa. St. 126.

**A Commercial Commodity.**—"Natural gas is as much an article of commerce as iron ore, coal, petroleum, or any other of the like products of the earth. It is a commodity which may be transported, and it is an article which may be bought and sold in the markets of the country." And, therefore, a statute forbidding the transportation of the gas from the State is void, as it is in conflict with the constitution of the United States, which provides that the regulation of interstate commerce shall be with congress. State v. Indiana etc. Oil, Gas & Min. Co., 120 Ind. 579; Carothers v. Philadelphia Co., 118 Pa. St. 468.

Less common than wood or oil, it is nevertheless, a fuel. Citizens' Gas etc. Min. Co. v. Elwood, 114 Ind. 338. See also Emerson v. Com., 108 Pa. St. 126.

3. Westmoreland etc. Nat. Gas Co. v. Dewitt, 130 Pa. St. 235; Wood Co. Petroleum Co. v. West Virginia Transp. Co., 28 W. Va. 210; s. c., 57 Am. Rep. 659.

A landlord leased premises for the express and sole purpose of mining and taking carbon oil therefrom at a fixed royalty. The tenant opened a well which produced both oil and hydrocarbon gas, the latter in large quantities, issuing by its own force from the

**NATURAL GAS COMPANIES**—(See GAS COMPANIES, vol. 8, p. 1268).—A natural gas company, being for a public use, may receive the right of eminent domain from the legislature.<sup>1</sup>

well. The tenant separated the gas from the oil, and by pipes conducted it beyond the leased premises, where he sold or appropriated it to his own use. *Held*, that the tenant was not accountable to the landlord for the gas or its value. The court said: "By analogy it seems to me the rule and principles, which pertain to air and water and other subjects of the same nature, must be applied to the natural or hydrocarbon gas involved in this suit. Neither the developments of science nor the evidence in this cause establish that such gas is likely to be exhausted by its use and consumption. That such may ultimately be the case is possible, but the fact, if it is such, is not sufficiently certain or apparent to be the basis of a judicial decision. The appellant therefore could not certainly be guilty of either legal or equitable waste in the use of said gas. . . . If no oil was or ever had been obtained from the well the case might be different. . . . If the gas did not escape from the well of its own force, it is possible the lessee would not, against the consent of the lessors, be permitted to pump it from the well. But in this case, as it is essential that the well shall be kept open in order that the oil may be pumped from it, and as the gas issues of its own accord from the well so necessarily and rightfully kept open, it is clear that the lessee, in the absence of any stipulation for compensation, has the right to use and appropriate the gas in any proper manner he may choose without accounting therefor to the lessors." *Wood Co. Petroleum Co. v. West Virginia Transp. Co.*, 28 W. Va. 210; s. c., 57 Am. Rep. 659.

A gas company which has leased and is using natural gas wells is entitled to an injunction against the lessor restraining him from interfering, since such interference is likely to result in irreparable injury. *Citizens' Nat. Gas Co. v. Shenango Nat. Gas. Co.* (Pa. 1890), 20 Atl. Rep. 947.

**Drilling Gas Wells.**—One undertaking to drill a gas well to a certain depth and of a certain size must comply literally with the contract, even though no gas be found and a well of a smaller bore is just as effective in determining that no gas can be found there at that

depth. 30 Cent. Law J. 503; *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19.

In the Jefferson common pleas court it was sought by the owners of a coal mine to enjoin the owner of the surface from boring a gas well through their strata of coal, on the ground that it was a trespass attended with great danger to the lives of the miners and property of the mine, owing to the fact that the gas could not be controlled. This was in 1885. The court at first denied an injunction, upon the ground that the act of the defendant would be a mere trespass, for which an adequate remedy was afforded in an action at law. But on the succeeding day the court, at the trial, reversed its former ruling, placing it chiefly upon the probable danger of driving a gas well through a mine, although it was the court's opinion that it would be some day possible to dig such a well in such a place. The court also held that the surface owner had no right of way of necessity through the vein of coal to his land beneath it, a reservation of such a way not having been made. 30 Cent. Law J. 503; *Jefferson Iron Works v. Gill Bros.*, 14 W. L. Bull. 2.

1. *Bloomfield etc. Nat. Gas Light Co. v. Richardson*, 63 Barb. (N. Y.) 437; *State v. Indiana etc. Gas, Oil & Min. Co.*, 120 Ind. 581; *Pittsburgh's Appeal*, 115 Pa. St. 4; *Johnston v. Peoples' Nat. Gas Co.*, 5 Cent. R. 564.

Corporations having the power to deal in natural gas organized before the passage of the Pennsylvania Natural Gas act of 1885, received by that act the power to condemn rights of way for their pipe lines, whether they had such power before or not, under that provision of the act which confers the right and prescribes the proceedings of eminent domain as to all corporations then engaged or thereafter to be engaged in the business. *Carothers v. Philadelphia Co.*, 118 Pa. St. 468.

As to compensating the holder of the fee for laying gas mains under a highway, see *Bloomfield etc. Nat. Gas Light Co. v. Richardson*, 63 Barb. (N. Y.) 437; *Bloomfield etc. Nat. Gas Light Co. v. Calkins*, 62 N. Y. 386; *Sterling's Appeal*, 111 Pa. St. 35; *McDevitt's Appeal* (Pa.), 7 Atl. Rep. 588. **Pennsylvania Natural Gas Act of 1885.**

## NATURAL HEIRS—NATURALIZATION.

**NATURAL HEIRS**—(See also *ISSUE*, 11 *Am. & Eng. Encyc. of Law* 869).—The words "natural heirs" and "heirs of the body" in a will, and by way of executory devise, are considered as of the same legal import.<sup>1</sup>

**NATURALIZATION**—(See also *CITIZENSHIP*, vol. 3. p. 242; *ALIEN*, vol. 1, p. 456).

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—A corporation whose charter enables it to engage in "any work or works, public or private, which may tend, or be designed to improve, increase, facilitate or develop" trade, can engage in the business of producing and supplying natural gas under the Pennsylvania Natural Gas act of 1885, whose preamble declares that natural gas has become a "prime necessity for use as a fuel, and otherwise in the development of trade." *Carothers v. Philadelphia Co.*, 118 Pa. St. 468.

Where a natural gas company had been incorporated under a law that did not authorize the incorporation of such a company, and under it had begun to supply natural gas within a city, and had laid pipes therein—having supplied one mill within the city, it was held to be within the provisions of an act subsequently enacted, authorizing the incorporation of such a company, and providing that such a company could accept the provisions of such subsequent act, and organize thereunder, and that the provision of the act should not apply to a corporation accepting it, which "had to some extent prior to the passage" "begun supplying natural gas within such city borough, or had laid pipes for such purpose therein." But a city cannot sustain a bill for perpetual injunction against a natural gas fuel company, organized under such act, on the ground that the corporation has laid its pipes in the streets without permission, and that such pipes are defective and cause injury to the persons and property and citizens, where the averments of the bill are denied, and the court upon examination finds the matter complained of is not a public nuisance. 30 *Cent. Law J.* 501; *Appeal*

of Borough of Butler (Pa.), 6 *Atl. Rep.* 708. See also *Allegheny v. Chartier's Valley Gas Co.*, 10 *Cent. Rep.* 281.

The powers of the councils of cities and boroughs to legislate in regard to natural gas companies are only such as are delegated to them by the act of May 29th, 1885, P. L. 29. They are authorized to give or withhold their assent without more. They have no power to couple their assent with any condition or restriction not imposed by said act, unless the company agrees to accept the same, and be bound thereby; and even the conditions or restrictions so accepted by the company must harmonize and in no wise conflict with the provisions of said act. The assent of councils being given, the regulations they are authorized to adopt are such only as relate to the manner of laying pipes, altering, inspecting and repairing the sewers, and the character thereof with respect to safety and public convenience. These regulations must also be reasonable and not in conflict with any of the provisions of the act. In all other respects the power of such companies are clearly defined and their duties and liabilities prescribed by the act under which they are incorporated. *Pittsburgh's Appeal*, 115 Pa. St. 4.

- 1. *Smith v. Pendell*, 19 *Conn.* 107.

The words "natural heirs" in a legacy were held to mean children, issue, in distinction from collateral heirs, in *Miller v. Churchill*, 78 *N. Car.* 372.

The words "natural heirs" in a will have been held to be synonymous with "heirs." *Re Sinzheimer*, 5 *Den.* (N. Y.) 321. And see *Miller v. Churchill*, 78 *N. Car.* 372; *Ludlum v. Otis*, 15 *Hun* (N. Y.) 410.

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**I. DEFINITION.**—Naturalization is the act by which an alien is made a citizen of the United States of America. It is the act of adopting a foreigner and clothing him with all the privileges of a native born citizen.<sup>1</sup>

**II. IN WHOM THE POWER IS VESTED**—1. **United States**—The power of naturalization is vested exclusively in congress and cannot be exercised by any of the States.<sup>2</sup>

2. **States**—The States, however, may confer such of the privileges of their own citizens upon aliens, with regard to the ownership of land or the participation in the State government, as each may think fit within its own limits, and, in short, as to the State government, can place them on an equal footing with a citizen, but cannot make them citizens of the United States.<sup>3</sup>

1. 1 Bouv. L. Dict.; *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 827; 9 Op. Att. Gen. 359.

A nation, or the sovereign who represents it, may grant to a stranger the quality of a citizen by admitting him into the body of the political society. This is called naturalization. Vattel Law of Nat., bk. 1, ch. 19, §§ 212-214. See also Morse on Citizenship 66, and *Re Wehlitz*, 16 Wis. 443; s. c., 84 Am. Dec. 700.

2. 1 Minor's Inst. 139; *United States v. Vellato*, 2 Dall. (U. S.) 373; *Houston v. Moore*, 5 Wheat. (U. S.) 1, 48; *Thurlow v. Massachusetts*, 5 How. 504; *Smith v. Turner*, 7 How. (U. S.) 283; 1 Kent, § 424.

The power of naturalization is exclusively in congress, but the treaty of amity and commerce between the United States and France of 1778, art. 11, enabled the subjects of France to purchase and hold lands in the United States. *Chirac v. Chirac*, 2 Wheat. (U. S.) 259. See also CITIZENSHIP, 3 Am. & Eng. Encyc. of Law 246, note 1. *Contra*, *Collet v. Collet*, 2 Dall. (U. S.) 294, which case, however, was subsequently overruled by the cases above cited, and was said by CHANCELLOR KENT to have been "hastily and inconsiderately declared." 1 Kent, § 224.

3. 1 Minor's Inst. 139; *Barzizas v. Hopkins*, 2 Rand. (Va.) 276; *Dred*

*Scott v. Sandford*, 19 How. (U. S.) 393. Each State being sovereign, except as to matters referred to the general government, may, as the result of that sovereignty, confer the rights of citizenship on whomsoever it pleases, so far as to make him a citizen of that State, though he will not thereby become a citizen of the United States. *Re Wehlitz*, 16 Wis. 443; s. c., 84 Am. Dec. 700.

"No less than twelve of the States also permit aliens, after a short residence therein, and after declaring their intention to become citizens, to exercise the elective franchise. When an alien is thus given the privilege permanently to reside within a State, and to hold property of all kinds therein, and to exercise the privilege of suffrage, the distinction in right and privilege and immunity between him and a citizen is not very plain. Indeed, as the suffrage would seem peculiarly to belong to citizens, and as the voter for representatives in the State legislature may vote for representatives in congress also, it would seem that there might be some question whether a State could confer upon an alien this high privilege. It is a question, however, which has never been made. One privilege, at least, the State could not confer upon an alien. Without the power of naturalization she could not give him as a citizen a title to those privileges and immunities

**III. WHO MAY BE NATURALIZED**—1. **In General.**—Any alien friend,<sup>1</sup> who is a free white person, or a person of African nativity or descent,<sup>2</sup> who has made the preliminary declaration prescribed by law,<sup>3</sup> who has resided for the five years next preceding his application in the United States,<sup>4</sup> and for one year next preceding such application in the State or Territory in which the court sits to whom he makes application, and who, during that time, has been of good moral character, attached to the principles of the constitution of the United States and well disposed to the good order of the same, may become a citizen of the United States,<sup>5</sup> in the manner to be described, and no other.<sup>6</sup> A married woman may be naturalized without the concurrence of her husband.<sup>7</sup>

2. **Privileged Classes**—(a) *Minors.*—The children of naturalized citizens of the United States, being under the age of twenty-one at the time of their parents naturalization, shall, if dwelling in this country, be deemed citizens thereof.<sup>8</sup> Any alien who has re-

of citizens of the several States which the federal constitution guaranties and secures." Cooley on Prin. of Con. L. 77. See also ELECTIONS, 6 Am. & Eng. Encyc. of Law 267.

1. No alien who is a native citizen or subject, or a denizen of any country, state or sovereignty with which the United States are at war at the time of his application, shall be then admitted to become a citizen of the United States. Rev. Stat. U. S., § 2171. See also The Frances, 8 Cranch (U. S.) 335; *Ex parte* Newman, 2 Gall. (U. S.) 11.

2. Rev. Stat., § 2169. The naturalization laws apply only to foreigners, subjects of another allegiance. They do not include Indians. 7 Atty. Gen. Op. 746. See also CITIZENSHIP, 3 Am. & Eng. Encyc. of Law 245. "White persons" here does not include persons of the Mongolian race. *Re* Ah Yup, 5 Sawyer (U. S.) 155. Or those of half white and half Indian blood. *Re* Camille, 6 Sawyer (U. S.) 541; 6 Fed. Rep. 256; 2 Kent Com. 72; *Lynch v. Clarke*, 1 Sandf. Ch. (N. Y.) 583; 9 Atty. Gen. Op. 373; 7 id. 746; *Elk v. Wilkins*, 112 U. S. 94.

Rev. Stat. U. S. 1878, § 2169, which allows only persons of the white or African races to become citizens, is not modified by 22 St. at Large, p. 61, § 14, providing that no court shall naturalize Chinese, and repealing all laws in conflict therewith, as the latter act was only intended to remove doubts as to the eligibility of Chinese to citizenship, and hence a native of the Hawaiian islands cannot be naturalized, as he belongs to neither of the races mentioned. *In re*

Kanaka Nian (Utah), 21 Pac. Rep. 993.

3. Rev. Stat. U. S., § 2165. See also PRELIMINARY DECLARATION IV, 1. An alien who emigrated to the United States after June 18th, 1812, and who was not a minor on his arrival, was held not entitled to take the oath of naturalization on five years' residence, without having made the declaration of his intention to become a citizen, required by act of May 26th, 1824, two years before his application to take the oath of naturalization. *Ex parte* Brownlee, 9 Ark. 191. *Compare Ex parte* Paul, 7 Hill (N. Y.) 56.

4. Rev. Stat. U. S., § 2170; *Spratt v. Spratt*, 4 Pet. (U. S.) 393; *Ex parte* Walton, 1 Cranch (U. S.) 186; *Ex parte* Saunderson, 1 Cranch (U. S.) 219; *Ex parte* Pasquall, 1 Cranch (U. S.) 243; Anonymous, Pet. (C. C.) 457; *Matter of Hawley*, 1 Daly (N. Y.) 351.

5. Rev. Stat. U. S., § 2165.

6. Rev. Stat. U. S., § 2165; *Priest v. Cummings*, 16 Wend. (N. Y.) 617; *Shanks v. Dupont*, 3 Pet. (U. S.) 248.

7. 1 Minor's Inst. 139. The act of congress of 1802, ch. 28, does not exclude females from the rights of citizenship by naturalization. *Brown v. Shilling*, 9 Md. 7.

8. Rev. Stat. U. S., § 2172; *State v. Penney*, 10 Ark. 621; *Campbell v. Gordon*, 6 Cranch (U. S.) 177.

Minor children of foreign parents, whose mother, after the death of the father, marries a citizen, become citizens. *Kreitz v. Behrensmeyer*, 125 Ill. 741.

A was born abroad and came to the

sided in the United States for five years, of which three were the years next preceding his arriving at the age of twenty-one, and who has continued to reside therein up to the time of his application for admission as a citizen, may become a citizen without having made the preliminary declaration of intention<sup>1</sup> required in the first condition of § 2168 of U. S. Rev. Stat., provided, that he shall make the declaration required therein at the time of his admission, and furnish proof and declare on oath that for two years it has been his intention to become a citizen of the United States, and in all other respects comply with the laws in regard to naturalization.<sup>2</sup>

United States when an infant with his alien parents. His father died when he was eight. His mother married an alien resident, who was naturalized when A (then sixteen) and his mother were living with him. *Held*, that as, under U. S. Rev. Stat., § 1994, this made A's mother a citizen, it made A one under section 2172, which declares that children under age of persons naturalized shall be deemed citizens. *People v. Newell*, 38 Hun (N. Y.) 78.

The Naturalization act, in providing that the children of persons naturalized shall be citizens, operates prospectively, and makes citizens of those who, residing within the United States at the time of the naturalization of their parents, were born of alien parents in a foreign country. *State v. Andriano*, 92 Mo. 70; *O'Connor v. State*, 9 Fla. 215; *West v. West*, 8 Paige (N. Y.) 433; *United States v. Kellar*, 13 Fed. Rep. 82; *People v. Newell*, 1 How. Pr., N. S. (N. Y.) 8; *United States v. Hirshfield*, 13 Blatchf. (U. S.) 330; 15 Atty. Gen. Op. 114.

**Evidence.**—Where a person asking to be registered claims to be a citizen by virtue of the naturalization of his parents, the best evidence of the naturalization of the parent would be the original certificate of naturalization, or a duplicate thereof, when it can be obtained. But a party may, in the matter of proving his citizenship, resort to secondary evidence when preliminary evidence cannot be obtained. *People v. McNally*, 59 How. (N. Y.) Pr. 500.

Children born in foreign countries of parents who were then aliens, but who subsequently emigrated to this country, and became naturalized during the time such children were minors, are citizens of this country. 10 Atty. Gen. Op. 329. But a child born out of the country after his father has renounced his allegiance to the United States, is not a citizen noren-

titled to registration as a voter. *Browne v. Dexter*, 66 Cal. 39; *In re Look Tin Sing*, 10 Sawyer (U. S.) 353; Gould & Tucker Notes on Rev. Stat., § 2772.

**Children of citizens of the United States**, who are born abroad, are United States citizens, of the United States. *Wolff v. Archibald*, 14 Fed. Rep. 369; 15 Atty. Gen. Op. 114; 10 Atty. Gen. Op. 328; *People v. Newell*, 38 Hun 78. See also CITIZENSHIP, 3 Am. Eng. & Encyc. of Law 244.

1. See *post*, IV, 1.

2. Rev. Stat. U. S., § 2167.

An alien, who has resided in the United States five years, of which three were the last years of his minority, is entitled to be admitted to citizenship under Rev. Stat. U. S., § 2167, which relates to the admission of aliens who have resided in the United States during the last three years of their minority, without having made the preliminary declaration of intention required in section 2165. *Schutz's Petition*, 64 N. H. 241.

A minor who has neither declared his intention to become a citizen as required by the statute, nor proved a residence of five years, is not entitled to be admitted to citizenship. *Ex parte Merry*, 14 Phila. (Pa.) 212.

It is not necessary that two of the five years' residence here required in the case of a minor alien should occur after the applicant has attained his majority. *Schultz's Petition*, 64 N. H. 241; *Ex parte Merry*, 14 Phila. (Pa.) 212; *Ex parte Randall*, 14 Phila. (Pa.) 224.

U. S. Rev. Stat., § 2167, relating to naturalization, provides that an alien, applying for citizenship under said section, may "be admitted a citizen of the United States without having made the declaration (of intention) required in the first condition of section 2165; but such alien shall make the declaration

(b) *Wives of citizens*, native or naturalized, if capable of naturalization, are to be deemed citizens.<sup>1</sup>

(c) *Widow and Children of One Who Has Made the Preliminary Declarations, but Dies Before His Admission*.—When an alien, who has made the preliminary declaration required in § 2165 Rev. Stat., dies before his admission as a citizen, his widow and children, upon taking the oaths prescribed by law, shall be deemed citizens.<sup>2</sup>

required therein at the time of his admission." *Held*, that the declaration last mentioned relates, not to the declaration of intention required in the first condition of section 2165, but to the declaration of allegiance required, in the second condition of said section, to be made "at the time of his application to be admitted." *State v. Macdonald*, 24 Minn. 48. And the declaration must be under oath. *United States v. Walsh*, 22 Fed. Rep. 644.

1. Rev. Stat. U. S., § 1994.

Under U. S. Rev. Stat., § 1994, an alien woman of the race or class of persons that are entitled to be naturalized under existing laws, who is married to a citizen of the United States, becomes by that act a citizen thereof; and such admission to citizenship has the same force and effect as if such woman had been naturalized by the judgment of a competent court. *Leonard v. Grant*, 6 Sawyer (U. S.) 603. See also CITIZENSHIP, 3 Am. & Eng. Encyc. of Law 243.

**Nonresident Wife of Citizen**.—The clause in said statute, "might herself be lawfully naturalized," does not require that the woman shall have the qualifications of residence, good character, etc., as in case of admission to citizenship in a judicial proceeding, but it is sufficient if she is of the class or race of persons who may be naturalized under existing laws. *Leonard v. Grant*, 6 Sawyer (U. S.) 603.

Under the naturalization laws, a woman who is an alien acquires citizenship whenever her husband becomes a citizen. It makes no difference that she is not twenty-one years of age. The common and statute law of New York, as to the ability of aliens to take lands by descent—considered. *Renner v. Muller*, 44 N. Y. Super. Ct. 535.

An alien woman, whose husband becomes a naturalized citizen of the United States, is, under section 2 of the act of congress of 1855, thereby made a citizen, though she may live at a distance from her husband for years, and

never come to the United States until after his death. *Headman v. Rose*, 63 Ga. 458. See also *Burton v. Burton*, 1 Keyes (N. Y.) 359; *Kane v. McCarthy*, 63 N. Car. 299; *Luhrs v. Eimer*, 16 Fed. Rep. 215; 14 Atty. Gen. Op. 402. *Contra*, in 1 Minn. Ins. 141, the learned author seems to incline to the contrary opinion, viz., that the wife must be a resident of the United States in the lifetime of her husband, citing *Kelly v. Owen*, 7 Wall. (U. S.) 498, and *Burton v. Burton*, 26 How. Pr. (N. Y.) 474.

But the former case is cited on both sides of the controversy, and the point does not seem to have been well considered, while the latter was overruled in *Burton v. Burton*, 1 Keyes (N. Y.) 350.

2. Rev. Stat. U. S., § 2168.

When a foreign subject, after residing here the proper time, declares his intention to become a citizen, but dies before he has been here long enough to receive his certificate of citizenship, his children, born abroad, who came here under 17 years of age with him, take an estate of inheritance in his lands, and, on attaining 21 years of age, become citizens of the United States and of the State of Texas. *Schrimpf v. Settegast*, 38 Tex. 96.

The proviso in the act of April 14th, 1802, which excludes from citizenship aliens whose country should be, at the time of the application, at war with the United States, was held to extend to the supplementary act of March, 1804, authorizing the naturalization of the widow and children of persons, who, having pursued the directions of the original act, might die before they became naturalized. Therefore the minor son of an alien, who had made report of himself conformably to the act, but who had died two years thereafter, was held not to be admissible to the rights of citizenship, the country from which he emigrated being, at the time of the application of the son, at war with the United States. *Ex parte Overington*, 5 Binn. (Pa.) 371. See also



(d) *Aliens in the Military Service of the United States.*—Any alien of the age of twenty-one years or more, who has been honorably discharged from the military service of the United States, may be admitted to become a citizen without the preliminary declaration of intention; and shall only be required to prove one year's residence previous to his application; "and the court admitting such alien shall, in addition to such proof of residence and good moral character as now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States."<sup>1</sup>

(e) *Seamen.*—Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States in any competent court, and shall have served three years on board of a merchant vessel of the United States subsequent to the date of such declaration, may, on his application to any competent court, and the production of his certificate of discharge and good conduct during that time, together with the certificate of his declaration of intention to become a citizen, be admitted a citizen of the United States; and every seaman, being a foreigner, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served such three years, be deemed a citizen of the United States for the purpose of manning and serving on board any merchant vessel of the United States, anything to the contrary in any act of congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen.<sup>2</sup>

ELECTIONS, 6 Am. & Eng. Encyc. of Law 267.

1. Rev. Stat. U. S., § 2166.

This has been held to include the navy as well as the army. *Re Stewart*, 7 Robt. (N. Y.) 635. But see *In re Bailey*, 2 Sawyer (U. S.) 200, where it was held not to apply to marines. *In re Bye*, 2 Daly (N. Y.) 525.

Satisfactory proof by a person applying to be naturalized that he is of good moral character, that he has resided one year within the United States previous to the application, that he is of the age of twenty-one years and upwards, that he was regularly enlisted in the United States navy, where he served as an enlisted man, and that he was honorably discharged from service, entitle him to naturalization under the provisions of section 21 of the act of congress of July 17th, 1862. *Re Stewart*, 7 Robt. (N. Y.) 635.

**No Qualification as to Race Required.**—From the words, "the court admitting shall, in addition to such proof of residence and good moral character as

now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States," it might well be thought that no qualification as to race is required under this section. Such is the conclusion of Dr. Minor, who states very emphatically (1 Min. Inst. 141) that the discharged soldier or sailor may be admitted to citizenship without qualification as to race.

2. Rev. Stat. U. S., § 2174.

Stat. June 9th, 1874, ch. 260 (18 St. 64) provides that none of the provisions of the cited act of 1872, "shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise, or voyage."

U. S. Rev. Stat., § 2174, conferring

**IV. PROCEDURE—1. Preliminary Declaration of Intention.**—The alien seeking admission to citizenship must declare upon oath, before a circuit or district court of the United States, or a district or supreme court of the Territories, or a court of record of any of the States having common law jurisdiction, and a seal and a clerk, at least two years prior to his admission to citizenship, that it is his *bona fide* intention to become a citizen,<sup>1</sup> and to renounce his allegiance to any prince, potentate, or state, and particularly by name to the prince or state whereof he is at the time a subject or citizen.<sup>2</sup>

upon seamen who have served on board merchant vessels of the United States the right to citizenship, upon application to the court, does not extend to the naval service. *Ex parte Gormly*, 14 Phila. (Pa.) 211.

1. Rev. Stat. U. S., § 2167. See also ELECTIONS, 6 Am. & Eng. Encyc. of Law 267.

The declaration of intention must be under oath. *United States v. Walsh*, 22 Fed. Rep. 644.

The intention must be declared in such form as to show the time when it was actually formed. *Ex parte Randall*, 14 Phila. (Pa.) 224.

The probate court of Shelby county, Tennessee, has no common law jurisdiction, and cannot take this declaration. *Ex parte Tweedy*, 22 Fed. Rep. 85. City, police and county courts in various States, when courts of record, and having a clerk, have been held entitled to take it. *United States v. Power*, 14 Blatchf. (U. S.) 223; *Ex parte Gladhill*, 8 Metc. (Mass.) 168; *Ex parte Cregg*, 2 Curt. (U. S.) 98; *State v. Whittemore*, 50 N. H. 245; s. c., 9 Am. Rep. 196; *In re Conner*, 39 Cal. 98; s. c., 2 Am. Rep. 427; *Levy's Case*, 14 Atty. Gen. Op. 509; *State v. Webster*, 7 Neb. 469; *Morgan v. Dudley*, 18 B. Mon. (Ky.) 603; *People v. McGowan*, 77 Ill. 649; s. c., 20 Am. Rep. 254. State courts, in admitting aliens, act as United States courts. *In re Christern*, 43 N. Y. Super. Ct. 523; G. & T. Notes on Rev. Stat., § 2167.

**Declaration Made Before a Clerk.**—Under Rev. Stat. U. S., § 2165, relating to naturalization, which provides that an alien's declaration of intention to become a citizen may be made before the clerk of the courts therein named as well as before the court, it is not necessary that such declaration should be made in the office of the clerk. *Andres v. Judge of Circuit Court*, 77 Mich. 85.

The clerk of the United States circuit court has no authority to take from an alien a declaration of his intention to become a citizen of the United States at the private residence of the party, and for that purpose to carry the records of the court from the clerk's office to such residence. *In re Langtry*, 31 Fed. Rep. 879.

A court whose judge acts as its only clerk is not a court having a clerk within U. S. Rev. Stat. 469—providing for naturalization of aliens—and is not competent to naturalize. 1878, *State v. Webster*, 7 Neb. 469. See also ELECTIONS, 6 Am. & Eng. Encyc. of Law 367.

2. Rev. Stat. U. S., § 2167; Stat. February, 1876, ch. 5 (19 St. 2), provides "that the declaration of intention to become a citizen of the United States, required by Rev. Stat., § 2165, may be made by an alien before the clerk of any of the courts named in section 2165; and all such declarations heretofore made before any such clerk are hereby declared as legal and valid as if they had been made before one of the clerks named in said section." See also *Butterworth's Case*, 1 Woodb. & M. 323.

The declaration of an alien of his intention to become a citizen of the United States, stated that it was *bona fide* his intention to become a citizen of the United States of America, and to renounce and abjure all allegiance and fidelity to every foreign prince, state, potentate and sovereignty whatever, and particularly to the Queen of Great Britain and Ireland, according to the several acts of congress in such cases made and provided. *Held*, that the declaration was not objectionable because the name of the queen was not stated. *Ex parte Smith*, 8 Blackf. (Ind.) 395.

**Effect of the Declaration.**—A mere "declaration of intention" by a foreigner to become a citizen does not de-

The declaration must be recorded.<sup>1</sup>

**2. Application to be Admitted to Citizenship—(a) Before What Courts.**—Proceedings may be had for the admission of an alien to citizenship before any of the courts before which he might have made his preliminary declaration of intent;<sup>2</sup> and the court, in admitting the alien to citizenship, acts judicially.<sup>3</sup>

**(b) Declaration and Renunciations.**—The alien shall declare, on oath, that he will support the constitution of the United States, that he renounces and abjures all allegiance and fidelity to every foreign prince, potentate, or state; particularly by name to the prince, potentate, or state of which he was before a citizen or subject;<sup>4</sup> and, if he has borne any hereditary title or has been a member of any order of nobility, he shall make an express renunciation of such title or order, which proceedings must be recorded.<sup>5</sup>

**(c) Proof.**—The alien must prove that he has made the preliminary declaration required, which must be proved by the record,<sup>6</sup> that he has resided within the United States five years at least, and within the State or Territory where the court sits for one year,<sup>7</sup> and that during that time he has behaved as a man of good

prive a court of the United States of jurisdiction over a suit to which he is a party, as a suit against a foreign citizen or subject. The final renunciation of his foreign allegiance is necessary. 1854, *Baird v. Byrne*, 3 Wall. Jr. 1.

After a foreigner by birth has duly declared his intention to become a citizen, he must be regarded as having secured to himself and his children, who are minors, the right of a naturalized citizen, except so far as pertains to the exercise of the elective franchise. *Settegast v. Schrimpf*, 35 Tex. 344.

1. Rev. Stat., § 2165, cl. 4; *State v. Barrett*, 40 Minn. 65; *In re Christern*, 56 How. Pr. (N. Y.) 5.

Where the record of the previous declaration made by the party omitted to state that it was made on oath, and that it included a renunciation of allegiance to foreign princes, etc., such omission does not invalidate the subsequent act of naturalization founded on such previous declaration. *Towle's Case*, 5 Leigh (Va.) 743.

The original affidavit of a declaration of intention to become a citizen of the United States, or a copy, properly certified by the clerk or deputy clerk of a district court of Minnesota, attested by its seal, is competent evidence of the declaration of intention. *State v. Barrett*, 40 Minn. 65.

2. Rev. Stat. U. S., § 2165. See also IV, 1.

State courts in admitting aliens to citizenship under naturalization laws act as United States courts. *Matter of Christern*, 43 N. Y. Super. Ct. 523.

State courts have a competent and constitutional power to naturalize. *Matter of Ramsden*, 13 How. Pr. (N. Y.) 429; *People v. Sweetman*, 3 Park Cr. L. 358.

3. 1 Min. Ins. 140; *Spratt v. Spratt*, 4 Pet. (U. S.) 406; *Ex parte Knowles*, 5 Cal. 302; *In re Clark*, 18 Barb. (N. Y.) 444; *McCarthy v. Marsh*, 5 N. Y. 279; *In re An Alien*, 57 Hill (N. Y.) 138; *In re Christern*, 43 N. Y. Super. Ct. 523.

4. Rev. Stat. U. S., § 2165, cl. 2.

5. Rev. Stat. U. S., § 2165, cl. 4.

**The Oath.**—The oath of naturalization, when taken, confers the rights of citizen, and it is not necessary that there should be an order of court admitting him to become a citizen. *Campbell v. Gordon*, 6 Cranch (U. S.) 176.

Under this act, an alien must take the required oaths at the time of his admission to citizenship. And it is not sufficient that he took the oaths at the time of his giving notice to become a citizen. *Richards v. M'Daniel*, 2 Nott & M. (S. Car.) 351.

6. Rev. Stat. U. S., § 2165; 1 Min. Inst. 140.

7. Rev. Stat. U. S., § 2165.

moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; but the oath of the applicant shall in no case be allowed to prove his residence.<sup>1</sup>

(d) *The Judgment and the Effect Thereof.*—The admission of an alien to citizenship by a court of competent jurisdiction has the effect and force of a judgment of such court. The court's action must be recorded as its judgment, and the record is conclusive evidence of the facts which it recites.<sup>2</sup> The naturalization of an alien confers upon him the privileges of a native citizen save only such as are withheld from him by the constitution of the United States.<sup>3</sup>

1. Rev. Stat. U. S., § 2165, cl. 3.

Where an alien, during his residence in the United States, had been convicted of perjury, it was held that he had not behaved as a man of good moral character, so as to entitle him to admission to citizenship, and that the fact that he had received a pardon did not alter the case. *In re Spencer*, 5 Sawy. (U. S.) 195.

In proceedings instituted for naturalizing an alien, his residence cannot be established by affidavit, but must be proved in court by the testimony of witnesses. Nor are affidavits admissible to establish the alien's good moral character, or his attachment to the principle of our government; though on these points his own oath is admissible. But it seems that the oath of the alien should be corroborated by other evidence. *In re —*, 7 Hill (N. Y.) 137.

An alien cannot vouch for a person petitioning to be naturalized. *State v. Papen*, 1 Brewst. (Pa.) 263.

The Revised Statutes of the United States, § 2165, relating to the naturalization of aliens, which provide that *it shall be made to appear* to the satisfaction of the court admitting such alien that he has resided within the United States five years at least, and within the State or territory where such court is at the time held one year at least, but that the oath of the applicant shall be in no case allowed to prove his residence, forbid the taking of the oath of the applicant himself as proof of his residence, and do not merely render the oath of the applicant insufficient. Such an oath is extrajudicial, and perjury cannot be assigned thereon. *United States v. Grottkau*, 30 Fed. Rep. 672.

2. 14 Atty. Gen. Op. 509; *Spratt v. Spratt*, 4 Pet. (U. S.) 406; *Charles Green's Son v. Salas*, 31 Fed. Rep.

106; *Stark v. Chesapeake Ins. Co.*, 7 Cranch (U. S.) 420. See also *In re Coleman*, 15 Blatchf. (U. S.) 420; 1 Min. Ins., 141; *Towle's Case* 5 Leigh (Va.) 743; *In re Christern*, 43 N. Y. Super. Ct. 523.

The validity and efficacy of a judgment admitting a person to citizenship are not impaired by an inaccurate statement in its recitals; they constitute no part of the judgment. Accordingly, where the record of naturalization of an applicant for citizenship of the United States was perfect, but inaccurately recited that the applicant had resided within the United States for three years preceding his arrival at the age of twenty-one years, no deception being intended, the applicant being entitled to be admitted on other grounds, and these facts appearing on an application for renaturalization—*held*, that there was no occasion for further proceedings, and the application was denied. *In re McCoppen*, 5 Sawy. (U. S.) 630. See also V.

The judgment of the tribunal or court, to whom the power to grant naturalization is confided by the supreme power in the State, is conclusive as to law and fact everywhere and upon all the world. 18 Am. L. Reg., N. S. 674; *In re Acorn*, 2 Abb. (U. S.) 443; *People v. McGowan*, 77 Ill. 644; s. c., 20 Am. Rep. 254. See also pt. V.

3. *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 827; Const. U. S., art. 1, § ii, 2, and iii, 3.

**Effect of Naturalization on Alien's Suit Before Court of Claims.**—Under § 1068 of Rev. Stat. of United States, which provides that aliens who are citizens are subjects of any government which accords to the citizens of the United States the right to prosecute claims against such government, shall

**V. CERTIFICATE AND RECORD.**—The federal statute requires that a record should be kept of the naturalization proceedings.<sup>1</sup> This record or a certificate thereof is the sole evidence admissible to prove the fact of an alien's naturalization.<sup>2</sup> It is not necessary that

have the privilege of prosecuting claims against the United States in the court of claims. An alien who was naturalized before this section was enacted is entitled to prosecute an action begun before he was naturalized. *Bulwinkle v. United States*, 4 Ct. of Cl. 395; *Mentz v. United States*, 4 Ct. of Cl. —. And he may prosecute an action begun before this statute was enacted, if he was not an alien when the plea of alienage was put in. *Wagner v. United States*, 5 Ct. of Cl. 637; Gould & Tucker's Notes on R. S. 1068.

As to when naturalized citizen may vote, see ELECTIONS, 6 Am. & Eng. Encyc. of Law 269.

A rule to vacate a decree of naturalization will not be granted at the instance of a private citizen in the courts of Pennsylvania. *State v. Papen*, 1 Brewst. (Pa.) 263.

**Retroactive Effect of Naturalization.**—Naturalization, before office found, relates back, and confirms the title to land purchased during alienage. *Jackson v. Beach*, 1 Johns. Cas. (N. Y.) 399. Compare *Jackson v. Green*, 7 Wend. (N. Y.) 67; *Priest v. Cummings*, 20 Wend. (N. Y.) 338. But it does not retrospectively confirm a title claimed by descent. *Vaux v. Nesbit*, 1 McCord Ch. (S. Car.) 370. Naturalization does not have such a retroactive operation as to vest or confirm in the person naturalized an estate which, but for his being an alien, would have descended to him in fee at the death of the person last seised. The New York statute of 1843, providing that any naturalized citizen, to whom an estate would have descended if he had been a citizen at the death of the person last seised, might hold the same as though he had been a citizen at the time of the descent cast, applied only to persons already naturalized at the time the act was passed, and had no reference to the future. *Heney v. Brooklyn Benevolent Soc.*, 39 N. Y. 333; affirming 30 Barb. (N. Y.) 360.

No court has any power or authority in naturalizing an alien to declare in its order that such alien shall be held to be a citizen from a time preceding the making of the order; and if it makes such declaration its act is unauthorized

and void, so far as this declaration is concerned, and he is a citizen only from the time when such order was made. *Dryden v. Swinburne*, 20 W. Va. 89.

1. Rev. Stat. U. S., § 2165; *Charles Green's Sons v. Salas*, 31 Fed. Rep. 106

2. In the absence of evidence of naturalization by the court records, parol evidence is inadmissible to prove the fact. *Dryden v. Swinburne*, 20 W. Va. 89; *Matter of Desty*, 8 Abb. N. C. (N. Y.) 250; *People v. McNally*, 59 How. Pr. (N. Y.) 500; *The Acorn*, 2 Abb. (U. S.) 435; *In re Coleman*, 15 Blatchf. (U. S.) 406; *Slade v. Minor*, 2 Cranch (U. S.) 139.

A certificate of naturalization in these words, namely: "I, A B, Clerk, etc., hereby certify that at a superior court, held at Savannah, etc., before X Y, Judge, etc., on a certain day, C D, an alien, petitioned the court to be admitted a citizen, and having in all things complied with the law in such case, etc., the said C D was accordingly admitted a citizen of the United States, having first taken and subscribed in open court the oath of naturalization. Given under my hand and seal of the said court, etc." Held, to be insufficient to show that C D was naturalized. *Miller v. Reinhart*, 18 Ga. 239.

A certificate of the clerk of the district court, reciting that the applicant has been duly admitted to citizenship, but failing to show any extract from the record, or minute of the action of the court, is not competent to show naturalization. Naturalization cannot be proved by parol. *Charles Green's Son v. Salas*, 31 Fed. Rep. 106.

In the absence of proof that an alien has become a citizen of the United States, his original status is presumed to continue. *Hauenstein v. Lynham*, 100 U. S. 483. See also *Charles Green's Son v. Salas*, 31 Fed. Rep. 106.

But when records of naturalization are destroyed, secondary evidence of their contents is admissible, as of the contents of other records. *Kreitz v. Beyrensmeyer*, 125 Ill. 141.

The court cannot make up a record of naturalization proceedings and issue a certificate *nunc pro tunc*, when no

the record should show that all the legal prerequisites were complied with; the judgment being conclusive of such compliance,<sup>1</sup> and the record cannot be attacked in a collateral proceeding, by showing that these prerequisites have not, in fact, been complied with.<sup>2</sup> It has been held that the United States may sue in a federal court for the cancellation of a certificate of naturalization, obtained by fraud in a State court. But in such a suit the bill must show facts from which fraud may be inferred; it is not sufficient to show that the decree is erroneous.<sup>3</sup>

**NATURAL LAW.**—That rule of conduct deducible from reason and conscience as distinguished from divine law on the one hand and

record has been made of the steps taken antecedent to the issuing of the certificate. It cannot be supposed that things have been done in respect to the naturalization of persons which do not appear of record. *Matter v. Desly*, 8 Abb. N. Cas. (N. Y.) 250.

As to what has been held to constitute a sufficient record of naturalization, see *In re Christern*, 56 How. Pr. (N. Y.) 5; *In re Coleman*, 15 Blatchf. (U. S.) 406.

1. *Ritchie v. Putnam*, 13 Wend. (N. Y.) 524; *McDaniel v. Richards*, 1 McCord L. (S. Car.) 187; *In re Christern*, 56 How. Pr. (N. Y.) 5; *People v. McGowan*, 77 Ill. 646; *Charles Green's Son v. Salas*, 31 Fed. Rep. 106; *United States v. Walsh*, 22 Fed. Rep. 644; *Stark v. Chesapeake Ins. Co.*, 7 Cranch (U. S.) 420; *Spratt v. Spratt*, 4 Pet. (U. S.) 393. Hence it is not necessary that it should appear in the certificate granted by the court that the person naturalized "had behaved as a man of good moral character," etc., as the granting of a certificate by a competent court raises the presumption that the court was satisfied as to the moral character of the alien. *Campbell v. Gordon*, 6 Cranch (U. S.) 176.

A certificate of naturalization stated that the party "took the oath in such case required by the act of congress." *Held*, that this imported that he took the oath required in the very words prescribed by the statute, and so the act of naturalization was good. *Towles' Case*, 5 Leigh (Va.) 743.

2. It seems clear, both on principle and authority, a record of naturalization, made by a court of competent jurisdiction, cannot be impeached, in a collateral proceeding, by showing that the preliminary steps required by law have not, in fact, been taken. It is upon the principle such a record, like any other judgment of a court, affords complete evidence of its own validity. In proceedings of naturalization mat-

ters are submitted to the decision of the court, and the presumption will be indulged the court heard evidence, was satisfied the applicant had complied with the law, and its findings must be held conclusive as to all facts recited in the record. *Spratt v. Spratt*, 4 Pet. (U. S.) 393; *People v. Pease*, 30 Barb. (N. Y.) 588; *Campbell v. Gordon*, 6 Cranch (U. S.) 176; *McCarthy v. Marsh*, 5 N. Y. 263; *People v. McGowan*, 77 Ill. 646; s. c., 20 Am. Rep. 254; *State v. Macdonald*, 24 Minn. 59; *McCarthy v. Marsh*, 5 N. Y. 263; *Banks v. Walker*, 3 Barb. (N. Y.) Ch. 438.

It is a universal principle that, where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive (1 Cr. 170-171), legislative (4 Wh. 423; 2 Pet. 412; 4 Pet. 663), judicial (11 Mass. 227; 11 S. & R. 429, adopted in 2 Pet. 167, 168), or special (20 J. R. 739, 740; 2 Dow. P. Cas. 521), etc., unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law." *United States v. Arredondo*, 6 Pet. (U. S.) 729.

3. *United States v. Norsch*, 42 Fed. Rep. 417.

One who has been improperly naturalized may surrender his certificate and present a new petition. *State v. Papen*, 1 Brewst. (Pa.) 623.

enacted or formulated law on the other.<sup>1</sup>

**NATURAL LOVE AND AFFECTION**—1. Definition.—Natural love and affection is defined to be that affection which a husband, a father, a brother, or other near relative naturally feels toward those who are so nearly allied to him.<sup>2</sup> As to what degree of relationship will warrant such natural love and affection as will constitute a consideration, it seems that it must be that which exists between a parent and his legitimate child, brother and sister, or husband and wife.<sup>3</sup> A consideration of natural love and affection constitutes a sufficient consideration to support a deed,<sup>4</sup> but not an executory contract.<sup>5</sup> This distinction is due to the entire dif-

1. Abbott's L. Dict.

2. 2 Bouv. Law. Dict., Natural Affection; 2 Steph. Com. 61.

3. Parent and Child.—See *Pierson v. Armstrong*, 1 Iowa 282; *Kirkpatrick v. Taylor*, 43 Ill. 207; *Ford v. Ellingwood*, 3 Metc. (Ky.) 359; *Knowles v. Erwin*, 43 Hun (N. Y.) 150.

A consideration of "love and affection" will support a gift of an inheritance to a daughter. *Pierson v. Armstrong*, 1 Iowa 282.

A conveyance to the widow of the grantor's deceased son, of property left by the son, may be based on a consideration of love and affection, which will support it as between the parties. *Beith v. Beith*, 76 Iowa 601.

Natural love and affection for an illegitimate child does not constitute a consideration. *Blount v. Blount*, 2 Law Repos. (N. Car.) 587. See also *Cains v. Jones*, 5 Yerg. (Tenn.) 249.

The relationship between a grandparent and his or her grandchild, will warrant the natural love and affection which will constitute a consideration. *Hanson v. Buckner*, 5 Dana (Ky.) 251; *Stovall v. Barnett*, 4 Litt. (Ky.) 207.

In other cases, however, it is held that a deed of land to a legitimate or illegitimate grandchild is *voluntary*, and must yield to a subsequent deed, executed *bona fide*, in consideration of money or marriage. *Cains v. Jones*, 5 Yerg. (Tenn.) 249; *Borum v. King*, 37 Ala. 606.

**Brother and Sister.**—Bouv. Law Dict., Natural Affection.

**Husband and Wife.**—9 Am. & Eng. Encyc. of Law, HUSBAND AND WIFE, 791, 793.

**Collateral Consanguinity.**—Collateral consanguinity is not a meritorious consideration upon which a court of equity will specifically enforce an executory covenant or agreement. *Hayes v. Kershow*, 1 Sandf. Ch. (N. Y.) 251.

A contract for sale for value, which had been entered into by a vendor up-

wards of ninety years of age, was upon his death resisted by his devisee, on the ground that the vendor had, by a deed executed by him before the date of the contract, conveyed the property in fee to the devisee, *his great nephew*. The deed was expressed to be in consideration of natural love and affection, and contained a covenant by the grantee to "commence" a house upon the property according to plans to be furnished by the grantor; and that if the grantor failed to furnish such plans, then the grantee "would build such a house as he, the grantee, should think fit." No house was ever commenced, and the deed contained no proviso for re-entry or other penalties for breach of covenant. Upon a bill by the purchaser for specific performance, it was held that the deed was *purely voluntary*, there being an absence of any consideration by way of payment or benefit moving from the grantee to the grantor, and specific performance was decreed accordingly. *Roshur v. Williams*, 44 L. J. Ch. 419; 20 L. R., Eq. 210; 23 W. R. 561.

4. *Kirkpatrick v. Taylor*, 43 Ill. 207; *Stovall v. Barnett*, 4 Litt. (Ky.) 207; *Hanson v. Buckner*, 4 Dana (Ky.) 251; *Blackerby v. Holton*, 5 Dana (Ky.) 520; *Beith v. Beith*, 76 Iowa 601; *Hayes v. Kershow*, 1 Sandf. Ch. (N. Y.) 258; *Pennington v. Gittings*, 2 Gill & J. (Md.) 208; *Duvoll v. Wilson*, 9 Barb. (N. Y.) 487; *Marling v. Marling*, 9 W. Va. 89; s. c., 27 Am. Rep. 543.

Where a father made this writing: "James, I expect to marry soon, and if you will settle yourself on the Grayer farm, you may have it," it was considered by the court that the relation of a father and son is a good consideration to uphold the promise; and it is not indispensable that it should be expressed in terms in the writing of gift, in order to make such writing operative. *Ford v. Ellingwood*, 3 Metc. (Ky.) 359.

5. *Kirkpatrick v. Taylor*, 45 Ill. 2071

ference, as regards the consideration requisite, between deeds (being instruments under seal, and, therefore, a consideration often unnecessary) and other contracts which are without the presumption of a valuable consideration afforded by a seal.<sup>1</sup> Where a deed purports to have been executed for a valuable consideration, and is impeached by proving that no such consideration was paid, it cannot be sustained by showing that it was executed in consideration of natural love and affection.<sup>2</sup> If a deed recites that it was made in consideration of "natural love and affection" and for the further consideration of "one dollar" (or any other sum), parol proof is admissible to prove other considerations.<sup>3</sup> An instrument in any form cannot operate as a covenant to stand seized for the benefit of another when not founded on the consideration of blood or marriage for want of the requisite consideration.<sup>4</sup> As to the application of the consideration of love and affection as applied to uses, see that title.<sup>5</sup>

**NATURALLY.**—In the usual course of things.<sup>6</sup>

*Hayes v. Kershow*, 1 Sandf. Ch. (N. Y.) 258; *Duvoll v. Wilson*, 9 Barb. (N. Y.) 487; 1 Parsons on Notes, 178, 197; *Holliday v. Atkinson*, 5 B. & C. (E. C. L.) 501; *Smith v. Kittridge*, 21 Vt. 238; *Fink v. Cox*, 18 Johns. (N. Y.) 145. Compare *Marling v. Marling*, 9 W. Va. 89; s. c., 27 Am. Rep. 543, where an unsealed instrument running thus: "I sine all my interest and claim unto Mary Marling and Elizabeth Marling, the farm they now live on, coled the Harsty farm, as witness my hand and sel. Elijah Marling," was supported upon a consideration of natural love and affection. Compare also *Hayes v. Kershow*, 1 Sandf. Ch. (N. Y.) 258.

A promissory note cannot be supported on the consideration of blood, or of natural love and affection; something more is necessary—some valuable consideration—or it cannot be enforced at law or in equity. *Pennington v. Gittings*, 2 Gill & J. (Md.) 208; *Duvoll v. Wilson*, 9 Barb. (N. Y.) 487. Mere blood relationship is not a sufficient consideration in law to support an assumpsit. A stranger to the consideration cannot sue on a contract, although there is privity by blood between him and the contracting parties, and the contract was made for his benefit. *Tweddle v. Atkinson*, 1 B. & S. 393; 8 Jur., N. S. 332; 30 L. J., Q. B. 265; 9 W. R. 781; 4 L. T., N. S. 468.

Where a note, expressed to be for value received, was made in favor of an infant aged nine, and in an action against the executors of the maker, no evidence of consideration being given,

the judge told the jury that the note being for value received, imported that a good consideration existed, and that gratitude to the infant's father, or affection to the child, would suffice. *Held*, that although the jury might have presumed that a good consideration was given, yet that those pointed out were insufficient. *Holliday v. Atkinson*, 5 B. & C. 501.

The defendant's father owed the plaintiff money for goods sold; and for the price of these goods the defendant made his note in his own name, and gave it to the plaintiff, who was cognizant of all the facts, and that the defendant had received no consideration for the note. *Held*, that the circumstances could not be given in evidence under a plea of accommodation bill, and that there was in this case an original liability on the part of the defendant, and that for a good consideration, viz, family affection. *Cook v. Long*, Car. & M. (41 E. C. L.) 510.

1. See DEEDS, 5 Am. & Eng. Encyc. of Law 435, where the matter of the consideration necessary in deeds is treated.

2. *Burrage v. Beardsley*, 16 Ohio 438.

3. *Harvey v. Alexander*, 1 Rand. (Va.) 219; *Scott v. Scott*, 1 Mass. 527.

4. *Lossee v. Ellis*, 13 Hun (N. Y.) 638; *Corwin v. Corwin*, 6 N. Y. 342; *Schott v. Burton*, 13 Barb. (N. Y.) 173; *Rogers v. Eagle Fire Co.*, 9 Wend. (N. Y.) 611.

5. Consult in this connection, 2 Minor's Insts. (3rd ed.) 210, *et seq.*

6. *Smeed v. Foord*, 1 El. & E. 613;



**NAUGHTY.**—See note 1.

**NAVIGABLE WATERS.**—(See ACCRETION, vol. 1, p. 136; ADMIRALTY, vol. 1, p. 193; BOOM COMPANIES, vol. 2, p. 469; BOUNDARIES, vol. 2, p. 495; BRIDGES, vol. 2, p. 540; DAM, vol. 4, p. 971; FERRIES, vol. 7, p. 941; FISH AND FISHERIES, vol. 8, p. 23; HIGHWAY, vol. 9, p. 362; ICE AND ICE COMPANIES, vol. 9, p. 852; INTERNATIONAL LAW, vol. 11, p. 431; LAKES AND PONDS, vol. 12, p. 610; LOGS AND LUMBER, vol. 13, p. 1018; MILLS, vol. 15, p. 482; NAVIGATION; RIPARIAN RIGHTS; SHIPPING; WATER AND WATERCOURSES; WHARVES).

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**I. DEFINITION**—1. *In America.*—In the most approved modern sense of the term in this country, navigable waters include all

s.c., 102 E.C.L. 612; *Mitchell v. Clarke*, 71 Cal. 164; *Kuhn v. Jewett*, 32 N. J. Eq. 649; *Parke v. Frank*, 75 Cal. 370.

1. In *Merivale v. Carson*, 36 W. R. 231, LORD ESHER, M. R., said: "For the defendant it was contended . . . that the words 'naughty wife,' as there applied (in the newspaper criticism of a play), did not necessarily mean an adulterous woman. It might be a question for the judge at the trial whether,

in this particular play, the word 'naughty' could imply 'adultery,' and the court might come to the conclusion that it could not, by any reasonable person, be taken to mean 'adulterous.' But unless it was held that there was no evidence to go to the jury upon such a point, the jury were right in putting their interpretation upon the words, and I am inclined to agree that such was the meaning of the critic."

those which afford a channel for useful commerce. Such waters are public highways of common right.<sup>1</sup>

**1. American Definition.—Waters Navigable in Fact Are Public Highways.—**

*Alabama.*—Bullock v. Wilson, 2 Port. (Ala.) 436; State v. Bell, 5 Port. (Ala.) 365; Rhodes v. Otis, 33 Ala. 578; Peters v. New Orleans etc. R. Co., 56 Ala. 528; Walker v. Allen, 72 Ala. 456; Lewis v. Coffee Co., 77 Ala. 190; s. c., 54 Am. Rep. 55; Sullivan v. Spotswood, 82 Ala. 163; Olive v. State, 86 Ala. 88, 93.

*Arkansas.*—Little Rock etc. R. Co. v. Brooks, 39 Ark. 403; St. Louis etc. R. Co. v. Ramsey (Ark.), 13 S. W. Rep. 931; s. c., 8 L. R., A. 559.

*California.*—Gunter v. Geary, 1 Cal. 462; American River Water Co. v. Amsden, 6 Cal. 443; People v. Gold Run Ditch Min. Co., 66 Cal. 138, 146; s. c., 56 Am. Rep. 80.

*Connecticut.*—Adams v. Pease, 2 Conn. 481; Chapman v. Kimball, 9 Conn. 38, 41; s. c., 21 Am. Dec. 707; Hollister v. Union Co., 9 Conn. 436; s. c., 25 Am. Dec. 36.

*Georgia.*—Young v. Harrison, 6 Ga. 130, 141; Code of Georgia, 1882, § 2229.

*Illinois.*—Middleton v. Pritchard, 4 Ill. 510; s. c., 38 Am. Dec. 112; Godfrey v. Alton, 12 Ill. 510; s. c., 52 Am. Dec. 476; Illinois River Packet Co. v. Peoria Bridge Assoc., 38 Ill. 467; Ensinger v. People, 47 Ill. 384; s. c., 95 Am. Dec. 495; Chicago v. McGinn, 51 Ill. 266; s. c., 2 Am. Rep. 295; Healy v. Joliet etc. R. Co., 2 Ill. App. 435; Washington Ice Co. v. Shortall, 101 Ill. 46, 52; s. c., 40 Am. Rep. 196; McCartney v. Chicago etc. R. Co., 112 Ill. 611, 634.

*Indiana.*—Cox v. State, 3 Blackf. (Ind.) 193; Martin v. Bliss, 5 Blackf. (Ind.) 35; s. c., 32 Am. Dec. 52; Depew v. Trustees of Wabash etc. Canal, 5 Ind. 9; St. Joseph Co. v. Pidge, 5 Ind. 13; Neaderhouser v. State, 28 Ind. 257; Bainbridge v. Sherlock, 29 Ind. 364; s. c., 95 Am. Dec. 644; Sherlock v. Bainbridge, 41 Ind. 35; s. c., 13 Am. Rep. 302; Ross v. Faust, 54 Ind. 471; s. c., 23 Am. Rep. 655.

*Iowa.*—McManus v. Carmichael, 3 Iowa 1; Steamboat "Globe" v. Kurtz, 4 G. Greene (Iowa), 433; Tomlin v. Dubuque etc. R. Co., 32 Iowa 106; s. c., 7 Am. Rep. 176; Wood v. Chicago etc. R. Co., 60 Iowa 466.

*Kansas.*—Wood v. Fowler, 26 Kan. 682; s. c., 40 Am. Rep. 330.

*Kentucky.*—Green & Barren River Nav. Co. v. Palmer, 83 Ky. 646; Kentucky Lumber Co. v. Green, 87 Ky. 257, 258.

*Louisiana.*—Boykin v. Shaffer, 13 La. An. 129; Ingram v. Police Jury of St. Tammany, 20 La. An. 226; Goodwill v. Bossier Police Jury, 38 La. An. 752, 755.

*Maine.*—Berry v. Carle, 3 Me. 269; Spring v. Russell, 7 Me. 290; Moor v. Veazie, 31 Me. 360; Brown v. Chadbourne, 31 Me. 9, 21; s. c., 50 Am. Dec. 641; Treat v. Lord, 42 Me. 552; s. c., 66 Am. Dec. 298; Parsons v. Clark, 76 Me. 476.

*Maryland.*—2 Public Gen. Laws 1888, art. 54, § 44; art. 98, § 21; Albert v. State, 66 Md. 325, 366; s. c., 59 Am. Rep. 159.

*Massachusetts.*—Commonwealth v. Chapin, 5 Pick. (Mass.) 199; Ingraham v. Wilkinson, 4 Pick. (Mass.) 268; s. c., 16 Am. Dec. 342; Commonwealth v. Alger, 7 Cush. (Mass.) 53, 82; Blood v. Nashua etc. R. Co., 2 Gray (Mass.) 137, 139; s. c., 61 Am. Dec. 444.

*Michigan.*—La Plaisance Bay Harbor Co. v. Monroe, Walk. (Mich.) 155; Lorman v. Benson, 8 Mich. 18; s. c., 77 Am. Dec. 435; Tyler v. People, 8 Mich. 320; Ryan v. Brown, 18 Mich. 195, 207; Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336; s. c., 18 Am. Rep. 184; Butterfield v. Gilchrist, 53 Mich. 22; Turner v. Holland, 54 Mich. 300, 65 Mich. 453.

*Minnesota.*—Castner v. The Steamboat Dr. Franklin, 1 Minn. 73; Schurmeier v. St. Paul etc. R. Co., 10 Minn. 82; s. c., 58 Am. Dec. 59; Swanson v. Mississippi etc. Boom Co., 42 Minn. 532.

*Mississippi.*—Morgan v. Reading, 3 Smed. & M. (Miss.) 366; Comm. of Homochitto River v. Withers, 29 Miss. 21, 37; Smith v. Louisville etc. R. Co., 62 Miss. 510, 512; Smith v. Fonda, 64 Miss. 551.

*Missouri.*—O'Fallon v. Daggett, 4 Mo. 343, 347; s. c., 29 Am. Dec. 640; Benson v. Morrow, 61 Mo. 345; Meyers v. St. Louis, 8 Mo. App. 266, 272.

*New Hampshire.*—Carter v. Thurston, 58 N. H. 104; s. c., 42 Am. Rep. 584; Thompson v. Androscoggen River Imp. Co., 58 N. H. 108.

*New Jersey.*—Attorney General v. Delaware etc. R. Co., 27 N. J. Eq. 1, 7;

*Lister v. Newark Plank Road Co.*, 36 N. J. Eq. 477.

*New York*.—*Palmer v. Mulligan*, 3 Cal. (N. Y.) 308; s. c., 2 Am. Dec. 270; *Hooker v. Cummings*, 20 Johns. (N. Y.) 90; s. c., 11 Am. Dec. 249; *People v. Canal Appraisers*, 13 Wend. (N. Y.) 355; *People v. Canal Appraisers*, 33 N. Y. 461; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; *Morgan v. King*, 18 Barb. (N. Y.) 277, 283; s. c., 35 N. Y. 454, 459; s. c., 91 Am. Dec. 58; *Roberts v. Baumgarten*, 110 N. Y. 380, 383.

*North Carolina*.—*Wilson v. Forbes*, 2 Dev. (N. Car.) 30, 34; *Ingram v. Threadgill*, 3 Dev. (N. Car.) 59, 61; *Collins v. Benbury*, 5 Ired. (N. Car.) 118; s. c., 42 Am. Dec. 155; *Fagan v. Armistead*, 11 Ired. (N. Car.) 433; *State v. Dibble*, 4 Jones (N. Car.) 107, 110; *Davis v. Jerkins*, 5 Jones (N. Car.) 290, 292; *Broadnax v. Baker*, 94 N. Car. 675, 681; s. c., 55 Am. Rep. 633; *Hodges v. Williams*, 95 N. Car. 331, 335; s. c., 59 Am. Rep. 242; *State v. Narrows Island Club*, 100 N. Car. 477, 481.

*Ohio*.—*Gavit v. Chambers*, 3 Ohio 495, 498; *Lamb v. Ricketts*, 11 Ohio 311, 315; *Walker v. Board of Public Works*, 16 Ohio 540, 544; *Hickok v. Hine*, 23 Ohio St. 523, 527; s. c., 13 Am. Rep. 255.

*Oregon*.—*Weise v. Smith*, 3 Oregon 445; *Haines v. Welch*, 14 Oregon 319.

*Pennsylvania*.—*Carson v. Blazer*, 2 Binn. (Pa.) 475; s. c., 4 Am. Dec. 463; *Shrunk v. Schuylkill Nav. Co.*, 14 S. & R. (Pa.) 71, *Bird v. Smith*, 8 Watts (Pa.) 434; s. c., 34 Am. Dec. 483; *Johns v. Davidson*, 16 Pa. St. 512, 522; *Barclay R. & Coal Co. v. Ingham*, 36 Pa. St. 194, 200; *Com. v. Fisher*, 1 P. & W. (Pa.) 462; *Flanagan v. Philadelphia*, 42 Pa. St. 219; *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112, 120; s. c., 84 Am. Dec. 527; *McKeon v. Delaware Division Canal Co.*, 49 Pa. St. 424, 433; *Stover v. Jack*, 60 Pa. St. 339; *Wainwright v. McCullough*, 63 Pa. St. 66, 73; *Poor v. McClure*, 77 Pa. St. 214; *Pursell v. Stover*, 110 Pa. St. 43, 46; *Fulmer v. Williams*, 122 Pa. St. 191.

*South Carolina*.—*Cates v. Wadlington*, 1 McCord (S. Car.) 580; s. c., 10 Am. Dec. 699. But see *McCullough v. Wall*, 4 Rich. (S. Car.) 68; *Shands v. Triplet*, 5 Rich. Eq. (S. Car.) 76, 79.

*Tennessee*.—*Elder v. Burrus*, 6 Humph. (Tenn.) 358; *Stuart v. Clark*, 2 Swan. (Tenn.) 1; s. c., 58 Am. Dec. 49; *Sigler v. State*, 7 Baxt. (Tenn.) 493; *Holbert v. Endens*, 5 Lea (Tenn.) 204,

207; s. c., 40 Am. Rep. 26; *Goudwin v. Thompson*, 15 Lea (Tenn.) 209; s. c., 54 Am. Rep. 410.

*Texas*.—*Selman v. Wolfe*, 27 Tex. 68. *West Virginia*.—*Ravenswood v. Flemings*, 22 W. Va. 52; s. c., 46 Am. Rep. 485; *Barre v. Fleming*, 29 W. Va. 314; *Gaston v. Mace*, 33 W. Va. 14.

*Wisconsin*.—*Walker v. Shepardson*, 4 Wis. 486; s. c., 2 Wis. 384; s. c., 60 Am. Dec. 423; *Boorman v. Sunnucha*, 42 Wis. 233; *Diedrich v. Northwestern R. Co.*, 42 Wis. 248, 263; *Black River Flooding Dam Assoc. v. Ketchum*, 54 Wis. 313; *Norcross v. Griffiths*, 65 Wis. 599; 56 Am. Rep. 642.

*United States*.—Ordinance of 1787, art. 4; *Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91, 97; *Bowman v. Wathen*, 2 McLean (U. S.) 376, 382; *The Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 443; *Railroad Co. v. Schurmeir*, 7 Wall. (U. S.) 272; *Rundle v. Delaware etc. Canal Co.*, 14 How. (U. S.) 79; *The Daniel Ball*, 10 Wall. (U. S.) 557; *The Montello*, 20 Wall. (U. S.) 430; *Barney v. Keokuk*, 94 U. S. 324, 338; *Pound v. Teurck*, 95 U. S. 459.

It will be noticed that, in some of the earlier of these cases, the term "navigable" is used in its common law sense (see *infra*), but they nevertheless confirmed the general principle stated in the text. There is a marked unanimity in the later authorities from almost every State in support of the American rule. A few excerpts from leading opinions will serve to illustrate the development of the law on this subject and the trend of late decisions.

*TILGHMAN, C. J.*: It is said, however, that some of the cases assert, that by navigable waters are meant, rivers in which there is no [a?] flow or reflow of the tide. This definition may be very proper in *England*, where there is no river of considerable importance as to navigation, which has not a flow of the tide; but it would be highly unreasonable when applied to our large rivers, such as the *Ohio*, *Alleghany*, *Delaware*, *Schuylkill*, or *Susquehanna*, and its branches. *Carson v. Blazer*, 2 Binn. (Pa.) 475, 478; s. c., 4 Am. Dec. 463.

*TURLEY, J.*: All laws are or ought to be, an adaptation of principles of action to the state and condition of a country, and to its moral and social position. . . . The insular position of Great Britain, the short courses of her rivers, and the well known fact that there are none of them navigable above

tide-water but for very small craft, well warrants the distinction there drawn by the common law. But very different is the situation of the continental powers of Europe in this particular. Their streams are many of them large and long, and navigable to a great extent above tide water, and accordingly we find that the civil law which regulates and governs those countries has adopted a very different rule as to what are or are not navigable streams, and by it all rivers, even above tide-water, provided they are navigable for ships or boats, are considered as public property. Now, these principles of the common and civil law are not in conflict with one another; they are both right and proper for the countries to which they are made to apply. In *England* there are no streams navigable above tide-water; but the reverse is true of the continent, and the end designed to be effected, both by the common and civil law upon this subject, is identical—viz, that navigable waters shall not become private property, but shall belong to the community at large. If the local situation of the continent of Europe required an extension of the construction of what was necessary to constitute a navigable river, and prevented its restriction to tide-water much more so does that of our own country, and particularly the valley of the Mississippi. *Elder v. Burrus*, 6 Humph. (Tenn.) 358, 366-7 (1845).

WELLS, J.: If a stream could be subject to public servitude by long use only, many large rivers in newly settled States, and some in the interior of this State, would be altogether under the control and dominion of the owners of their beds, and the community would be deprived of the use of those rivers, which nature has plainly declared to be public highways. The true test, therefore, to be applied in such cases, is, whether a stream is inherently and in its nature, capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs. *Brown v. Chadbourne*, 31 Me. 9, 21; s. c., 50. Am. Dec. 641.

WOODWARD, J.: It is navigability in fact, which forms the foundation for navigability in law; and from the fact follows the appropriation to public use, and hence its publicity and legal navigability. . . . It is impossible to bring the mind to an approval, when we attempt to apply to the rivers of this country, stretching up to three

thousand miles of extent—flowing through or between numerous and independent States, and bearing a commerce which competes with that of the oceans—a test which might be applicable to an island not so large as some two of our States; and to streams whose utmost length was less than three hundred miles, and whose outlet and fountain, at the same time, could be within the same State jurisdiction. In *England* or in *Great Britain*, the chief rivers are the Severn, Thames, Kent, Humber, and Mersey; the latter of which is about fifty, and the first about three hundred miles in length, and of this (the Severn) about one hundred miles consist of the Bristol Channel. The world renowned Thames has the diminutive proportion of two hundred miles. And of even these lengths, not the whole is navigable. Thus it will be seen that these chief rivers of good old England, range in extent with our Connecticut, Merrimac, Hudson, Alleghany, Monongahela, Cedar, Iowa, and Des Moines, and bear a proportion of one to twenty, when compared with the greater rivers of this continent. *McManus v. Carmichael*, 3 Iowa 1, 30-1 (1856).

READ, J.: We are aware by the common law of England, such streams as the Mississippi, the Missouri, the rivers Amazon and Plate, the Rhine, the Danube, the Po, the Nile, the Euphrates, the Ganges and the Indus, were not navigable rivers, but were the subject of private property, whilst an insignificant creek in a small island was elevated to the dignity of a public river, because it was so near the ocean that the tide ebbed and flowed up the whole of its petty course. The Roman law, which has pervaded continental Europe, and which took its rise in a country where there was a tideless sea, recognized all rivers as navigable which were really so, and this common-sense view was adopted by the early founders of Pennsylvania, whose province was intersected by large and valuable streams, some of which are a mile in breadth. *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112, 120-1; s. c., 85 Am. Dec. 527.

UPTON, J.: It may be considered the settled law of the United States, that so much of the doctrine of the common law of England, as made the ebb and flow of the tide a test of navigability, is not now applicable in the United States. On the contrary, the

"maxim of Lord Mansfield, "out of the fact arises the right," is applied by the courts of this country, *citing* *Morgan v. King*, 35 N. Y. 454; s. c., 91 Am. Dec. 58; *Jones v. Pettibone*, 2 Wis. 308; *Weise v. Smith*, 3 Oreg. 435, 448.

FIELD, J.: The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in *England*, or any test at all of the navigability of waters. There, no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. *The Daniel Ball*, 10 Wall. (U. S.) 557, 563.

DAY, J.: A river is regarded as navigable which is capable of floating to market the products of the country through which it passes, or upon which commerce may be conducted; and, from the fact of its being so navigable, it becomes in law a public river or highway. The character of a river, as such highway, is not so much determined by the frequency of its use for that purpose as it is by its capacity of being used by the public for purposes of transportation and commerce. *Hickok v. Hine*, 23 Ohio St. 523, 527; s. c., 13 Am. Rep. 255.

DAVIS, J.: It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for pur-

poses of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. *The Montello*, 20 Wall. (U. S.) 430, 441-2.

FOSTER, J.: The public easement is not, as was formerly inferred by our courts (*Scott v. Willson*, 3 N. H. 321, 325), founded upon usage, custom or prescription. Any stream capable of being generally and commonly useful for some purpose of trade, and the transportation of property, whether by steamers, or sailing vessels, or oar-boats, or rafts, is a public stream. *Carter v. Thurston*, 58 N. H. 104, 106-7; s. c., 42 Am. Rep. 584.

RYAN, C. J.: Waters at the common law were called navigable, only when affected by the ebb and flow of the tide. Of course in this State, bounded on one side by a great freshwater sea, and on another by a great river, which, with its confluent, constitutes perhaps the most extensive inland navigation in the world, and having within it many streams and bodies of water capable of navigation and actually navigated, there is no water subject to the ebb and flow of the tide, or called navigable at the common law. Here, therefore, the restricted sense of the word navigable, at the common law, is wholly inappropriate to the actual conditions of things. Waters are here held navigable when capable of navigation in fact, without other condition. And when we use the terms navigable or unnavigable, we mean capable or incapable of actual navigation. *Diedrich v. Northwestern R. Co.*, 42 Wis. 248, 268.

BAILEY, J.: It may be remarked that none of the streams or water-courses within this State are navigable in the sense of the common law. No rivers, by the common law, are navigable above the ebb and flow of the tide; and as this State is situated many hundred miles above the highest point at which the tide ebbs and flows in the Mississippi and St. Lawrence, to which all our waters are tributary, it is manifest that the classification of waters into navigable and non-navigable by the common law rule, at least so far as relates to the public easement, can have

(a) *Commerce Carried on Over Such Waters Must be Valuable.*  
—In order that waters may be navigable in the legal sense, commerce must be carried on over them which is of an essentially valuable character.<sup>1</sup>

no application here. *Healy v. Joliet etc. R. Co.*, 2 Ill. App. 435, 439.

BRICKELL, C. J.: It is not the ebb and flow of the tide which, as in *England*, constitutes the usual, or, it may be said, any test at all of the navigability of waters, by which we mean their subjection to public use. The test is the adaptability of the waters to the purposes of navigation; whether they are, or in fact have been, used by the public, or are capable of being used, in their natural condition, as highways for commerce; for trade and travel; for the transportation of the products of the country, of its industries, of its fields, forests or mines, in the customary modes of such transportation. *Walker v. Allen*, 72 Ala. 456, 457-8.

SMITH, J.: Navigable waters, constituting highways, are not ascertained here, as they are in *England*, an island accessible to ocean tides, by the extent of their ebb and flow, but by a more practical test of their capacity to float boats used as instruments of commerce, in the interchange of commodities, and large enough for the purpose. *Broadnax v. Baker*, 94 N. Car. 675, 681; s. c., 55 Am. Rep. 633.

GREEN, J.: The great mass of the commerce of the United States is transported on waters in which the tide does not ebb and flow. And even when it is moved upon streams on which the tide does ebb and flow it is only for a comparatively short distance, while, for nearly the whole distance, it has been moved from above the tide-water section of the country. Indeed, this is the case in many States of the Union that carry on a large commerce, and in which there is no tide water—our own State for instance. But in none of these States has it ever been held that these are not navigable streams, simply because there was no ebb or flow of the tide. *Gaston v. Mace*, 33 W. Va. 14, 20.

BATTLE, J.: The ebb and flow of the tide is merely an arbitrary test, since many waters where the tide flows are not in fact navigable, and many, especially on the continent, where it does not flow, are navigable. . . . While in *England* the ebb and flow of

the tide is the most convenient, certain and usual test of the navigability of rivers, as the tide does in fact ebb and flow in all its navigable rivers, it is wholly inapplicable in this country, where there are large fresh water rivers thousands of miles long, flowing almost across the entire continent, bearing upon their bosom the commerce of the outside world in part, as well as of the continent. *St. Louis etc. R. Co. v. Ramsey* (Ark.), 13 S. W. Rep. 931; s. c., 8 L. R., A. 559, 561.

1. *Burrows v. Gallup*, 32 Conn. 493, 501; s. c., 87 Am. Dec. 186; *Neaderhouse v. State*, 28 Ind. 257; *Woodman v. Pittman*, 79 Me. 456; *Charleston v. Middlesex Co.*, 3 Metc. (Mass.) 202; *Murdock v. Stickney*, 8 Cush. (Mass.) 113, 115; *Rowe v. Granite Bridge Corp.*, 21 Pick. (Mass.) 344.

"But this language is applied to the capacity of the stream, and is not intended to be a strict enumeration of the uses to which it must be actually applied in order to give it this character. Navigable streams are highways; and a traveller for pleasure is as fully entitled to protection in using a public highway, whether by land or by water, as a traveller for business." Per CHAPMAN, C. J., in *Attorney General v. Woods*, 108 Mass. 436, 439.

But it was held in *Burrows v. Whitwam*, 59 Mich. 279, that "The fact that the public have used a river after a dam was built across it, for pleasure boating or fishing, has no tendency whatever to prove it navigable."

*Town of Wethersfield v. Humphrey*, 20 Conn. 217, was a proceeding against certain parties for obstructing navigation. In order to furnish access to a ferry, they had laid out a highway across the mouth of Keeney's Cove, an inlet from the Connecticut River, in which the tide ebbed and flowed. The court held that the obstruction complained of did not constitute a public nuisance, and in the course of the opinion said (p. 227): "This cove cannot be said to be navigable by any craft whatever, though at times a fish boat or skiff or Indian canoe may be pushed through its waters; or, in the winter months occasionally, a small

(b) *Streams merely floatable* are highways. But such commerce need not be conducted by means of boats and vessels; waters which are capable only of floating rafts and logs are public highways for that purpose.<sup>1</sup>

sea boat is laid up to avoid the ice of the river. But this is not navigation. That only is such, and those only are navigable waters where the public pass and re-pass upon them with vessels or boats in the prosecution of useful occupations. There must be some commerce or navigation which is essentially valuable. A hunter or fisherman, by drawing his boat through the waters of a brook or shallow creek, does not create navigation, or constitute their waters channels of commerce."

It has also been held that the property which is the subject of such commerce, must be "conducted by the agency of man." *Munson v. Hungerford*, 6 Barb. (N. Y.) 265. But this doctrine was not followed in *Morgan v. King*, 18 Barb. (N. Y.) 227.

1. *Lewis v. Coffee Co.*, 77 Ala. 190; s. c., 54 Am. Rep. 55; *Sullivan v. Jernigan*, 21 Fla. 264; *Berry v. Carle*, 3 Me. 269; *Spring v. Russell*, 7 Me. 273; *Wadsworth v. Smith*, 11 Me. 278; s. c., 26 Am. Dec. 525; *Brown v. Chadbourne*, 31 Me. 9; s. c., 50 Am. Dec. 641; *Knox v. Chaloner*, 42 Me. 150; *Treat v. Lord*, 42 Me. 552; s. c., 66 Am. Dec. 298; *Brown v. Black*, 43 Me. 443; *Veazie v. Dwinel*, 50 Me. 479; *Gerrish v. Brown*, 51 Me. 256; s. c., 81 Am. Dec. 569; *Davis v. Winslow*, 51 Me. 264; s. c., 81 Am. Dec. 573; *Lancey v. Clifford*, 54 Me. 487; s. c., 92 Am. Dec. 561; *Moore v. Sanborne*, 2 Mich. 520; s. c., 59 Am. Dec. 209; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336; s. c., 18 Am. Rep. 184; *Thompson v. Androscoggin Co.*, 54 N. H. 545; *Carter v. Thurston*, 58 N. H. 104; s. c., 42 Am. Rep. 584; *Shaw v. Crawford*, 10 Johns. (N. Y.) 236; *Brown v. Scofield*, 8 Barb. (N. Y.) 239; *Morgan v. King*, 18 Barb. (N. Y.) 277, 284; 30 Barb. (N. Y.) 90; 35 N. Y. 454; s. c., 91 Am. Dec. 58; *Town of Pierpont v. Loveless*, 72 N. Y. 211, 216; *Weise v. Smith*, 3 Oreg. 445; *Felger v. Robinson*, 3 Oreg. 455; *Shaw v. Oswego Iron Co.*, 10 Oreg. 371; s. c., 45 Am. Rep. 146; *Stuart v. Clark*, 2 Swan (Tenn.) 16; s. c., 58 Am. Dec. 49; *Gatson v. Mace*, 33 W. Va. 14; *Whisler v. Wilkinson*, 22 Wis. 572; *Sellers v. Union Lumbering Co.*, 39 Wis. 525; *Olson v. Merrill*, 42 Wis. 203,

212; *Cohn v. Wausau Boom Co.*, 47 Wis. 324; *Weatherby v. Meiklejohn*, 56 Wis. 73; *Herman v. Beef Slough Mfg. etc. Co.*, 8 Biss. (U. S.) 334; 1 Fed. Rep. 145; *United States v. Mississippi etc. Boom Co.*, 3 Fed. Rep. 548; *Esson v. M'Master*, 1 Kerr (N. Brunswick) 501; *Rower v. Titus*, 1 Allen (N. Brunswick) 326, 333; *Boissonault v. Olivia, Stuart* (Lower Canada) 564.

"Upon many of our streams, although of sufficient capacity for navigation by boats, they are never seen—whilst rafts of lumber of immense value, and mill logs which are counted by thousands, are annually floated along them to market. Accordingly we find that a capacity to float rafts and logs in those States where the manufacture of lumber is prosecuted as a branch of trade, is recognized as a criterion of the public right of passage and of use, upon the principle already adverted to, that such right is to be ascertained from the public necessity and occasion for such use." Per MARTIN, J., in *Moore v. Sanbourne*, 2 Mich. 520, 526.

**Qualifications of This Rule.**—(See also next note)—*South Carolina*. "Although we cannot define by technical terms what constitutes a navigable river in this State, yet I presume we may venture to say that cannot be considered a navigable river, the natural obstructions of which prevent the passage of boats of any description whatever." Per NOTT, J., in *Cates v. Wadlington*, 1 McCord (S. Car.) 582; s. c., 10 Am. Dec. 699.

*California*.—In *American River Water Co. v. Amsden*, 6 Cal. 413, it was held that while a stream is navigable which can float rafts of lumber, it is not so if it only have capacity for floating logs and planks.

On the other hand, in *Pennsylvania*, a stream declared by statute to be a public highway for the passage of "boats and rafts," is open to the public use for floating logs, though not fastened together. *Deddrick v. Wood*, 15 Pa. St. 9.

**Restrictions on the Right of Floatage.**—It has been held that streams in which logs cannot be floated without being propelled by persons on the

(c) *Navigability Need Not be Perennial.*—It is not necessary that such waters be fit for navigation at all times, but their capacity therefor must recur with regularity.<sup>1</sup>

banks, are not navigable. *Brown v. Chadbourne*, 31 Me. 9; s. c., 50 Am. Dec. 60; *Treat v. Lord*, 42 Me. 552; s. c., 66 Am. Dec. 298; *Morgan v. King*, 35 N. Y. 454; s. c., 91 Am. Dec. 58. But this rule has not been adopted in Wisconsin. *Olson v. Merrill*, 42 Wis. 203, 212. See also *Weise v. Smith*, 3 Oreg. 445.

In *Michigan*, a private stream capable of floatage cannot be used for floating logs not cut near its banks. *Koopman v. Blodgett* (Mich.), 14 N. W. Rep. 909. And the language of other decisions would seem to limit this right to the transportation of the products of lands adjacent to the banks of the stream. See *Smith v. Fonda*, 64 Miss. 551, 554; *Morgan v. King*, 35 N. Y. 454, 459; s. c., 91 Am. Dec. 58.

On a stream which is valuable for floatage, but not for navigation in the more enlarged sense, it cannot be said that the right of floatage is so far paramount to the use of the water for machinery as to authorize the sacrifice of the latter for the former interest. *Middleton v. Flat River Booming Co.*, 27 Mich. 533.

At those times when a stream is not naturally floatable, an upper riparian owner has no right to detain the water until a flood can be caused, to the detriment of a lower proprietor, sufficient for floating logs. *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336; s. c., 18 Am. Rep. 184; *Witheral v. Muskegon Booming Co.*, 68 Mich. 48.

1. *Navigability Need Not be Perennial.*—*Walker v. Allen*, 72 Ala. 456; *Little Rock etc. R. Co. v. Brooks*, 39 Ark. 403, 409; *Moore v. Sanborne*, 2 Mich. 519; s. c., 59 Am. Dec. 209; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336; s. c., 18 Am. Rep. 184; *Hogg v. Zanesville etc. Canal Co.*, 5 Ohio 410, 422; *Olson v. Merrill*, 42 Wis. 203, 212.

But It Must be Periodical.—*Lewis v. Coffee Co.*, 77 Ala. 190; s. c., 54 Am. Rep. 55; *Smith v. Fonda*, 64 Miss. 551; *Haines v. Hall*, 17 Oreg. 165; *Olson v. Merrill*, 42 Wis. 203.

*Streams Periodically Floatable.*—The decisions are not harmonious respecting the right of the public to use streams which are capable only of floatage, and that for but a portion of the year. In

States where the lumber industry is important, such streams are held to be subject to the public use during times when they have sufficient capacity. *Brown v. Chadbourne*, 31 Me. 9; s. c. 50 Am. Dec. 641; *Smith v. Fonda*, 64 Miss. 551, 559; *Weise v. Smith*, 3 Oreg. 445; *Shaw v. Oswego Iron Co.*, 10 Oreg. 371. See also the dictum in *Barclay R. & Coal Co. v. Ingham*, 36 Pa. St. 201, 202.

MARTIN, J.: "It is a valuable, rather than a continual use, which determines the public right." *Moore v. Sanborne*, 2 Mich. 526; s. c., 59 Am. Dec. 207.

DANFORTH, J.: "In order to make a stream floatable, it is not necessary that it should be so at all seasons of the year. It is sufficient if it have that character at different periods with reasonable certainty and for such a length of time as to make it profitable for that purpose." *Holden v. Robinson Mfg. Co.*, 65 Me. 216.

BOISE, C. J.: "We hold the law to be, that any stream in this State is navigable on whose waters logs or timbers can be floated to market, and that they are public highways for that purpose, and that it is not necessary that they be navigable the whole year for that purpose to constitute them such. If at high water they can be used for floating timber, then they are navigable." *Felger v. Robinson*, 3 Oreg. 457-8; citing *Moor v. Veazie*, 32 Me. 343; s. c., 52 Am. Dec. 655; *Treat v. Lord*, 42 Me. 552; s. c., 66 Am. Dec. 298; *Brown v. Scofield*, 8 Barb. (N. Y.) 243.

But "however necessary it may be in the great lumbering States of Maine and Michigan, that private rights should yield to the prevailing interest, no such necessity exists in this State." BRESEE, J., in *Hubbard v. Bell*, 54 Ill. 110, 118; s. c., 5 Am. Rep. 98.

And in other States the rule is laid down that small streams capable of floating logs only during a freshet or for a limited portion of the year, are not subject to the public easement of floatage. *Rhodes v. Otis*, 33 Ala. 578; *Lewis v. Coffee Co.*, 77 Ala. 190; s. c., 54 Am. Rep. 55; *Cardwell v. Sacramento Co.*, 79 Cal. 347; *Rowe v. Granite Bridge Corp.*, 21 Pick. (Mass.) 344; *Munson v. Hungerford*, 6 Barb. (N. Y.) 265; *Curtis v. Keesler*, 14 Barb. (N. Y.) 511;



(d) *Navigability Need Not be Continuous*.—Nor is it essential that waters, in order to be navigable, afford a continuous passage throughout their entire extent for water-craft or logs.<sup>1</sup>

(e) *Waters Artificially Navigable*.—Most of the authorities limit the term navigable to waters having a natural and inherent capacity for navigation.<sup>2</sup>

(f) *Other Tests of Navigability*.—In addition to the general criterion of adaptability for the purposes of commerce, which all the American authorities emphasize, other tests of navigability are stated in some of the cases and will be found in the notes.<sup>3</sup>

*Morgan v. King*, 18 Barb. (N. Y.) 277; 30 Barb. (N. Y.) 9; 35 N. Y. 454; s. c., 91 Am. Dec. 58; *Haines v. Welch*, 14

Oreg. 319; *Haines v. Hall*, 17 Oreg. 165. If, however, such stream is so used without objection for twenty years, it is a public thoroughfare. *Stump v. McNairy*, 5 Humph. (Tenn.) 363; s. c., 42 Am. Dec. 437.

On the general subject of streams periodically navigable, see articles in 5 Albany Law Journal, 359 and 407.

1. *Walker v. Allen*, 72 Ala. 456; *Brown v. Chadbourne*, 31 Me. 9, 25; s. c., 50 Am. Dec. 641; *Morgan v. King*, 18 Barb. (N. Y.) 277; *Broadnax v. Baker*, 94 N. Car. 675, 681; s. c., 55 Am. Rep. 633; *The Montello*, 20 Wall. (U. S.) 430; *Spooner v. McConnell*, 1 McLean (U. S.) 337, 350.

2. *Artificial Streams*.—See cases cited in foregoing note.

"A stream which can only be made floatable by artificial means, can in no sense be deemed a public highway." *MARTIN, J.* in *Moore v. Sanborne*, 2 Mich. 519, 524; s. c., 59 Am. Dec. 209.

Streams not naturally fitted for floating logs do not become public through improvement by the riparian owner. *Wadsworth v. Smith*, 11 Me. 278; s. c., 26 Am. Dec. 525; *Holden v. Robinson Mfg. Co.*, 65 Me. 215.

In *Oregon*, an artificial channel opened by an individual for his special use, and capable of floating logs and small boats for a few days in the year and at high water only, is not subject to the public easement. *Nutter v. Gallagher* (Oregon 1890), 24 Pac. Rep. 250. See also *Haines v. Hall*, 17 Oreg. 165.

But the public may use for floatage a new channel into which the waters of a navigable stream have been diverted. *Dwinel v. Barnard*, 28 Me. 554; s. c., 48 Am. Dec. 507; *Dwinel v. Veazie*, 44 Me. 167.

In *England*, an artificial channel through which the waters of a navigable

river flow to the sea, is public. *Regina v. Betts*, 44 Cox (C. C.) 211; 19 L. J., Q. B. 501.

And the same is true of a new channel created by a break in a dam. *Whisler v. Wilkinson*, 22 Wis. 572.

And in *South Carolina*, the court declined to say "that an individual has such an exclusive right to a river which is capable of being made navigable, that the legislature may not declare it to be a public highway, whenever the obstructions are removed and it becomes fit for public use." *Cates v. Wadlington*, 1 McCord (S. Car.) 583; s. c., 10 Am. Dec. 699.

3. The following are laid down in *Rhodes v. Otis*, 33 Ala. 578: Number of people interested in commerce carried on over the waters; importance of public interests involved; length of time floatable capacity continues; previous use by public; treatment in government surveys.

The existence of a current is not a test of the navigability of a river; it may be navigable with or without such current. *Turner v. Holland*, 54 Mich. 300; 65 Mich. 453.

In *Burroughs v. Whitwam*, 59 Mich. 279, the opinion of the majority of the court would seem to make actual use, and not capacity therefor, the test of navigability.

In *North Carolina*, the test of navigability has been held to be capacity to afford passage for *sea going vessels*. *Wilson v. Forbes*, 2 Dev. (N. Car.) 30; *Collins v. Benbury*, 3 Ired. (N. Car.) 277; s. c., 38 Am. Dec. 722; *State v. Glenn*, 7 Jones (N. Car.) 321. But this rule has been modified by recent decisions. *Broadnax v. Baker*, 94 N. Car. 675; s. c., 55 Am. Rep. 633; *Hodges v. Williams*, 95 N. Car. 331; s. c., 59 Am. Rep. 242.

Under Tenn. Code, §§ 1439, 1524, providing for the erection of mill dams across waters not navigable in the

(g) *Proof of Navigability*.—Navigable capacity is generally a question of fact,<sup>1</sup> and the burden of proving it is on the party alleging the same.<sup>2</sup> But the courts of some States will take judicial notice of the navigability of streams.<sup>3</sup>

2. *At common law* a distinction was made between waters navigable in law and those navigable in fact, the former phrase being used interchangeably with tide-waters.<sup>4</sup> This is the sense in which the term is still used in England,<sup>5</sup> and in many, especially the earlier, cases in this country.<sup>6</sup> Under this doctrine the title to

proper, legal or ordinary sense, a stream is not navigable which is not of sufficient depth naturally for valuable floatage, such as rafts, flatboats and small vessels. *Irwin v. Brown* (Tenn. 1889), 12 S. W. Rep. 340.

The Niagara River is a navigable river, notwithstanding the obstruction of the falls. *Re State Reservation Comm.*, 37 Hun (N. Y.) 537.

1. *A Question of Fact*.—*State v. Bell*, Port. (Ala.) 365; *Rhodes v. Otis*, 33 Ala. 578; *Olive v. State*, 86 Ala. 88; *Treat v. Lord*, 42 Me. 552; s. c., 66 Am. Dec. 298; *Smith v. Fonda*, 64 Miss. 551; *Felger v. Robinson*, 3 Oreg. 455; *Healey v. Joliet etc. R. Co.*, 116 U. S. 191. And may be proved by parol. *Little Rock etc. R. Co. v. Brooks*, 39 Ark. 403.

But when facts are ascertained it becomes a question of law. *Morgan v. King*, 18 Barb. (N. Y.) 277; *Rhodes v. Otis*, 33 Ala. 578; *Walker v. Allen*, 72 Ala. 456.

2. *Burden of Proof*.—*Walker v. Allen*, 72 Ala. 456; *Morrison v. Coleman*, 87 Ala. 655; *Lewis v. Coffee Co.*, 77 Ala. 190; s. c., 54 Am. Rep. 55; *Sullivan v. Spotswood*, 82 Ala. 163; *Alabama S. R. Nav. Co. v. Georgia Pac. R. Co.*, 87 Ala. 154.

The fact that a stream between two lakes was not meandered by United States surveyors raises a presumption that it is not navigable. *Clute v. Briggs*, 22 Wis. 607.

But a statute prohibiting obstructions in streams meandered by United States surveyors, does not dispense with proof of their navigability. *Jones v. Pettibone*, 2 Wis. 308. See also *Ross v. Faust*, 54 Ind. 471; s. c., 23 Am. Rep. 655.

All tide waters are *prima facie* navigable. See cases cited in foregoing note.

3. *Judicial Notice*.—*Bittle v. Stuart*, 34 Ark. 224; *Neaderhouser v. State*, 28 Ind. 257; *Ross v. Faust*, 54 Ind. 471;

s. c., 23 Am. Rep. 655; *Woods v. Fowler*, 26 Kan. 682; s. c., 40 Am. Rep. 330; *Hodgman v. St. Paul etc. R. Co.*, 23 Minn. 153, 160; *State v. Gilmanton*, 14 N. H. 467; *Thompson v. Andros-coggin Co.*, 54 N. H. 545; *Metzger v. Post*, 42 N. J. L. 77; s. c., 43 Am. Rep. 341; *Brown v. Scofield*, 8 Barb. (N. Y.) 239; *Lands v. A Cargo of 227 Tons of Coal*, 4 Fed. Rep. 478. See also *Walker v. Allen*, 72 Ala. 456; *Tewks-bury v. Schulenberg*, 41 Wis. 584.

In *England* it has been held that in instances of persons frequenting a stream for pleasure parties, etc., without consent of one claiming exclusive ownership, is sufficient proof that the stream is public. *Miles v. Rose*, 1 Marsh 313; 5 Taunt. 705.

4. 3 Kent's Commentaries (13th ed.) 413. And see generally cases cited in foregoing note. This definition was first laid down Royal Fishery in the Banne, 2 Davies (Eng.) 149.

5. See cases cited below.

In *England*, as is well brought out in the opinions quoted in the foregoing note, the physical conditions of the country rendered the common law definition approximately correct, and the same is largely true of Massachusetts, New Jersey and other States bordering on the ocean.

6. Although the weight of authority, as seen in the foregoing note is to the contrary, there are some well considered American cases in which the common law definition is adhered to. See *Mid-dleton v. Pritchard*, 4 Ill. 510; s. c., 38 Am. Dec. 112; *Chicago v. McGinn*, 51 Ill. 266, 272; s. c., 2 Am. Rep. 295; *Binney's Case*, 2 Bland Ch. (Md.) 124; *Browne v. Kennedy*, 5 Har. & J. (Md.) 196; *Day v. Day*, 22 Md. 530, 537; *Hatch v. Dwight*, 17 Mass. 289; s. c., 9 Am. Dec. 145; *Com. v. Charles-town*, 1 Pick. (Mass.) 180; s. c., 11 Am. Dec. 161; *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268, 271, 272; s. c., 16 Am. Dec. 342; *Com. v. Chapin*, 5 Pick.

the soil beneath all tide-waters was, in England,<sup>1</sup> in the king, and in this country in the State.<sup>2</sup>

(a) *The Tidal Test Only a Prima Facie One*.—But the ebb and flow of the tide was only a *prima facie* test of navigability even at common law, tidal waters, in many instances, being held non-navigable.<sup>3</sup>

(b) *Departures from the Common Law Definition*.—There have been two notable departures in America from the common law in this regard. *First*—An extension in meaning of the term navigable waters, so as to include all which are such in fact.<sup>4</sup> *Second*—In many States a change by which all nontidal waters fit for navigation came to be regarded as public property.<sup>5</sup>

3. *By the civil law*, waters navigable in fact are such in law; a navigable river being defined as "*statio itinere navigio*"—a place or way for navigation.<sup>6</sup> The development of American law on this subject is toward the adoption of the civil law doctrines.<sup>7</sup>

II. **CLASSES**.—Navigable waters may be divided into two classes,<sup>8</sup> public and semi-public; the basis of classification being ownership.

1. **Public**.—The waters of the first class and the soil beneath them are common property. The public not only have the right of navigation, but all other rights incident to ownership. Among these are fishing, gathering ice, sea-weed, sand and gravel,<sup>9</sup> etc. (See FISH AND FISHERIES, 8 Am. & Eng. Encyc. of Law 852; ICE AND ICE COMPANIES, 9 Am. & Eng. Encyc. of Law 852; To this class belong (a) tide-waters, including the sea and its arms and tidal-rivers; (b) in many of the States all fresh water rivers and lakes which afford capacity for valuable floatage. (See LAKES AND PONDS, 12 Am. & Eng. Encyc. of Law 610.)

(Mass.) 199; *Waterman v. Johnson*, 13 Pick. (Mass.) 261; *Bardwell v. Ames*, 22 Pick. (Mass.) 333; *Knight v. Wilder*, 2 Cush. (Mass.) 199; s. c., 48 Am. Dec. 660; *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 544; *Attorney General v. Woods*, 108 Mass. 436; s. c., 11 Am. Rep. 380; *Com. v. Vincent*, 108 Mass. 441; *Morgan v. Reading*, 3 Smed. & M. (Miss.) 368; *The Steamboat Magnolia v. Marshall*, 39 Mich. 110; *Scott v. Wilson*, 3 N. H. 321, 325; *Cobb v. Davenport*, 32 N. J. L. 379; *Attorney General v. Delaware etc. R. Co.*, 27 N. J. Eq. 631; *Arnold v. Mundy*, 6 N. J. L. 1; s. c., 10 Am. Dec. 356; *Benner v. Platter*, 6 Ohio 505, 510, note.

1. See cases cited *supra*.

2. See cases cited *supra*.

3. *Mayor of Lynn v. Turner*, Cowper 86; *Miles v. Rose*, 6 Taunt. (Eng.) 705; 1 Marsh. 313; *McManus v. Carmichael*, 3 Iowa 1, 27.

In *Rex v. Montague*, 6 D. & R. 616 (Eng.) 4 B. & C. 398, it is held that

the true criterion is the situation and nature of the channel. See also Woolrych on Waters, pp. 40-41.

Tidal channels are navigable in law only when so in fact. *State v. Pacific Guano Co.*, 22 S. Car. 50, 77.

4. See note *supra*.

5. See *supra*.

6. *Institutes Just.*, lib. 2, tit. 1; Digest, lib. 43, tits. 12, 13, 14; *Domat Civil Law*, Preliminary, bk. 1, tit. 3 § 1, arts. 1, 2; *Code Napoleon*, bk. 2, tit. 2, ch. 2, arts. 556, 560-63; tit. 1, ch. 3, art. 538.

7. See especially the later case cited in note *supra*.

8. For other classifications, see Angell on Watercourses (7th ed.) 1; *Stuart v. Clark*, 2 Swan (Tenn.) 9; s. c., 58 Am. Dec. 49; *Ross v. Faust*, 54 Ind. 471; s. c., 23 Am. Rep. 655; *Georgia Code* 2229; *Holbert v. Edens*, 5 Lea (Tenn.) 204, 207; s. c., 40 Am. Rep. 26.

9. See *supra*; *Solliday v. Johnson*, 38 Pa. St. 380.

(a) *Tidal*—(1) *National Dominion Over*—(See also ADMIRALTY, 1 Am. & Eng. Encyc. of Law 193; INTERNATIONAL LAW, 11 Am. & Eng. Encyc. of Law 431).—The open sea is the common property of all nations and cannot be exclusively appropriated.<sup>1</sup> But a nation has dominion over seas adjacent to its coast for a distance equal to the range of cannon, or about three miles.<sup>2</sup>

1. 1 Wharton's Int. Law Digest, § 26; 1 Kent Com. 26\*; Grotius De Jure Belli, bk. 2, ch. 2, § 3; Vattel, Droit des Gens (Chitty's ed.), § 280.

2. *The Marine League*.—1 Wharton's Int. Law Digest, § 32; Bynckershoek De Dominio Maris, ch. 2, p. 257; Vattel, Droit des Gens, § 287, *et seq.*; Wheaton's Int. Law (Lawrence), pt. 2, ch. 4, §§ 8, 10; 1 Phillimore's Int. Law (2nd ed.), ch. 4; Heffter Pub. Int. Law, § 75; Bluntschle, Das Moderne Volkrecht, §§ 307-9; The Leda Swa. Adm. (Eng.) 40; The Maria, 1 C. Rob. (Eng.) 340, 353; The Twee Gebroeders, 3 C. Rob. (Eng.) 162, 164; Regina v. 49 Casks of Brandy, 3 Hagg. Adm. (Eng.) 257, 289; The Saxonia, 15 Moore (P. C.) 262; Gammel v. Commrs. of Woods, 3 Macq., H. L. 419, 465; Gann v. Whitstable Free Fishers, 11 H. L. Cas. 192; 13 C. B., N. S. 853; 11 C. B., N. S. 387; Church v. Hubbard, 2 Cranch (U. S.) 187, 234; The Ann, 1 Gall. (U. S.) 62; United States v. Smiley, 6 Sawy. (U. S.) 640; Chase v. American Steamboat Co., 9 R. I. 419; s. c., 11 Am. Rep. 274. The range of cannon is taken as the measure of distance, on the principle that the dominion of a State extends only so far as it may be maintained by force from the coast. 1 Wharton's Int. Law, § 32, p. 102; Lawrence's Wheaton's Int. Law 846. Hence it seems that this distance may be extended with the increased range of canon. Hall Int. Law 127; Field Int. Code (2nd ed.), § 28; 1 Fiore Int. Law, § 373; Bluntschle, 303. See also an article by Francis Wharton, "The Marine Zone," 32 Albany Law Journal 104.

*Qualifications of the Doctrine*.—In United States v. Kessler, Baldw. (U. S.) 22, it was said that the principle on which nations claimed this extension was, "to protect their safety, peace and honor from invasion, disturbance and insult," and it was held that the court did not acquire jurisdiction over a crime committed on a foreign vessel, because the latter was within three miles of the shore.

In England, previous dicta and de-

cisions upholding the doctrine of marine extension were overruled in Queen v. Keyn, L. R., 2 Exch. Div. 63 (1876). In that case defendant was commander of a German vessel which negligently collided with and sunk a British ship, causing the death, by drowning, of one of its passengers. The affair took place within three miles of the coast of England, and by the law of that country the facts were such as to constitute manslaughter.

But it was held by a majority of the thirteen judges that low water mark on the coast was the limit of the territory of England, and that its courts had no jurisdiction over the person of defendant. Among the reasons advanced for this holding were: that the doctrine of the marine league was merely a shrinkage of the extravagant claims of early writers on international law (See Gould on Waters, §§ 3, 7; Henry, Adm. Jur., § 89.), and that these claims being no longer maintained as to the whole, could not apply to a limited portion; that it could not be shown that the law relative to the ancient jurisdiction of the admiral had ever been supplanted by the doctrines of the publicists; and that neither the assertions of the latter nor the assent of other nations were sufficient, without an express act of parliament, to extend the territory of England. This decision was binding on the English courts. Harris v. The Franconia, L. R., 2 C. P. Div. 173; Direct U. S. Cable Co. v. Telegraph Co., L. R., 2 App. Cas. 394. But, according to Sir Henry Maine, it rests on an entirely different conception than that which prevails in America, as to the obligatory force of international law on individual States. Maine's Int. Law 39, *et seq.*

*Statutory Extension*.—The effect of the decision in Queen v. Keyn was nullified by the Territorial Waters act, passed in 1878, extending the jurisdiction of the admiralty to the three-mile limit.

In the United States the three-mile belt received statutory recognition in the act Congress of 1794 (1 Stat. at Large, p. 384, ch. 50, § 6), providing for the jurisdiction of district courts over cap-

Where the coast is indented, this distance is measured from a straight line drawn between the enclosing headlands.<sup>1</sup>

(2) *Ownership*.—The title to all tide-waters and their beds is, in this country, vested in the several States for the use and benefit of the public.<sup>2</sup> In *England* it is *prima facie* in the crown.<sup>3</sup>

(a) *Right to Bathe in the Sea*.—But while the public are, in general, entitled to the common enjoyment of such waters and their products,<sup>4</sup> it has been held that there is no common law right to bathe in the sea.<sup>5</sup>

tures within the marine league. By the treaty between the United States and Mexico (9 Stat. at Large, 926, art. 5) it was stipulated that the boundary line should commence in the gulf, three leagues from land opposite the mouth of the Rio Grande, and run northward with the middle of the river. The territorial limits of Alabama are extended by the constitution (art. 2, § 1) to six leagues from the gulf shore. California's limits reach three English miles into the Pacific (Const. art. 12). Those of Massachusetts extend one marine league from low-water mark (Gen. Stat. 1882, ch. 1, § 1; of Rhode Island one league from high water mark (Pub. Stat., 1882, ch. 1, § 1). The limits of the Republic of Texas extended three leagues into the gulf, and this boundary was retained by the State after annexation. (Hartley's Digest, §§ 1631, 1634).

1. 1 Wharton's Int. Law Dig., § 28; Phillimore's Int. Law (2nd ed.), pt. 3, ch. 8; Lawrence's Wheaton's Int. Law, pt. 2, ch. 4, § 6; Marten's *Precis du Droit*, § 40; Klüber, *Droit des Gens*, § 130; Com. v. Peters, 12 Metc. (Mass.) 387; Mahler v. Transportation Co., 35 N. Y. 352; People v. Supervisors, 73 N. Y. 393, 396; United States v. Robinson, 4 Mason (U. S.) 307; De Lovis v. Boit, 2 Gall. 398, 425; United States v. Grush, 5 Mason (U. S.) 290; United States v. New Bedford Bridge, 1 Woodb. & M. (U. S.) 401; Direct U. S. Cable Co. v. Anglo-American Telegraph Co., L. R., 2 App. Cas. 394; Queen v. Cunningham, Bell (C. C.) 86.

2. Martin v. Waddell, 16 Pet. (U. S.) 367; Pollard v. Hagan, 3 How. (U. S.) 212; Howard v. Ingersoll, 13 How. (U. S.) 381, 421; Bennett v. Boggs, 1 Baldw. (U. S.) 76; Smith v. Maryland, 18 How. (U. S.) 74; Mumford v. Wardwell, 6 Wall. (U. S.) 423, 436; Barney v. Keokuk, 94 U. S. 324; McCready v. Virginia, 94 U. S. 391, 394; Coburn v. Ames, 52

Cal. 385; Pitkin v. Olmstead, 1 Root (Conn.) 217; Chapman v. Kimball, 9 Conn. 40; s. c., 21 Am. Dec. 707; Simons v. French, 25 Conn. 346; Moulton v. Libbey, 37 Me. 472; s. c., 59 Am. Dec. 57; Browne v. Kennedy, 5 Har. & J. (Md.) 195; Lakeman v. Burnham, 7 Gray (Mass.) 437, 440; Boston v. Richardson, 105 Mass. 351; Arnold v. Mundy, 6 N. J. L. 1; s. c., 10 Am. Dec. 356; Gough v. Bell, 21 N. J. L. 156; 22 N. J. L. 441; Bell v. Gough, 23 N. J. L. 624; Stevens v. Paterson R. Co., 34 N. J. L. 532; s. c., 3 Am. Rep. 269; Paul v. Hazleton, 37 N. J. L. 106; Attorney General v. Stevens, 1 N. J. Eq. 369; s. c., 22 Am. Dec. 526; Attorney General v. Hudson Tunnel R. Co., 27 N. J. Eq. 176; Hudson Tunnel Co. v. Attorney General, 27 N. J. L. 573; Roger v. Jones, 1 Wend. (N. Y.) 261; Smith v. Levinus, 8 N. Y. 472; People v. Tibbetts, 19 N. Y. 523; Hudson River R. Co. v. Loeb, 7 Robt. (N. Y.) 418; People v. New York etc. Ferry Co., 68 N. Y. 71; Towle v. Remson, 70 N. Y. 303, 308; Providence Steam Engine Co. v. Providence etc. Steamship Co., 12 R. I. 348; s. c., 34 Am. Rep. 652.

3. 8 Bacon's Abridgment, title Prerogative, bk. 3; 5 Comyns Digest, Navigation, A. B; Royal Fishery of the Banne, Davies (Eng.) 49; Fitzwalter's Case, 1 Mod. Rep. (Eng.) 105; Carter v. Burcot, 4 Bur. (Eng.) 2162; King v. Smith, 2 Doug. (Eng.) 441; Williams v. Wilcox, 8 Ad. & E. (Eng.) 314; Attorney General v. Chambers, 4 De G. M. & G. (Eng.) 206; Whitstable Free Fishers v. Gann, 11 H. L. Cas. 192; 11 C. B., N. S. 387; 18 C. B., N. S. 853; 19 C. B., N. S. 803; Penryhn v. Holme, L. R., 2 Exch. Div. 328; Mayor of Carlisle v. Graham, L. R., 4 Exch. 361, 368; Murphy v. Ryan, Ir. R., 2 C. L. 143.

4. See *supra*.

5. *Right to Bathe in the Sea*.—Blundell v. Catterall, 5 B. & Ald. 268.

And under a statute regulating sea bathing and licensing bathing machines

(b) *Nontidal*—(1) *Rivers*—(See also LAKES AND PONDS, 12 Am. & Eng. Encyc. of Law 610).—A river is a body of water with a uniform current.<sup>1</sup> It consists of the *alveus* or bed, the water, and the banks or shores (*ripae* or *litora*), according as the stream is nontidal or tidal.<sup>2</sup> (See also WATERS AND WATER-COURSES.) In many of the States, inland rivers navigable in the

on the seashore, a licensee is not warranted in placing the latter in a portion of the beach which is private property. *Mace v. Philcox*, 15 C. B., N. S. 600; 10 Jur., N. S. 680; 33 L. J., C. P. 124.

**Qualifications of This Doctrine.**—"If the decision in *Blundell v. Catterall*, 5 B. & Ald. 268, relates only to such parts of the shore as are private property, the only practical restraint upon the privilege of sea bathing seems to be that which is imposed by decency and respect for the public morals." *Gould on Waters*, § 26, citing *Rex v. Gunder*, 2 Camp. 89.

In *McManus v. Carmichael*, 3 Iowa 1, *WOODWARD, J.*, says of *Blundell v. Catterall*: "It is a strange case and much more, it is conceived, has been made of it than it warrants. All that was decided upon the question of the common law right was clearly extra-judicial, and it sets up a doctrine which probably would not be listened to in this country; that is, that there is no common law right to bathe in the sea. The case is doubted and dissented from in many others, and an English writer, Hall, in his treatise on the Rights of the Crown, etc., finds fault with it."

*LOWRIE, C. J.*: "It has never been considered as a trespass against the State . . . to bathe in the public waters." *Solliday v. Johnson*, 38 Pa. St. 380, 381.

*PEARSON, J.*: "We all, by nature, have a right to see by the light of the sun, and to breathe the air of heaven, to bathe in the sea, and to catch fish; but there is no necessity, and nothing from which to imply a right to go over another's land for these purposes." *Hetfield v. Baum*, 13 Ired. (N. Car.) 394, 399; s. c., 57 Am. Dec. 563.

1. **Definition.**—*State v. Gilmanton*, 14 N. H. 467. See also *Joliet etc. R. Co. v. Healy*, 94 Ill. 416. In the former case it is said that this definition must be construed with reference to the particular body of water to which it relates.

"A river has been defined to be a running stream, pent in on either side by walls and banks, and it bears that

name as well where the waters flow and reflow as where they have their current one way." *Woolrych on Waters*, p. 40, citing *Callis on Sewers*, p. 77.

*TENTERDEN, C. J.*, in construing the phrase *flumen vel cursus aquae*, says: "Now if these words be considered to denote water flowing in a channel between banks more or less defined, although such channel may be occasionally dry, a rule will be established of general and easy application." *Rex v. Oxfordshire*, 1 B. & Ad. (Eng.) 301.

But "to confine those words to a constant stream, or course of water flowing at all times, to the exclusion of flood water, whether rarely or frequently occurring, is not altogether consistent with the doctrine laid down in *Rex v. Trafford* (1 B. & Ad. 874). In that case the court, in speaking of the ancient course and outlet of flood water, which had been obstructed by fenders or banks, said: 'Now it has been long established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of those fenders cannot be justified.'" 2 Q. B. 745; 6 Jur. 485.

The chief difference between a river and a lake is in the presence of a current in the former. *Callis on Sewers*, 82; *Woolrych on Sewers*, 81; *Gould on Waters*, § 79; *Trustees of Schools v. Schroll*, 120 Ill. 509, 521; s. c., 60 Am. Rep. 575. But a "lake does not lose its distinctive character because there is a current in it for a certain distance leading toward the outlet." *State v. Gilmanton*, 14 N. H. 476.

2. **Parts.**—*Haight v. Keokuk*, 4 Iowa 199, 212; *Angell on Water Courses* (7th ed.), § 4; *Gould on Waters*, §§ 41, 45.

The bed is the soil so occupied by the

American sense,<sup>1</sup> are, like tide-waters, public property. Grants of land bordering on them do not extend *ad usque filum aquæ*, as at common law,<sup>2</sup> but are limited by the banks, and such streams have the general characteristics of public waters.<sup>3</sup>

stream as to be wrested from vegetation. *Houghton v. Chicago etc. R. Co.*, 47 Iowa 370.

"The bank of a stream is the continuous margin where vegetation ceases, and the shore is the pebbly, sandy or rocky space between that and low water mark." *COULTER, J.*, in *McCullough v. Wainwright*, 14 Pa. St. 171, 174.

The banks are those elevations which "contain the river, its natural channel, when there is the greatest flow of water." 1 Bouv. L. Dict.; *Howard v. Ingersoll*, 13 How. (U. S.) 426.

*DARGAN, C. J.*: The bank of a river may be said to be that space of rising ground above low water mark, which is usually covered by ordinary high water. We cannot conceive of any other definition more accurate than this, for the rising ground above low water cannot with any propriety be said to be the bed of a river, and therefore it must be the bank. We then see that the term bank of a river is an imperfect, or, rather, an indefinite guide, when we seek by it to fix upon a precise point of locality; for the bank of a river extends, or may extend, over a considerable space; in this respect, therefore, the term is indefinite and indeterminate. *Howard v. Ingersoll*, 17 Ala. 780, 789.

*WALWORTH, CHANCELLOR*: The shore of tide water is that portion of the land which is alternately covered by the water and left bare by the flux and reflux of the tide. Properly speaking, therefore, a river in which the tide does not ebb and flow has no shores, in the legal sense of the term. It has *ripam* but not *litus*. *Child v. Starr*, 4 Hill (N. Y.) 369, 375.

*COWEN, J.*: The *bank* and the *water* are correlative. You cannot own one without touching the other. *Starr v. Child*, 20 Wend. (N. Y.) 149, 152.

*CURTIS, J.*: But neither the line of ordinary high water mark, nor of ordinary low water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to

mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation as well as in respect to the nature of the soil itself. Whether this line between the bed and the banks will be found above or below, or at a middle stage of water, must depend upon the character of the stream. *Howard v. Ingersoll*, 13 How. (U. S.) 380, 427.

1. See *supra*.

2. See *BOUNDARIES*, 2 Am. & Eng. Encyc. of Law 495.

3. *States in Which Nontidal Navigable Rivers Are Public Property.*—*Alabama*.—Riparian proprietor on navigable streams owns to low water mark. *Bullock v. Wilson*, 2 Port. (Ala.) 436; *Mobile v. Enslava*, 9 Port. (Ala.) 577; *Williams v. Glover*, 66 Ala. 189; *Sullivan v. Spotswood*, 82 Ala. 163. In the latter case it is held that a lease of "water front and booming facilities" does not carry a lease of the bed.

*Arkansas*.—*St Louis etc. R. Co. v. Ramsey* (Ark.), 13 S. W. Rep. 931; s. c., 8 L. R., A. 559.

*California*.—*Packer v. Bird*, 71 Cal. 134.

*Indiana*.—In this State the ownership of the bed of navigable fresh water streams is in doubt. *Ross v. Faust*, 54 Ind. 471; s. c., 23 Am. Rep. 655. See also *Stinson v. Butler*, 4 Blackf. (Ind.) 285; *Bainbridge v. Sherlock*, 29 Ind. 364; s. c., 95 Am. Dec. 644.

"The Wabash is a navigable stream, the bed of which has neither been surveyed nor sold." *Dawson v. James*, 64 Ind. 162.

Grants of lands bordering on the Ohio river extend only to low water mark. *Stinson v. Butler*, 4 Blackf. (Ind.) 285; *Bainbridge v. Sherlock*, 29 Ind. 364; s. c., 95 Am. Dec. 644; *Sherlock v. Bainbridge*, 41 Ind. 35; *Martin v. Evansville*, 32 Ind. 85. See also *Cox v. State*, 3 Blackf. (Ind.) 193.

*Iowa*.—*McManus v. Carmichael*, 3 Iowa 1, is one of the leading cases on this subject. It was an action of trespass by the owner of an island in the Mississippi river against one who had taken two boat loads of sand from a sand-bar adjoining the island, but situated between high and low water mark.

The court held that the action would not lie, basing its decision on three grounds: First, that the tidal test was not the only one even at common law; second, that in any event such test was not applicable to the Mississippi; and third, that the common law consequences of navigability attach to that river. WOODWARD, J., in delivering the opinion of the court, reviews exhaustively the leading authorities both English and American, and in closing says, p. 57: "When the Mississippi river was declared a public highway, in the solemn instruments before referred to, it was not in any technical sense, but in a high, broad and free understanding; and it was placed upon the same ground with a river navigable at common law. And as we cannot take the *medium flum* as our line, we think we are obeying the settled rules of law in considering the stream as declared a navigable river in the legal sense, and as subject to the consequences which attach to such waters at common law. The conclusion, therefore, is that plaintiff has not a title to the land between high and low water, so as to enable him to maintain this action for taking the sand. This opinion need not preclude the idea that the adjacent owner may have some rights between high and low water, which are even peculiar to himself and not common. Nor does it necessarily determine the question of the right to make wharves or structures for the convenience of navigation and commerce, and other questions of a similar nature." The doctrine is confirmed in *Haight v. Keokuk*, 4 Iowa 199; *Tomlin v. Dubuque etc. R. Co.*, 32 Iowa 106; s. c., 7 Am. Rep. 176; *Musser v. Hershey*, 42 Iowa 356; *Houghton v. Chicago etc. R. Co.*, 47 Iowa 370; *Renwick v. Davenport etc. R. Co.*, 49 Iowa 664, 669; *Barney v. Keokuk*, 94 U. S. 324.

*Kansas*.—*Wood v. Fowler*, 26 Kan. 682; s. c., 40 Am. Rep. 330, was an action by the owner of lands bordering on the Kansas river to restrain certain parties from cutting and removing ice formed opposite his land. The stream had once been used for navigation, but had been subsequently declared non-navigable by the legislature; and the court, BREWER, J., delivering the opinion, decided that the act of the legislature did not extend the riparian owner's title to the thread of the stream, and that "the title to the soil being in the State, and the stream be-

ing in a public highway, ownership of the ice would rest in the general public, or in the State as the representative of that public."

*Minnesota*.—"The navigation of large streams has been embarrassed and impeded by individual ownerships and improvements. Lands bounded by navigable rivers have carried, as incidents of this circumstance, the exclusive right to the soil to the middle of the stream, and where they were united in the same person on both sides of the river, such person has exercised the exclusive control of the entire channel adjacent. . . . From the view, however, we have taken of the law in this case, we have not deemed it necessary to declare judicially that the principle of the common law we have been discussing is not applicable to our situation." MEEKER, J., in *Castner v. Steamboat Dr. Franklin*, 1 Minn. 73. The rule is followed and extended in *Schurmeier v. St. Paul R. Co.*, 10 Minn. 82; s. c., 88 Am. Dec. 596; affirmed 7 Wall. (U. S.) 272; *St. Paul etc. R. Co. v. First Division of St. Paul etc. R. Co.*, 26 Minn. 31.

*Missouri*.—"The question of the ownership of the soil under the water is one which each State is at liberty to determine for itself; and if it chooses to concede the right of the riparian owner to the center of the stream, it is not for others to raise objection, as is said by the Supreme Court of the United States in *Barney v. Keokuk*, 94 U. S. 324. In *Missouri* the riparian proprietor owns only to the water's edge." BLAKEWELL, J., in *Meyers v. St. Louis*, 8 Mo. App. 272, citing *Benson v. Morrow*, 61 Mo. 351.

The rule was first held as to the Missouri river in *O'Fallon v. Daggett*, 4 Mo. 343, 347; s. c., 29 Am. Dec. 640. See also *Shelton v. Maupin*, 16 Mo. 124; *Lamme v. Buse*, 70 Mo. 463.

In *Jones v. Soulard*, 24 How. (U. S.) 41, it was held that the corporation of St. Louis extended to the middle of the Mississippi river.

But private grants do not. *St. Louis Public Schools v. Risely*, 10 Wall. (U. S.) 91; 40 Mo. 365.

*Nevada*.—*Shoemaker v. Hatch*, 13 Nev. 261.

*Oregon*.—In grants of public lands on a meandered river the stream and not the meandered line is the boundary. *Minto v. Delancy*, 7 Oreg. 337; *Moore v. Willamette Transp. Co.*, 7 Oreg. 355-



And the rule of the State seems to be that the beds of streams navigable in fact are public. *Johnson v. Knott*, 13 *Oreg.* 308, 311; *Parker v. West Coast Packing Co.*, 17 *Oreg.* 510, 515. The case last cited, however, was in reference to the Columbia river, where it appears to be subject to tidal influence.

But in *Shaw v. Oswego Iron Co.*, 10 *Oreg.* 371; s. c., 45 *Am. Rep.* 146, it was held in reference to the Tualatin river that, though it was capable of floatage, there were not the same reasons for departing from the common law rule as in the case of the large rivers of the country, and that the bed of the stream was the property of the riparian owners.

*Pennsylvania.*—The public character of navigable fresh water rivers was recognized in a number of early colonial statutes. See *Carson v. Blazer*, 2 *Binn. (Pa.)* 475; s. c., 4 *Am. Dec.* 463. In 1785 an act was passed excepting from entry islands in the Ohio, Alleghany and Delaware rivers. 2 *Sm. Laws* 317. Public ownership of the beds of navigable streams was recognized as early as 1810 in *Carson v. Blazer*, 2 *Binn. (Pa.)* 475, and confirmed by a long line of authorities. See *Shrunk v. Schuylkill Nav. Co.*, 14 *S. & R. (Pa.)* 71; *Bird v. Smith*, 8 *Watts (Pa.)* 434; s. c., 34 *Am. Dec.* 483; *Hart v. Hill*, 1 *Whart. (Pa.)* 124; *Ball v. Slack*, 2 *Whart. (Pa.)* 508; s. c., 30 *Am. Dec.* 278; *Coovert v. O'Conner*, 8 *Watts (Pa.)* 470; *Jones v. Janney*, 8 *W. & S. (Pa.)* 436, 443; s. c., 42 *Am. Dec.* 309; *Johns v. Davidson*, 16 *Pa. St.* 512; *Bailey v. Miltenberger*, 31 *Pa. St.* 37; *Barclay R. & Coal Co. v. Ingham*, 36 *Pa. St.* 194; *Flanagan v. Philadelphia*, 42 *Pa. St.* 219; *Monongahela Bridge Co. v. Kirk*, 46 *Pa. St.* 112; s. c., 84 *Am. Dec.* 527; *McKeen v. Delaware Divis. Canal Co.*, 49 *Pa. St.* 424; *Storer v. Jack*, 60 *Pa. St.* 339; *Tinicum Fishing Co. v. Carter*, 61 *Pa. St.* 21; s. c., 100 *Am. Dec.* 597; *Poor v. McClure*, 77 *Pa. St.* 214; *Philadelphia v. Scott*, 81 *Pa. St.* 80; *Simpson v. Neill*, 89 *Pa. St.* 183; *Pursell v. Stover*, 110 *Pa. St.* 43, 46; *Fulmer v. Williams*, 122 *Pa. St.* 191; *Rundle v. Delaware etc. Canal Co.*, 14 *How. (U. S.)* 80.

The wrongful diversion of the waters of a navigable river from its bed does not extinguish the title of the State nor add to that of individuals. *Wainwright v. McCullough*, 63 *Pa. St.* 66, cited

with approval in *Zug v. Com.*, 70 *Pa. St.* 138.

A riparian owner is not entitled to damages for the destruction of a spring between high and low water mark on a tidal river. *Com. v. Fisher*, 1 *P. & W. (Pa.)* 462. But is, for one similarly situated, on a nontidal river (*Lehigh Valley R. Co. v. Trone*, 28 *Pa. St.* 206), as low water mark is the boundary of lands bordering a stream of the former class. See also cases above cited.

By a conveyance of lands adjacent to a stream not declared navigable by law, the grantee takes to the thread. *Coovert v. O'Conner*, 8 *Watts (Pa.)* 470.

*Tennessee.*—"Shall it be held that the interest of the community of England requires that their navigable streams should belong to the crown as public property, but that in all the States bordering on the Mississippi and its mighty tributaries, these great and important highways, by which such an amount of merchandise of every kind and description is annually sent to market, shall belong to private individuals because the tide does not ebb and flow in them? Surely not, unless we are compelled by positive law so to maintain." *TURLEY, J.*, in *Elder v. Burnes*, 6 *Humph. (Tenn.)* 358, 367. Doctrine confirmed in *Stuart v. Clark*, 2 *Swan (Tenn.)* 1; s. c., 58 *Am. Dec.* 49; *Sigler v. State*, 7 *Baxt. (Tenn.)* 493; *Martin v. Nance*, 3 *Head (Tenn.)* 649; *Holbert v. Edens*, 5 *Lea (Tenn.)* 204; s. c., 40 *Am. Rep.* 26; *Goodwin v. Thompson*, 15 *Lea (Tenn.)* 209; s. c., 54 *Am. Rep.* 410. In those of the above cases in which a definite boundary line of riparian lands is fixed, it is placed at low water mark.

*Virginia.*—By statutes of 1780 and 1802, re-enacted and affirmed at various times, and still, in their main provisions, in force (Code 1887, §§ 1338-9), the ungranted beds of streams are reserved to the State, and privileges of riparian owners limited to low water mark. The beds of navigable streams (and the term does not seem to be restricted to tide waters), are the property of the commonwealth and cannot be granted. *Horne v. Richards*, 4 *Call (Va.)* 441; s. c., 2 *Am. Dec.* 574; *Martin v. Beverly*, 5 *Call (Va.)* 444; *Mead v. Haynes*, 3 *Rand. (Va.)* 33; *French v. Bankhead*, 11 *Gratt. (Va.)* 136; *Norfolk City v. Cooke*, 27 *Gratt. (Va.)* 430.

*West Virginia.*—*Ravenswood v. Flemings*, 22 *W. Va.* 52; s. c., 46

**2. Semi-public.**—In other States of the Union, as well as in *England*, the legal status of nontidal navigable waters is midway between that of tide-waters, which are entirely public, and waters unfit for navigation, which are wholly private. Such nontidal waters, and the soil beneath them, are private property, but the owner's interest therein is qualified by being subjected to the public easement of passage.<sup>1</sup>

Am. Rep. 485; *Barre v. Fleming*, 29 W. Va. 314.

**Other States.**—Decisions upholding the above doctrine have also been made in *Kentucky*, *Michigan*, *New York* and *North Carolina*, but later cases have departed sufficiently from this holding to warrant the withdrawal of such States from this group, and the classification of their non-tidal navigable streams under the head of SEMI-PUBLIC. See *infra*.

**Federal.**—The Supreme Court of the United States, in construing government land grants, has also held this doctrine. "The court does not hesitate to decide that congress, in making a distinction between streams navigable, and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways." *CLIFFORD, J.*, in *St. Paul etc. R. Co. v. Schurmeir*, 7 Wall. (U. S.) 272, 288. See also *Barney v. Keokuk*, 94 U. S. 324.

**1. States in Which Nontidal Navigable Rivers Are Private Property.**—*Connecticut.*—*Adams v. Pease*, 2 Conn. 481; *Warner v. Southworth*, 6 Conn. 471, 474; *Chapman v. Kimball*, 9 Conn. 38, 41; s. c., 21 Am. Dec. 707; *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 463. In the earlier decisions in this State the term navigable is used in the common law sense, as nearly synonymous with tidal.

*Delaware.*—*Delaney v. Boston*, 2 Harr. (Del.) 289.

*Georgia.*—*Hendrick v. Cook*, 4 Ga. 241; *Young v. Harrison*, 6 Ga. 130, 141; *Jones v. Water Lot Co.*, 18 Ga. 539; *Stanford v. Mangin*, 30 Ga. 355. But in some of these cases it does not seem clear whether or not the term navigable is used in its common law sense. Navigable waters have been the subject of considerable legislative enact-

ment in this State, and a navigable stream is defined as "one capable of bearing upon its bosom, either for the whole or a part of the year, boats laden with freight in regular course of trade." Code 1882, § 2229.

"The beds of streams not navigable belong to the owner of the adjacent land." Code 1882, § 2229.

Land bordering on the Chattahoochee extends to the western bank of the river. *Moses v. Eagle etc. Mfg. Co.*, 62 Ga. 455, and cases above cited. See also note *supra*.

*Illinois.*—"The rule that where a stream is not subject to the ebb and flow of the tide its bed shall be deemed the property of the soil bounding upon its border has been too long and firmly settled in this State to be disturbed without unsettling titles and unhinging all faith and respect and confidence in the decisions of the courts." Per *THORNTON, J.*, in *Braxon v. Bressler*, 64 Ill. 488, 493. See also *Ensminger v. People*, 47 Ill. 384; s. c., 95 Am. Dec. 495; *Chicago v. McGinn*, 51 Ill. 266; s. c., 2 Am. Rep. 295; *Hubbard v. Bell*, 54 Ill. 110; s. c., 5 Am. Rep. 98; *Chicago etc. R. Co. v. Stein*, 75 Ill. 41; *Cobb v. Lavalle*, 89 Ill. 331, 334; s. c., 31 Am. Rep. 91; *McCartney v. Chicago etc. R. Co.*, 112 Ill. 611, 634; *Trustees of Schools v. Schroll*, 120 Ill. 509; s. c., 60 Am. Rep. 575; *Fuller v. Dauphin*, 124 Ill. 542; *People v. Madison Co.*, 125 Ill. 9.

A riparian owner on a navigable river has an exclusive property in the ice. *Washington Ice Co. v. Shortall*, 101 Ill. 46; s. c., 40 Am. Rep. 196.

Government grants of riparian lands convey to the thread of the stream, even on the Mississippi. *Middleton v. Pritchard*, 4 Ill. 510; s. c., 38 Am. Dec. 112; *Chicago v. Laffin*, 49 Ill. 172.

But a fractional quarter, of which no monuments are established, is bounded by the river. *Houck v. Yates*, 82 Ill. 179; *McCormick v. Huse*, 78 Ill. 363.

A conveyance calling for Lake Michigan as a boundary, carries to a line

where the water usually stands when free from disturbing causes. *Seaman v. Smith*, 24 Ill. 521.

The term navigable is used in the common law sense in most of the above cases, but this is departed from in *Healy v. Joliet etc. R. Co.*, 2 Ill. App. 435.

*Kentucky*.—In this State, the law as to the ownership of navigable streams long remained unsettled. The question was raised but not decided in *Louisville v. United States Bank*, 3 B. Mon. (Ky.) 138. In *Thurman v. Morrison*, 14 B. Mon. (Ky.) 296, the court inclined to regard such streams as the property of riparian owners. But in *Morrison v. Thurman*, 17 B. Mon. (Ky.) 249; s. c., 66 Am. Dec. 153, it was said that the owner of land on the bank of a navigable river has no exclusive right to the use of the soil covered by the water. In *Berry v. Snyder*, 3 Bush (Ky.) 266; s. c., 96 Am. Dec. 619, it was held that a grant of riparian lands on the Ohio conveys to the thread of the stream, unless expressly limited by its terms; and this is now the settled law of the State. *Miller Hepburn*, 8 Bush (Ky.) 326; *Williamsburg Boom Co. v. Smith*, 84 Ky. 372; *Kentucky Lumber Co. v. Green*, 87 Ky. 257. See as to boundaries, *Cockrell v. M'Quinn*, 4 T. B. Mon. (Ky.) 61; *Bruce v. Taylor*, 2 J. J. Marsh. (Ky.) 160.

*Maine*.—*Pejepscot Proprietors v. Cushman*, 2 Me. 94; *Berry v. Carle*, 3 Me. 269; *Morrison v. Keen*, 3 Me. 474; *Spring v. Russell*, 7 Me. 273, 290; *Wadsworth v. Smith*, 11 Me. 278; s. c., 26 Am. Dec. 525; *Nickerson v. Crawford*, 16 Me. 245; *Lincoln v. Wilder*, 29 Me. 169; *Brown v. Chadbourne*, 31 Me. 9; s. c., 50 Am. Dec. 641; *Knox v. Chaloner*, 42 Me. 150; *Strout v. Millbridge Co.*, 45 Me. 76; *Veazie v. Dwinel*, 50 Me. 479; *Granger v. Avery*, 64 Me. 292.

In the last named case it was held that the owner of lands on both sides of a river above tide water, owned also the islands therein to the extent of the land opposite. See also *Holden v. Robinson Mfg. Co.*, 65 Me. 215.

But grants of land bordering lakes and ponds do not convey to the center. *Bradley v. Rice*, 13 Me. 198, 201; s. c., 29 Am. Dec. 501.

*Maryland*.—The rule was recognized in *Ridgely v. Johnson*, 1 Bland Ch. (Md.) 316, note, and *Baltimore v. McKim*, 3 Bland Ch. (Md.) 453. Also in *Binney's Case*, 2 Bland Ch. (Md.) 99.

125, where it was held that the Potomac "was not originally deemed a navigable river, but has been made so, in a qualified manner, by law." The doctrine was laid down more definitely in *Browne v. Kennedy*, 5 Har. & J. (Md.) 196, 205; *Goodsell v. Lawson*, 42 Md. 348, 372.

*Massachusetts*.—Ordinance of 1641; *Storer v. Freeman*, 6 Mass. 435, 438; s. c., 4 Am. Dec. 155; *Hatch v. Dwight*, 17 Mass. 289, 298; s. c., 9 Am. Dec. 145; *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268; s. c., 16 Am. Dec. 342; *Com. v. Chapin*, 5 Pick. (Mass.) 199; s. c., 16 Am. Dec. 386; *Waterman v. Johnson*, 13 Pick. (Mass.) 261, 265; *Bardwell v. Ames*, 22 Pick. (Mass.) 333, 354; *Knight v. Wilder*, 2 Cush. (Mass.) 199; s. c., 48 Am. Dec. 660; *Com. v. Alger*, 7 Cush. (Mass.) 53, 90, 97; *McFarlin v. Essex Co.*, 10 Cush. (Mass.) 304, 309; *Blood v. Nashua R. Co.*, 2 Gray (Mass.) 137, 139; s. c., 61 Am. Dec. 444; *Boston v. Richardson*, 13 Allen (Mass.) 146, 154.

The rule that the thread of the stream is the boundary applies to grants from the State. *Boston v. Richardson*, 105 Mass. 351, 355.

In *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 544, it was held that the Connecticut was not a navigable stream, and that when it had changed its channel, the land of the old bed was still divided equally between the riparian owners.

Riparian lands on ponds, natural or artificial, as on rivers, are bounded by the center. *Phinney v. Watts*, 9 Gray (Mass.) 269, 270; s. c., 69 Am. Dec. 288. See also *Com. v. Vincent*, 108 Mass. 441, 447.

*Michigan*.—The holding in *La Plaisance Bay Harbor Co. v. Monroe*, Walk. (Mich.) 155, "that the beds of all meandered streams and navigable waters belong to the State," has been overruled, and the doctrine of the common law as to ownership is now the settled law of the State. *Norris v. Hill*, 1 Mich. 202; *Moore v. Sanborne*, 2 Mich. 519; s. c., 59 Am. Dec. 209; *Lorman v. Benson*, 8 Mich. 18; s. c., 77 Am. Dec. 435; *Rice v. Ruddiman*, 10 Mich. 125; *Ryan v. Brown*, 18 Mich. 196; *Clark v. Campau*, 19 Mich. 325; *Attorney General v. Evert Bor ing Co.*, 34 Mich. 462, 474; *Maxw l v. Bay City Bridge Co.*, 41 Mich. 453, 456.

In *Watson v. Peters*, 26 Mich. 508, it was held that city lots on the banks of a stream extended to its center, and the

holding was approved in *Bay City Gas Light Co. v. Industrial Works*, 28 Mich. 182.

In the late case of *Carpenter v. Strobel*, 64 Mich. 476, it is held that the above rules as to grants on rivers do not apply to lakes.

*Mississippi*.—The *Steamboat Magnolia v. Marshall*, 39 Miss. 109, is one of the leading American authorities in support of the common law doctrine. The case involved the ownership of land between high and low water mark on the Mississippi, but the opinion discusses the subject of the ownership of fresh water rivers in general. The leading authorities are reviewed, and those which hold the doctrine that rivers of this class are public, are quite strongly criticised. HARRIS, J., in the course of the opinion, says: "It has been the chief end and policy of civil society to resign to everything capable of ownership a legal and determinate owner; to secure common or public rights so far as the interests of the public require; to furnish a proper line of demarkation between these rights, common to all, and those private rights which belong to each individual as his exclusive property, and thus to promote the general peace and harmony of mankind. Hence the general distinctions, so long declared and recognized by learned judges and law writers, and deemed by them of so much excellence and importance as to be regarded as beyond all question, 'that rivers not navigable (that is, fresh water rivers of what kind soever) do, of common right, belong to the owners of the soil adjacent.'" (p. 116). See also *Morgan v. Reading*, 3 Sm. & M. (Miss.) 366; *New Orleans etc. R. Co. v. Frederic*, 46 Miss. 1, 9.

*New Hampshire*.—*Proprietors of Claremont v. Carlton*, 2 N. H. 369; *State v. Gilmanton*, 9 N. H. 461; 14 N. H. 467. In the latter case it was held that riparian lands extend only to the margin of lakes. *Greenleaf v. Kilton*, 11 N. H. 530; *Norway Plains Co. v. Bradley*, 52 N. H. 86. See also *Kimball v. Schoff*, 40 N. H. 190.

Title *usque ad filum aquæ* may be acquired by adverse possession. *Nichols v. Suncook Mfg. Co.*, 34 N. H. 345.

The limits of towns situated on a river, extend to the center thereof. *Boscawen v. Canterbury*, 23 N. H. 189; *State v. Canterbury*, 28 N. H. 195, 216.

*New Jersey*.—*Arnold v. Mundy*, 6 N. J. L. 1; s. c., 10 Am. Dec. 356; *Attor-*

*ney General v. Delaware etc. R. Co.*, 27 N. J. Eq. 1, 8, 631; *Society etc. v. Low*, 2 C. E. Green (N. J.) 20. The soil of lakes belongs to riparian proprietors. *Cobb v. Davenport*, 32 N. J. L. 369. But "neither the sovereignty nor propriety of New Jersey on the Delaware extended below low water mark." *Gough v. Bell*, 22 N. J. L. 441, 489.

*New York*.—Although doubt has been cast on the doctrine of the text by some of the decisions of this State (e. g., *Canal Appraisers v. People*, 5 Wend. (N. Y.) 423), yet it has always been supported by the weight of authority, and is now the settled law of the State. *Palmer v. Mulligan*, 3 Cal. (N. Y.) 307; s. c., 2 Am. Dec., 270 (*Opinions of KENT, CH. J., and THOMPSON, J.*); *People v. Platt*, 17 Johns. (N. Y.) 195; *Hooker v. Cummings*, 20 Johns. (N. Y.) 90; s. c., 11 Am. Dec. 549; *People v. Seymour*, 6 Cow. (N. Y.) 579; *Ex parte Jennings*, 6 Cow. (N. Y.) 551; *People v. Canal Appraisers*, 13 Wend. (N. Y.) 355; 17 Wend. (N. Y.) 571; *Luce v. Carley*, 24 Wend. (N. Y.) 451; s. c., 35 Am. Dec. 637; *Varick v. Smith*, 5 Paige (N. Y.) 137; s. c., 28 Am. Dec. 417; s. c., 9 Paige (N. Y.) 547; *Gould v. Hudson River R. Co.*, 6 N. Y. 522, 547; *Lowndes v. Dickerson*, 34 Barb. (N. Y.) 588, 592; *Mott v. Mott*, 68 N. Y. 246; *Town of Pierrepont v. Loveless*, 72 N. Y. 211, 216; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; *Smith v. Rochester*, 92 N. Y. 463; s. c., 44 Am. Rep. 393. But the bed of the Mohawk belongs to the State. *Canal Appraisers v. People*, 17 Wend. (N. Y.) 571; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44, 63; *People v. Canal Appraisers*, 33 N. Y. 461; *Crill v. Rome*, 47 How. Pr. (N. Y.) 398.

The same is true of that moiety of the bed of the Niagara over which the State has jurisdiction. *Kingman v. Sparrow*, 12 Barb. (N. Y.) 201; *Canal Appraisers v. People*, 17 Wend. (N. Y.) 571, 597.

The Hudson has been held to be navigable and public at Troy, though there was no proof that the river was there ordinarily subject to tidal influence. *People v. Tibbetts*, 19 (N. Y.) 523, 527.

But the rights of riparian owners upon the Hudson (aside from its tidal character) and the Mohawk are affected by the doctrines of the civil law prevailing in the Netherlands, from whose government they were derived, and are

distinguishable from such rights upon other navigable waters of the State. *Smith v. Rochester*, 92 N. Y. 463; s. c., 44 Am. Rep. 393.

The rule as to the ownership of rivers is not applicable to large fresh water lakes. *Champlain etc. R. Co. v. Valentine*, 19 Barb. (N. Y.) 489.

*North Carolina*.—"The acts of 1715 and 1777, in regulating entries and surveys on which to found a grant, provided that land lying on any navigable water should be surveyed so that the water should form one side of the survey." *Ward v. Willis*, 6 Jones (N. Car.) 183, 184; s. c., 72 Am. Dec. 570.

Some of the earlier declarations of the supreme court of this State, to the effect that the beds of navigable streams are public, may be traceable to this statute, while other cases may perhaps be explained by the use of the term navigable in its common law sense. See *Wilson v. Forbes*, 2 Dev. (N. Car.) 30; *Ingram v. Threadgill*, 3 Dev. (N. Car.) 59; *Fagan v. Armistead*, 11 Ired. (N. Car.) 433; *Skinner v. Hettrick*, 73 N. Car. 53. At any rate the later cases adhere to the doctrine stated in the text. *Hodges v. Williams*, 95 N. Car. 331, 338.

In *State v. Narrows Island Club*, 100 N. Car. 477, 481, the court said, in speaking of waters: "The public right arises only in case of their navigability. Whether they are navigable or not depends upon their capacity for substantial use, as indicated. They can be so used only for the free passage of vessels; the public have only the right of navigation. The title to the bed of the river, lake or sound in such case, and all special privileges and advantages incident thereto, vest and remain in the owner thereof subject only to the public easement."

*Ohio*.—*Gavit v. Chambers*, 3 Ohio, 496; *Benner v. Platter*, 6 Ohio 504; *Lamb v. Rickets*, 11 Ohio 311; *Walker v. Board of Public Works*, 16 Ohio, 540; *Hickok v. Hine*, 23 Ohio St. 523; s. c., 13 Am. Rep. 255; *June v. Purcell*, 36 Ohio St. 396; *Day v. Railroad Co.*, 44 Ohio St. 406, 419.

Land on the Ohio River between high and low-water mark, belongs to the adjacent proprietor. *Blanchard v. Porter*, 11 Ohio 138.

A grantee does not take to the thread of the stream where the call is to low water. *Hopkins v. Kent*, 9 Ohio 13.

Riparian grants on Sandusky Bay

and Lake Erie convey only to the line where the water stands free from disturbing causes. *Sloan v. Biemiller*, 34 Ohio St. 492, 512.

Land covered by a navigable land locked bay or harbor on Lake Erie may be held by private ownership subject to the public rights of navigation and fishery, provided the owner derive title from an express grant made or sanctioned by the United States. *Hogg v. Beerman*, 41 Ohio St. 81; s. c., 52 Am. Rep. 71.

*Rhode Island*.—*Hughes v. Providence etc. R. Co.*, 2 R. I. 508, 512; *Olney v. Fenner*, 2 R. I. 211, 214.

*South Carolina*.—In *Cates v. Wadlington*, 1 McCord (S. Car.) 580; 10 Am. Dec. 699, it was held that a river merely capable of being made navigable was private.

In *Jackson v. Lewis*, *Cheves* (S. Car.) 259, the law is considered as in doubt.

In *Boatwright v. Bookman*, 1 Rice (S. Car.) 447, the question was raised but not decided.

Later cases incline to the rule stated in the text. *Noble v. Cunningham*, *McMull* (S. Car.) Ch. 289; *McCullough v. Wall*, 4 Rich. (S. Car.) 68; *Shands v. Triplet*, 5 Rich. Eq. (S. Car.) 76, 79; *State v. Columbia*, 27 S. Car. 137, 146.

*Vermont*.—*Fletcher v. Phelps*, 28 Vt. 257, 262; *Newton v. Eddy*, 23 Vt. 319. In the latter case, however, no point was raised as to the navigability of the stream.

If lakes and ponds have a definite low water line, riparian lands are bounded thereby. *Jakeway v. Barrett*, 38 Vt. 316, 323; *Austin v. Rutland R. Co.*, 45 Vt. 215.

*Wisconsin*.—*Jones v. Pettibone*, 2 Wis. 308; *Walker v. Shepardson*, 4 Wis. 486; 2 Wis. 384; s. c., 60 Am. Dec. 423; *Arnold v. Elmore*, 16 Wis. 509; *Yates v. Judd*, 18 Wis. 118; *Gove v. White*, 20 Wis. 425; *Wisconsin River Imp. Co. v. Lyons*, 30 Wis. 61; *Arimond v. Green Bay etc. Canal Co.*, 31 Wis. 316; *Olson v. Merrill*, 42 Wis. 203; *Delaplaine v. Chicago etc. R. Co.*, 42 Wis. 214; s. c., 24 Am. Rep. 386; *Boorman v. Sunnachs*, 42 Wis. 233; *Diedrich v. Northwestern etc. R. Co.*, 42 Wis. 248; *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295, 303; *Chandos v. Mack* (Wis. 1890), 46 N. W. Rep. 803.

A grantee from the United States takes only to the water's edge. *Wright v. Day*, 33 Wis. 260.

**III. JURISDICTION**—(See *supra*; ADMIRALTY, 1 Am. & Eng. Encyc. of Law 193; CONSTITUTIONAL LAW, 3 Am. & Eng. Encyc. of Law 670; INTERSTATE COMMERCE, 11 Am. & Eng. Encyc. of Law 539)—1. **Over Intrastate Waters**.—Over navigable waters entirely within its borders, a State may exercise complete control, subject only to the limitations imposed by virtue of the commercial powers of congress.<sup>1</sup>

Lands on navigable lakes and ponds are bounded by low water. *Mariner v. Schulte*, 13 Wis. 692; *Delaplaine v. Chicago etc. R. Co.*, 42 Wis. 214; s. c., 24 Am. Rep. 386; *Diedrich v. Northwestern etc. R. Co.*, 42 Wis. 48.

The navigable waters of this State are especially subject to State control. See *Cohn v. Wausau Boom Co.*, 47 Wis. 314, and cases above cited.

**England**.—The doctrine laid down by LORD HALK that "fresh rivers of what kind soever do, of common right, belong to the owners of the soil adjacent, so that the owners of the one side have of common right the propriety of the soil, and consequently the right of fishing *usque flum aqua*, and the owners of the other side the right of the soil or ownership and fishing unto the *flum aqua* on their side" (*De Jure Maris* Ch. 1) is still the law of England as recognized by the most recent decisions. *Marshall v. Ulleswater Navigation Co.*, 3 B. & S. 742; *Bickett v. Morris*, 1 H. L. Sc. 47; *Orr Ewing v. Colquhoun, L. R.*, 2 App. Cas. 839; *Bristow v. Cormican, L. R.*, 3 App. Cas. 641, 666; *Crossley v. Lightowler, L. R.*, 3 Eq. Cas. 279; *Grant v. Oxford, L. R.*, 4 Q. B. 9.

The title remains in the riparian owner even after the river has been made public by act of parliament. *Hargreaves v. Diddams, L. R.*, 10 Q. B. 582, 585; *Micklethwaite v. Newlay Bridge Co., L. R.*, 33 Ch. Div. 133. The same doctrine is established in

**Ireland**.—*Murphy v. Ryan, Ir. R.*, 2 C. L. 143.

And the unusual width of a river does not interfere with the application of the rule that the riparian proprietor owns to the center. *Dwyer v. Rich, Ir. R.*, 4 C. L. 424.

But the rule does not apply to large inland lakes. *Bloomfield v. Johnston, Ir. R.*, 8 C. L. 68; *Bristow v. Cormican, Ir. R.*, 10 C. L. 398.

**1. Intrastate Jurisdiction**.—*Gunter v. Geary*, 1 Cal. 462; *Payne v. English*, 79 Cal. 540; *Chicago v. McGinn*, 51

Ill. 266; s. c., 2 Am. Rep. 295; *Depew v. Trustees of Wabash etc. Canal*, 5 Ind. 8; *St. Joseph Co. v. Pidge*, 5 Ind. 13; *Talbot Co. v. Queen Anne Co.*, 50 Md. 245; *Woodhouse v. Cain*, 95 N. Car. 113; *Delaware etc. Co. v. Lawrence*, 2 Hun (N. Y.) 163; *Hoeft v. Seaman*, 38 N. Y. Super. Ct. 62; *Town of Groton v. Hurlburt*, 22 Conn. 178; *Livingston v. Van Ingen*, 9 Johns. (N. Y.) 507; *Bedlow v. New York Floating Dry Dock Co.*, 112 N. Y. 263; *Pollard v. Hagan*, 3 How. (U. S.) 212; *Texas etc. R. Co. v. New Orleans*, 40 Fed. Rep. 111; *United States v. Bain*, 3 Hughes (U. S.) 593; *American Dock & Imp. Co. v. Public School Trustees*, 39 N. J. Eq. 409.

Though the acts under which States were admitted provide that their navigable waters shall be "common highways and forever free," the State still retains control. *Cardwell v. American River Bridge Co.*, 19 Fed. Rep. 562; 113 U. S. 205; *Scheurer v. Columbia Street Bridge Co. (Oreg.)*, 27 Fed. Rep. 172; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1. See *Pennsylvania v. Wheeling etc. Bridge*, 13 How. (U. S.) 519; *Escanaba etc. Trans. Co. v. Chicago*, 107 U. S. 678.

The same is true of States having similar constitutional provisions. *Wisconsin River Imp. Co. v. Manson*, 43 Wis. 255.

The commerce clause of the United States constitution (§ 8, art. 1) does not exclude the enactment by a State of mere police regulations. *Craig v. Kline*, 65 Pa. St. 399; s. c., 3 Am. Rep. 686; *Chicago etc. R. Co. v. Fuller*, 17 Wall. (U. S.) 560.

Accordingly a State may regulate pilotage. *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. (U. S.) 459; *Ex parte McNeil*, 13 Wall. (U. S.) 236; *The Panama, Deady* (U. S.) 27.

"Indeed there is quite an extensive field of border legislation on commercial subjects (generally local in character) which may be regulated by State

**2. Over Interstate Waters.**—(See also LAKES AND PONDS, 10 Am. & Eng. Encyc. of Law 610).—Waters which lie within the borders of different States are generally subject to the concurrent jurisdiction of all.<sup>1</sup> The territory of States and nations, when

laws until congress interposes and thereby excludes further State legislation. Pilotage is one of the subjects in this category. So far as congress has interposed, its authority is supreme and exclusive; but where it has not done so the matter is still left to the regulation of State laws." BRADLEY, J., in *The Lottawanna*, 21 Wall. (U. S.) 558, 581.

Such regulation does not withdraw the subject from the admiralty jurisdiction of the district courts. *Ex parte McNeil*, 13 Wall. (U. S.) 236; *The Lottawanna*, 21 Wall. (U. S.) 558, 581.

A State statute providing for a lien in pilotage contracts may be enforced in admiralty. *Banta v. McNeil*, 5 Ben. (U. S.) 75; *The America*, 1 Low. (U. S.) 177; *The California*, 1 Sawy. (U. S.) 463.

A State may fix the compensation of pilots beyond its boundaries. *The Nevada*, 7 Ben. (U. S.) 386; *Horton v. Smith*, 6 Ben. (U. S.) 264. See also *The Clymene*, 24 Alb. Law J. 491.

A State may enact port and harbor regulations. *The New York v. Rea*, 18 How. (U. S.) 223; *The James Gray v. The John Frazier*, 21 How. (U. S.) 184; *Mobile Co. v. Kimball*, 102 U. S. 691; *Commissioners of Pilots v. Clark*, 33 N. Y. 251; *Sampson's Appeal*, 77 Pa. St. 270.

So a State may regulate the management of vessels. *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 349. And a statute regulating lights on vessels may be operative after similar legislation by congress. *Fitch v. Livingston*, 4 Sandf. (N. Y.) 492.

A State may regulate the speed of steamboats in passing wharves. *People v. Jenkins*, 1 Hill (N. Y.) 469. Fix the fees of port masters and wardens. Master etc. of Port of New Orleans v. Prats, 10 Rob. (La.) 459; Port Wardens of New Orleans v. Ship M. J. Ward, 14 La. An. 289; Port Wardens of New Orleans v. Ship Chas. Morgan, 14 La. An. 595, 602. Enact quarantine and inspection laws. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 203; *Peete v. Morgan*, 19 Wall. (U. S.) 581. And grant exclusive rights of navigation upon such of its waters as are unsuited to interstate traffic. *Veazie v. Moor*, 14 How. (U. S.) 568.

**1. Interstate Jurisdiction.**—*Illinois* and *Missouri* have concurrent jurisdiction over the Mississippi river. *Wiggins Ferry Co. v. Reddig*, 24 Ill. App. 260.

The courts of *Indiana* have concurrent jurisdiction with those of *Kentucky* over the Ohio river. *Carlisle v. State*, 32 Ind. 55; *Sherlock v. Alling*, 44 Ind. 184; *Church v. Chambers*, 3 Dana (Ky.) 274; *McFall v. Commonwealth*, 2 Metc. (Ky.) 394; *Commonwealth v. Garner*, 3 Gratt. (Va.) 624; *Handly v. Anthony*, 5 Wheat. (U. S.) 374. And the States of *Kentucky* and *Ohio* have similar jurisdiction. *Blanchard v. Porter*, 11 Ohio 138; *Booth v. Hubbard*, 8 Ohio St. 243.

The Mississippi river is one of the waters of the State of *Missouri*, within the meaning of a statute, regulating navigation. *Swearingen v. The Lynx*, 13 Mo. 519.

In *Tennessee*, the county courts have jurisdiction to licence and establish ferries on the Mississippi river, though the State limits extend only to the thread of the stream. *Memphis v. Overton*, 3 Yerg. (Tenn.) 387.

Under their respective constitutions *Minnesota* and *Wisconsin* have concurrent jurisdiction over the St. Croix river; but it is no infringement for *Minnesota* to authorize the construction of booms in the river, even on the *Wisconsin* side. *J. S. Keaton Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 62.

But *Maryland* has exclusive jurisdiction over the Potomac. *Binney's Case*, 2 Bland Ch. (Md.) 99. As has also *New York* over the Hudson. *State v. Babcock*, 30 N. J. L. 29.

So the jurisdiction of the State of *Georgia* extends entirely over the Chatahoochee, the western bank of the river being the boundary line between *Georgia* and *Alabama*. *Howard v. Ingersoll*, 13 How. (U. S.) 281; *Alabama v. Georgia*, 23 How. (U. S.) 505.

*Pennsylvania* has the same jurisdiction over the adjacent waters of Lake Erie as though they had been embraced in the original charter to William Penn, and its legislative powers over them are absolute except when interfered with

bounded by rivers, extends to the center of the stream.<sup>1</sup>

**IV. THE PUBLIC EASEMENT<sup>2</sup> OF PASSAGE**—1. **Definition and Nature.**—The public have the right of passage over all streams which afford capacity for that purpose.<sup>3</sup> The right includes not only navigation in boats and vessels, but also floatage<sup>4</sup> and travel over the ice.<sup>5</sup>

by congress. *Dunlap v. Commonwealth*, 108 Pa. St. 607.

All that part of the St. Louis Bridge with its approaches east of the middle line of the main channel of the Mississippi river, is within the jurisdiction of *Illinois* for the purposes of State and local taxation. *Buttemuth v. St. Louis Bridge Co.*, 123 Ill. 535; *St. Louis Bridge Co. v. People*, 125 Ill. 226.

The courts of *Iowa* cannot abate a nuisance established and existing in the Mississippi river, on the *Illinois* side of the main channel, though the States of *Illinois* and *Iowa* have concurrent jurisdiction over cases arising out of the commerce of the river. *Gilbert v. Moline Water Power & Mfg. Co.*, 19 *Iowa* 319.

Property in transit from one State to another over navigable waters is not taxable by the States through which it passes, nor at a place where it is detained by low water, ice or other cause. *Burlington Lumber Co. v. Willetts*, 118 Ill. 559.

But a State may provide for the taxation as personalty, in their home port and where their owner's principal office is located, of steamboats plying between different points on an interstate river. *Wheeling etc. Transp. Co. v. Wheeling*, 99 U. S. 273.

The same rule applies to vessels which make voyages to foreign ports. *People v. Commissioners of Taxes*, 48 Barb. (N. Y.) 157.

And such taxation is not the levy of a tonnage duty within the meaning of the United States constitution. *The North Cape*, 6 Biss. (U. S.) 505.

1. 1 Wharton's International Law Digest, § 30; 1 Halleck's International Law (Baker) 146; Vattel's Law of Nations, bk. 1, ch. 22, §§ 266, 274; *The Schooner Fame*, 3 Mason (U. S.) 147; *Handly v. Anthony*, 5 Wheat. (U. S.) 374, 379; *The Steamboat Magnolia v. Marshall*, 39 Miss. 116, 119. But the territory of Kentucky extends entirely across and includes the Ohio. *Handly v. Anthony*, *supra*. See also, as to Georgia, the preceding note.

2. While the term "easement" is used

quite generally in the books, it must be understood rather in a popular than in a strictly legal sense. In *Barnard v. Hinkley*, 10 Mich. 459, CHRISTIANCY, J., says: "Nor do we think the right of navigation in a public river can with propriety be treated as real estate, vested in the public or the State for the benefit of every individual who may have occasion to use it. It is a public right, but we see no reason to call it real estate. It is sometimes called a 'public easement,' but we do not think it comes within the meaning of the term easement as used to designate an incorporeal hereditament, as a right of way belonging to one person or estate over the lands of another."

3. See *supra*, note.

4. *Ibid*.

5. **Travel on Ice.**—*French v. Camp*, 18 Me. 433; s. c., 36 Am. Dec. 728; *State v. Wilson*, 42 Me. 9; *West Roxbury v. Stoddard*, 7 Allen (Mass.) 158.

But the relative legal importance of this form of the right of passage was somewhat qualified in the recent case of *Woodman v. Pitman*, 79 Me. 456. There the plaintiff brought an action to recover for the loss of a team driven over the frozen surface of the Penobscot river where thick ice had been removed by defendants and only a thin coating had formed, the servant in charge of the team knowing of the dangers. The court held that the plaintiff could not recover, and in the course of the opinion said (p. 461): "It is an error, we think, to invest the right of passing on the ice in all places with the same degree of importance as that which attaches to the right of vessels in navigable waters. It may be an offshoot of the navigable right—something akin to it—but a right of secondary or inferior degree. The idea of roads over the frozen surface of rivers was never broached in the old common law; it has grown up since, and should be the superior right or not according to circumstances." And on page 463: "It is our opinion that any occupation of the Penobscot river within the limits now receiving our attention, for the purpose of



It is paramount to all other rights and interests.<sup>1</sup>

**2. How Acquired.**—At common law the right to navigate waters above the tide was acquired by user or prescription.<sup>2</sup> It may now be granted by an express act of the legislature,<sup>3</sup> but is generally regarded as an inherent public right, needing no legislative sanction.<sup>4</sup>

a winter way, would be at this day of such insignificant importance, so useless and valueless in comparison with other public interests, that it cannot be set up to prevent or abridge the taking of ice within those limits to any extent whatever."

**1. Navigation the Paramount Right.**—*Musser v. Hershey*, 42 Iowa 356, 361; *Delaware etc. R. Co. v. Stump*, 8 Gill & J. (Md.) 479, 510; s. c., 29 Am. Dec. 561; *Post v. Munn*, 4 N. J. L. 61; s. c., 7 Am. Dec. 570; *Davis v. Jerkins*, 5 Jones (N. Car.) 290; *Hodges v. Williams*, 95 N. Car. 331; s. c., 59 Am. Rep. 242; *Flanagan v. Philadelphia*, 42 Pa. St. 219; *Cobb v. Bennett*, 75 Pa. St. 326; s. c., 15 Am. Rep. 752.

In *England* the right is paramount to any right of property in the crown, and the latter cannot make a grant inconsistent with it. *Colchester v. Brooke*, 7 Q. B. 339; 15 L. J., Q. B., N. S. 59; 9 Jur. 1090; *Williams v. Wilcox*, 3 N. & P. 606; 8 A. & E. 314.

So the right is superior to that of fishery. Anonymous, 1 Camp. 517, note; *Lewis v. Keeling*, 1 Jones (N. Car.) 299; s. c., 62 Am. Dec. 168; *Moulton v. Libbey*, 37 Me. 472; 59 Am. Dec. 57. See also *Mason v. Mansfield*, 4 Cranch (U. S.) 580; *The City of Baltimore*, 5 Ben. (U. S.) 474; *Commonwealth v. Chapin*, 5 Pick. (Mass.) 41; s. c., 16 Am. Dec. 386.

It is also superior to the enjoyment of property in an oyster bed. *Colchester v. Brooke*, 7 Q. B. 339; 15 L. J., Q. B., N. S. 59; to ferry privileges. *Steamboat "Globe" v. Kurtz*, 4 G. Greene (Iowa) 433; *Babcock v. Herbert*, 3 Ala. 392; s. c., 37 Am. Dec. 695; *The Vancouver*, 2 Sawyer (U. S.) 381, and to the right to lay pipes in the bed of a river. *Milwaukee Gaslight Co. v. Gamecock*, 23 Wis. 144.

It has also been held to be paramount to the right to use and maintain bridges. *Scott v. Chicago*, 1 Biss. (U. S.) 510; *Castello v. Landwehr*, 28 Wis. 522; *Gates v. Northern Pac. R. Co.*, 64 Wis. 64. But in *Illinois River Packet Co. v. Peoria Bridge Assoc.*, 38 Ill. 467, it is said that the right of navigating a stream

and that of bridging it are coexistent. See also *Chicago v. McGinn*, 51 Ill. 266; s. c., 2 Am. Rep. 295.

**2. User or Prescription.**—*Delaney v. Boston*, 2 Harr. (Del.) 489; *Brubaker v. Paul*, 7 Dana (Ky.) 428; s. c., 32 Am. Dec. 111; *Ingram v. Police Jury of St. Tammany*, 20 La. An. 126; *Berry v. Carle*, 3 Me. 269; *Binney's Case*, 2 Bland Ch. (Md.) 124; *Scott v. Wilson*, 3 N. H. 321; *State v. Gilmanton*, 14 N. H. 467, 478; *Shaw v. Crawford*, 10 Johns. (N. Y.) 236; *Canal Appraisers v. People*, 5 Wend. (N. Y.) 423; 444; *Pearsall v. Post*, 20 Wend. (N. Y.) 111; 22 Wend. (N. Y.) 425; *Wheeler v. Spinola*, 54 N. Y. 377; *State v. Thompson*, 2 Strobb. (S. Car.) 12; s. c., *Stump v. McNairy*, 5 Humph. (Tenn.) 363; s. c., 42 Am. Dec. 437.

But it has been held that user alone is not sufficient to establish the fact of dedication to the public. *Munson v. Hungerford*, 6 Barb. (N. Y.) 265; *Curtis v. Keesler*, 14 Barb. (N. Y.) 511.

In *England*, prescription is considered to be the true foundation of the right of passage above tidewater. *Woolrych on Waters* (2nd ed.) 40; and see cases in note *supra*.

This view is consistent with the holding that nontidal waters are private property, and would seem to be applicable to the States of the Union where that doctrine prevails. See note *supra*.

**3. Rivers Made Navigable by Legislative Enactment.**—*Ellis v. Carey*, 30 Ala. 725; *Harold v. Jones*, 86 Ala. 274; *Minturn v. Lisle*, 4 Cal. 180; *People v. St. Louis*, 10 Ill. 351; *Attorney General v. Del. etc. R. Co.*, 27 N. J. Eq. 1, 7; *People v. Gutches*, 48 Barb. (N. Y.) 656; *State v. Dibble*, 4 Jones (N. Car.) 107; *Walker v. Board of Public Works*, 16 Ohio 540, 545; *Coovert v. O'Conner*, 8 Watts (Pa.) 470; *Dedrick v. Wood*, 15 Pa. St. 9; *Baker v. Lewis*, 33 Pa. St. 301; s. c., 75 Am. Dec. 598; *Witt v. Jescoat*, 10 Rich. (S. Car.) 389; *Selman v. Wolfe*, 27 Tex. 68.

**4.** "Nature is competent to make a navigable river without the help of the legislature." *Martin v. Bliss*, 5 Blackf. (Ind.) 35; s. c., 32 Am. Dec. 52.

3. Use of Banks and Shores—(a) *By the civil law* the public enjoyed a servitude in the banks and shores of navigable waters as appurtenant to the right of passage,<sup>1</sup> and the same is true of States where the principles of that system prevail.<sup>2</sup>

(b) *But under the common law* it seems now<sup>3</sup> to be settled that the rights of navigators are limited by high-water mark, and that the easement of passage does not include the use of banks and shores for the general purposes auxiliary to navigation.

(1) *Landing, etc.*—Accordingly it has been held that the public have no indiscriminate right, as against riparian owners, of landing, embarking, or loading and unloading freight.<sup>4</sup>

"The public easement now depends not so much on actual user as upon the capabilities of a stream for actual use as a public highway." *Healy v. Joliet R. Co.*, 2 Ill. App. 435.

"The first man who used the Connecticut river as a highway, under Indian or English law, had a legal right to use it as the public now has." *DOE, J.*, in *Thompson v. Androscoggin Co.*, 54 N. H. 549. And see generally the cases cited in note *supra*.

1. Institutes of Justinian, lib. 2, tit. 1.

2. *Louisiana*.—Civil Code 446; Municipality No. 2 *v. New Orleans Cotton Press*, 18 La. 122; *Hanson v. Lafayette*, 18 La. 295; *Carrollton R. Co. v. Winthrop*, 5 La. An. 36; *McKeen v. Kurfust*, 10 La. An. 523; *New Orleans v. New Orleans etc. R. Co.*, 27 La. An. 414; *Sweeney v. Shakspeare (La.)*, 7 South. Rep. 729.

*Missouri*.—*O'Fallon v. Daggett*, 4 Mo. 343; s. c., 29 Am. Dec. 640. This was a case involving title to an early grant under the Spanish law.

3. There are some early decisions which hold the contrary. *Middleton v. Pritchard*, 4 Ill. 510, 522; s. c., 38 Am. Dec. 112; *Morrison v. Thurman*, 17 B. Mon. (Ky.) 249; s. c., 66 Am. Dec. 153; *Morgan v. Reading*, 3 Smed. & M. (Miss.) 366, 407; *Lewis v. Keeling*, 1 Jones (N. Car.) 209; s. c., 32 Am. Dec. 168. See also *Dalrymple v. Mead*, 1 Grant's Cas. (Pa.) 197; *Memphis v. Overton*, 3 Yerg. (Tenn.) 387. But the weight of authority is strongly in favor of the doctrine stated in the text. See next note.

4. *Landing, etc.*—*Bickel v. Polk*, 5 Harr. (Del.) 325; *Ensminger v. People*, 47 Ill. 384; *Chicago v. Laffin*, 49 Ill. 172, 176; *Bainbridge v. Sherlock*, 29 Ind. 364; s. c., 95 Am. Dec. 644; *Sherlock v. Bainbridge*, 41 Ind. 35; s. c., 13

Am. Rep. 302; *Talbott v. Grace*, 30 Ind. 389; s. c., 95 Am. Dec. 704; *The Steamboat Magnolia v. Marshall*, 39 Miss. 109; *Bell v. Gough*, 23 N. J. L. 624, 677; *O'Neill v. Annett*, 27 N. J. L. 291; s. c., 72 Am. Dec. 364; *Chambers v. Furry*, 1 Yeates (Pa.) 167; *Ball v. Slack*, 2 Whart. (Pa.) 508, 531; s. c., 30 Am. Dec. 278; *State v. Randall*, 1 Strobh. (N. Car.) 110; s. c., 47 Am. Dec. 548.

This principle has even been extended to landing places which are already a part of the highway. In *Smith v. Cooper*, 9 S. & R. (Pa.) 33, *DUNCAN, J.*, says: "There are few ferries whose landing place is not a public highway; ferries would become a property in common, subject to continual strife and where the strongest must ever prevail. The common law, to prevent this confusion, assigns the exclusive right of all property capable of being so enjoyed, to some determinate owner. It has assigned to the owner of the soil the right of landing on his own soil, on the banks of all navigable rivers."

It may be noted that the ground here assigned for this decision (viz, the necessity of giving every species of property a definite owner) is the same as that stated by *HARRIS, J.*, in *The Magnolia v. Marshall*, 39 Miss. 116, for holding that all fresh water streams are private, and in which he sharply criticises the *Pennsylvania* cases in which the opposite doctrine is advanced. See note *supra*.

Views similar to those expressed in *Cooper v. Smith*, were adopted in *Chambers v. Furry*, 1 Yeates (Pa.) 167; *Chess v. Manown*, 3 Watts (Pa.) 219; *Bird v. Smith*, 8 Watts (Pa.) 434; s. c., 34 Am. Dec. 483; *Prosser v. Davis*, 18 Iowa 367; *Pipkin v. Wynns*, 2 Dev. (N. Car.) 402.

"But this strict and severe rule is

(2) *Mooring, etc.*—But as against all save such owners, the public have the right of mooring<sup>1</sup> on the banks, and of anchoring.<sup>2</sup>

(3) *Towing, etc.*—There is no public right, at common law, of towing on the banks,<sup>3</sup> nor even a public right of access to waters

somewhat relaxed in *England*, and in *Peter v. Kendal*, 6 B. & C. 703, the K. B. denied the justness of the conclusion in *Saville*, and held that the owner of a ferry need not have the property in the soil on either side. It was sufficient that the landing place was a public highway. It was a right incident to the ferry to use such a landing place for the purposes of a ferry. This is the most reasonable conclusion upon the right to the use of a public highway to which a ferry is connected." 3 Kent's Com. (13th ed.) 421, note c.

The doctrine last stated is held in *Burrows v. Gallup*, 32 Conn. 499; s. c., 87 Am. Dec. 186; *Walker v. Armstrong*, 2 Kan. 198; *Fowler v. Mott*, 19 Barb. (N. Y.) 204; *Gant v. Drew*, 1 Oreg. 35; *Mills v. Learn*, 2 Oreg. 215; *Patrick v. Ruffners*, 2 Rob. (Va.) 209; s. c., 40 Am. Dec. 740; *Somerville v. Wimbish*, 7 Gratt. (Va.) 205; *Newton v. Cubitt*, 12 C. B., N. S. (Eng.) 32.

**Landings by Prescription.**—It has been held that the public right to a landing place cannot be acquired by custom or prescription. *Talbott v. Grace*, 30 Ind. 389; s. c., 95 Am. Dec. 704; *Pearsall v. Post*, 20 Wend. (N. Y.) 111; 22 Wend. (N. Y.) 425; *Pearsall v. Hewlett*, 20 Wend. (N. Y.) 111; 22 Wend. (N. Y.) 559. See also *Adams v. Rivers*, 11 Barb. (N. Y.) 390; *Curtis v. Keesler*, 14 Barb. (N. Y.) 511; *Etz v. Daily*, 20 Barb. (N. Y.) 32; *Kelsey v. King*, 33 How. Pr. (N. Y.) 39; *Bloomfield etc. Gas Light Co. v. Calkins*, 62 N. Y. 386; *Gardiner v. Tisdale*, 2 Wis. 153; s. c., 60 Am. Dec. 407.

But a different rule obtains in *Massachusetts*. *Kean v. Stetson*, 5 Pick. (Mass.) 492; *Coolidge v. Learned*, 8 Pick. (Mass.) 504; *Boston v. Richardson*, 105 Mass. 351, 357; in *North Carolina*, *Askew v. Wynne*, 7 Jones (N. Car.) 22; in *Pennsylvania*, *Bird v. Smith*, 8 Watts (Pa.) 434; s. c., 34 Am. Dec. 483. See also *Gray v. Bond*, 2 Brou. & Bing. (Eng.) 667. So in *Maine*, *Sevey's Case*, 6 Me. 118. But see *Hasty v. Johnson*, 3 Me. 282; *Littlefield v. Maxwell*, 31 Me. 134; s. c., 50 Am. Dec. 653; *Hill v. Lord*, 48 Me. 83, 100. See also *DEDICATION*, 5 Am. & Eng. Encyc. of Law 395; *FERRIES*, 7 Am. & Eng.

Encyc. of Law 941; *HIGHWAY*, 9 Am. & Eng. Encyc. of Law 362; *WHARVES AND WHARFAGE*.

**Eminent Domain.**—The legislature may take private property for use as a landing. *Mayor etc. of N. Y. v. New York Ferry Co.*, 40 N. Y. Super. Ct. 300; *Barrington v. Neuse River Ferry Co.*, 69 N. Car. 165; *Memphis v. Wright*, 6 Yerg. (Tenn.) 497; s. c., 27 Am. Dec. 489; *Muire v. Falconer*, 10 Gratt. (Va.) 12.

But selectmen of a town cannot do so. *Bethum v. Turner*, 1 Me. 111; s. c., 10 Am. Dec. 36; *Kean v. Stetson*, 5 Pick. (Mass.) 492.

1. **Mooring.**—*Bainbridge v. Sherlock*, 29 Ind. 364; s. c., 95 Am. Dec. 644; *Sherlock v. Bainbridge*, 41 Ind. 35; s. c., 13 Am. Rep. 302; *Brown v. Stone*, 5 Pa. L. J. 75; *Baker v. Lewis*, 33 Pa. St. 301; s. c., 75 Am. Dec. 598; *Delaware River Steamboat Co. v. Burlington etc. Steam Ferry Co.*, 81 Pa. St. 103; *Culbertson v. The Southern Bell*, 18 How. (U. S.) 584; *The Granite State*, 3 Wall. (U. S.) 310; *The St. Lawrence*, 19 Fed. Rep. 328; *Wyatt v. Thompson*, 1 Esp. (Eng.) 252; *Original Hartlepool Collieries Co. v. Gibb*, L. R., 5 Ch. D. 713. As to the right of mooring rafts and logs, see *BOOM COMPANIES*, 2 Am. & Eng. Encyc. of Law 469; *LOGS AND LUMBER*, 13 Am. & Eng. Encyc. of Law 1018.

2. **Anchoring.**—*The J. W. Everman*, 2 Hughes (U. S.) 17; *The Indiana*, Abb. Adm. 330; *Gann v. Whitstable Free Fishers*, 11 H. L. Cas. 192; *Foreman v. Whitstable Free Fishers*, L. R. 4 H. L. 266.

But anchoring in an improper place is negligence. *Knowlton v. Sanford*, 32 Me. 148; *The Electra*, 6 Ben. (U. S.) 189; *Strout v. Foster*, 1 How (U. S.) 89. See also *NAVIGATION*.

3. **Towing, etc.**—The leading case on this subject is *Ball v. Herbert*, 3 T. R. (Eng.) 253, overruling *Young v. —*, 1 Ld. Raymond (Eng.) 725, and *Queen v. Cluworth*, 6 Mod. Rep. 163. See *Brown v. Chadbourne*, 31 Me. 9; s. c., 50 Am. Dec. 641; *Treat v. Lord*, 42 Me. 552, s. c., 66 Am. Dec. 298, *Reimold v. Moore*, 2 Mich. (N. P.) 15; *Ledyard v. Ten Eyck*, 36 Barb. (N. Y.) 102; *Lee Navigation Conservators v. Button*, L.

from inlying lands.<sup>1</sup> But the owners of stranded property may go upon the banks for the purpose of reclaiming it.<sup>2</sup>

**4. Exercise of the Right.**—The use of navigable waters by the public is subject to rules and restrictions similar to those which apply to highways in general.<sup>3</sup> (See *HIGHWAYS*, 9 Am. & Eng. Encyc. of Law 362.) The right must be exercised in a reasonable manner and with due regard to the rights of riparian owners and of other navigators.<sup>4</sup> (See *NAVIGATION, NEGLIGENCE, SHIPPING*, Am. & Eng. Encyc. of Law.) Navigation need not be confined to the usual track of boats and vessels but may extend to any

R., 6 App. Cas. 685; 51 L. J., Ch. 17; 45 L. T., N. S. 385.

In *England*, the right may be acquired by prescription. *Pierre v. Fauconberg*, 1 Burr. (Eng.) 292; *Kinloch v. Neville*, 6 M. & W. 794.

In *Maine*, those engaged in floating logs may go upon the banks under stress of necessity. *Brown v. Chadbourne*, 31 Me. 9; s. c., 50 Am. Dec. 641; *Hooper v. Hobson*, 57 Me. 273; s. c., 99 Am. Rep. 769; *Weise v. Smith*, 3 Oreg. 445, 450.

A board of public works may appropriate the banks of a creek for a tow path. *Carpenter v. State*, 12 Ohio St. 457.

**1. Right of access.** *Hetfield v. Baum*, 13 Ired. (N. Car.) 394; s. c., 57 Am. Dec. 563; *Seabrook v. King*, 1 Nott & (S. Car.) 140; *Lawton v. Rivers*, 2 McCord (S. Car.) 445, 448; s. c., 13 Am. Dec. 741; *Turnbull v. Rivers*, 3 McCord (S. Car.) 131; s. c., 15 Am. Dec. 622; *Blundell v. Catterall*, 5 B. & Ald. (Eng.) 268. See also *Bickel v. Polk*, 5 Harr. (Del.) 325; *West Roxbury v. Stoddard*, 7 Allen (Mass.) 158; *Coolidge v. Williams*, 4 Mass. 140; *Courtelyou v. Van Brundt*, 2 Johns. (N. Y.) 357; s. c., 3 Am. Dec. 439. But a traveller has a right to approach a public water way from any part of the highway, and does not become a trespasser upon the owner of the fee by so doing. *Parsons v. Clark*, 76 Me. 476.

**2. Right to Reclaim Stranded Property.**—*Hooper v. Hobson*, 7 Me. 276; s. c., 99 Am. Dec. 769; *Proctor v. Adams*, 113 Mass. 376; *Carter v. Thurston*, 58 N. H. 104, 107; s. c., 42 Am. Rep. 584; *Etter v. Watts*, 58 N. H. 63, 66; *Forster v. Juniata Bridge Co.*, 16 Pa. St. 393; s. c., 55 Am. Dec. 506; *Rogers v. Judd*, 5 Vt. 223; s. c., 26 Am. Dec. 299. In *Maine*, the right is provided by statute. *Rev. Stats.* 1883, ch. 42, § 8. See also *LOGS AND LUMBER*, 13 Am. & Eng. Encyc. of Law 1018.

### 3. Governed by the Law of Highways.

—*Angell on Highways* (3rd ed.), § 229; *Harold v. Jones*, 86 Ala. 274, 277; *Sherlock v. Bainbridge*, 41 Ind. 35, 42; s. c., 13 Am. Rep. 302; *Sawyer v. Eastern Steamboat Co.*, 46 Me. 400; *Wadsworth v. Smith*, 11 Me. 278; s. c., 26 Am. Dec. 525; *Veazle v. Dwinel*, 50 Me. 479, 493; *Gerrish v. Brown*, 51 Me. 256, 263; *Davis v. Winslow*, 51 Me. 264, 294; s. c., 81 Am. Dec. 573; *Cary v. Daniels*, 8 Metc. (Mass.) 466, 478; s. c., 41 Am. Dec. 532; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, 319; *Scott v. Wilson*, 3 N. H. 321; *People v. Horton*, 64 N. Y. 610; 5 Hun (N. Y.) 516; *Baker v. Lewis*, 33 Pa. St. 301; s. c., 75 Am. Dec. 598; *Dalrymple v. Mead*, 1 Grant's Cas. (Pa.) 197; *State v. Thompson*, 2 Strobb. (S. Car.) 12; s. c., 48 Am. Dec. 588; *Memphis v. Overton*, 3 Yerg. (Tenn.) 389; *Attorney General v. Terry*, L. R., 9 Ch. 423; *Original Hartlepool Collieries Co. v. Gibb*, L. R., 5 Ch. Div. 713; *Williams v. Wilcox*, 8 Ad. & El. (Eng.) 314; *Ordinance of 1787*.

But in *Binney's Case*, 2 Bland Ch. (Md.) 124, it is said that a navigable river is not a highway in the most extensive signification of the term.

**4. Use Must be Reasonable.**—*Lancey v. Clifford*, 54 Me. 489; s. c., 92 Am. Dec. 561; *Hayward v. Knapp*, 23 Minn. 430.

Reasonable use is a question of fact, and must be determined by the circumstances of each case. *Sawyer v. Eastern Steamboat Co.*, 46 Me. 400, 405; *Davis v. Winslow*, 51 Me. 264, 297; s. c., 81 Am. Dec. 573; *Original Hartlepool Collieries Co. v. Gibb*, L. R., 5 Ch. Div. 713, 721.

A collation of authorities on the subject of the rights and duties of those engaged in navigation will be found in the annotations to *Baker v. Lewis*, 38 Pa. St. 301; s. c., 75 Am. Dec. 601-612.

part of the channel.<sup>1</sup>

**5. How Lost**—(See also EASEMENTS, 6 Am. & Eng. Encyc. of Law 139). The public right of navigation may be abridged and even extinguished by natural causes or by legal means, such as legislative enactment.<sup>2</sup> (See OBSTRUCTIONS, *infra*.) But in those States where the ordinance of 1787 was in force, it has been held that highways by water cannot be totally destroyed.<sup>3</sup>

**V. IMPROVEMENTS—1. Legislative Power Over.**—The right of navigation is subject to the governmental power to regulate and control it, and to improve rivers and harbors.<sup>4</sup> In *England* this power is vested in parliament.<sup>5</sup> In the *United States*, the authority of congress, under the commercial clause of the constitution, is paramount.<sup>6</sup> In the absence of congressional action the power of the State legislatures is supreme. They may direct the improvement of navigable rivers, or may authorize improvements by individuals and private corporations, and the levy of tolls may be authorized by way of reimbursement.<sup>7</sup>

1. *Porter v. Allen*, 8 Ind. 1; s. c., 65 Am. Dec. 750; *Colchester v. Brooke*, 2 Q. B. 339; 15 L. J., Q. B. 59. See also *Orr Ewing v. Colquhoun*, 2 App. Cas. 839.

2. *King v. Montague*, 6 D. & R. (Eng.) 616; 4 B. & C. (Eng.) 598; *Peters v. New Orleans etc. R. Co.*, 56 Ala. 528; *Cardwell v. Sacramento Co.*, 79 Cal. 347; *Bailey v. Philadelphia R. Co.*, 4 Harr. (Del.) 389; s. c., 44 Am. Dec. 593; *Com. v. Charlestown*, 1 Pick. (Mass.) 180; s. c., 11 Am. Dec. 161; *Kean v. Stetson*, 5 Pick. (Mass.) 492; *Charlestown v. Middlesex Co.*, 3 Metc. (Mass.) 202; *Matthiessen etc. Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. 247; *Lister v. Newark Plank Road*, 36 N. J. Eq. 477; *Flanagan v. Philadelphia*, 42 Pa. St. 219.

But the right of passage is not lost or abridged by the fact that at certain states of the tide vessels cannot pass without grounding and injuring oyster beds. *Colchester v. Brooke*, 15 L. J., Q. B., N. S. 59; 9 Jur. 1090.

A riparian owner cannot, by prescription, acquire the right to defeat the public right to float logs in a stream capable of such use. *Collins v. Howard* (N. H. 1889), 18 Atl. Rep. 794.

3. *People v. St. Louis*, 10 Ill. 351, 359; *Chicago v. McGinn*, 51 Ill. 266, 271; s. c., 2 Am. Rep. 295; *Williams v. Beardsley*, 2 Ind. 591; *St. Joseph Co. v. Pidge*, 5 Ind. 13; *United States v. New Bedford Bridge*, 1 Woodb. & M. (U. S.) 401.

4. *Chicago v. McGinn*, 51 Ill. 266; s. c., 2 Am. Rep. 295; *Hollister v.*

*Union Co.*, 9 Conn. 436; s. c., 25 Am. Dec. 36; *Zimmerman v. Union Canal Co.*, 1 W. & S. (Pa.) 346.

A law of Pennsylvania forbidding the floating of loose logs does not violate an agreement between that State and Maryland to preserve the free and public navigation of the Susquehanna river, since it promotes navigation by making it safe and convenient for all. *Craig v. Kline*, 65 Pa. St. 399; s. c., 3 Am. Rep. 686.

5. *Vooght v. Wince*, 2 B. & A. 598; *Lowe v. Govell*, 3 B. & A. 863; *Rex v. Montague*, 4 B. & C. 598; *Williams v. Wilcox*, 8 A. & E. 314; *Atty. Gen. v. Burridge*, 10 Price 350; *Atty. Gen. v. Parmenter*, 10 Price 378; *Abraham v. Great Northern R. Co.*, 16 Q. B. 586.

6. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *United States v. Coombs*, 12 Pet. (U. S.) 72; *Pollard v. Hagan*, 3 How. (U. S.) 212; *The Passenger Cases: Smith v. Turner and Morris v. Boston*, 7 How. (U. S.) 283; *Smith v. Turner*, 7 How. (U. S.) 392; *Veazie v. Moor*, 14 How. (U. S.) 568; *Withers v. Buckley*, 20 How. (U. S.) 84; *The Passaic Bridges*, 3 Wall. (U. S.) 782; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *The Daniel Ball*, 10 Wall. (U. S.) 557; *The Montello*, 20 Wall. (U. S.) 430; *Pound v. Turck*, 95 U. S. 459; *Mobile Co. v. Kimball*, 102 U. S. 691; *The Brig Wilson*, 1 Brock. (U. S.) 423; *Rogers v. Cincinnati*, 5 McLean (U. S.) 337; *The Chusan*, 2 Story (U. S.) 456; *The Bright Star*, 1 Woolw. (U. S.) 266; *Navigation Co. v. Dwyer*, 29 Tex. 376.

7. *Cannon v. New Orleans*, 20 Wall.

**2. Right of Riparian Owner to Compensation.**—Nor are riparian owners entitled to be compensated for injuries ordinarily incident to such improvements. The rule is otherwise, however, as to injuries not thus incident.<sup>1</sup> In the case of an unnavigable stream

(U. S.) 577; *Huse v. Glover*, 15 Fed. Rep. 92; *Tewksbury v. Schulenberg*, 41 Wis. 584; *Lipes v. Hand*, 104 Ind. 503; *Kellogg v. Union Co.*, 12 Conn. 7; *Re Hampshire Co. (Mass.)*, 3 N. E. Rep. 433; *Chaffe v. Trezevant*, 38 La. An. 746; *Chicago v. McGinn*, 51 Ill. 266; s. c., 2 Am. Rep. 295; *McReynolds v. Smallhouse*, 8 Bush (Ky.) 447; *Sinking Fund Comms. v. Green etc. Nav. Co.*, 79 Ky. 73; *Carondelet Canal & Nav. Co. v. Parker*, 29 La. An. 430; *Clay v. Pennoyer Creek Imp. Co.*, 34 Mich. 204; *Benjamin v. Manistee R. Imp. Co.*, 42 Mich. 628; *Wilcox v. Paddock*, 65 Mich. 23; *Nelson v. Cheboygan Slack Water Nav. Co.*, 44 Mich. 7; s. c., 38 Am. Rep. 222; *Manistee Imp. Co. v. Sand*, 53 Mich. 593; *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112; s. c., 84 Am. Dec. 527; *Carman v. Clarion River Nav. Co.*, 81\* Pa. St. 412; *Lehigh Coal & Nav. Co. v. Brown*, 100 Pa. St. 338; *Wisconsin R. Imp. Co. v. Manson*, 43 Wis. 255.

An act of a State legislature, imposing reasonable tolls, as a compensation for improving the navigation of a river within its own borders, is constitutional, unless it conflicts with the powers of congress in actual exercise. *Thames Bank v. Lovell*, 18 Conn. 500; s. c., 46 Am. Dec. 332.

The ordinance of 1787 creating the Northwest Territory, and providing that the navigable waters shall be common highways and forever free, does not prohibit a State from improving the navigation thereof, and charging a reasonable toll for the increased facilities, the ordinance referring to such waters in their natural state. *Palmer v. Cuyahoga Co.*, 3 McLean (U. S.) 226; *Huse v. Glover*, 119 U. S. 543; *Benjamin v. Manistee R. Imp. Co.*, 43 Mich. 628; *Sands v. Manistee R. Imp. Co.*, 123 U. S. 288.

Nor did the act admitting Mississippi into the Union as a State by guarantying the free navigation of the Mississippi river prohibit that State from improving the river. *Withers v. Buckley*, 20 How. (U. S.) 84.

The State may authorize the conversion of an unnavigable into a navigable stream, and the authorized assessment

of tolls for the use of the improvement is not unconstitutional or unlawful. *Carondelet Canal & Nav. Co. v. Parker*, 29 La. An. 430; *Wisconsin Imp. Co. v. Manson*, 43 Wis. 255.

A railroad company constructing its road bed on the Hudson River in front of docks and wharves under authority of the State, congress having taken no action, invades no public right, and is not a nuisance as to a vessel owner thereby prevented from fulfilling his contract of transportation with the riparian owners. *Ormerod v. New York etc. R. Co.*, 13 Fed. Rep. 370.

The arms, bayous and sloughs of the Mississippi not required in the interests of commerce to be preserved for navigation are not public highways, but within the control of the State and municipal authorities, and the filling up of a slough at Dubuque formerly used for navigation under authority of the city, was adjudged valid. *Ingraham v. Chicago etc. R. Co.*, 34 Iowa 249.

The taking of the water power of a navigable stream in improving the same, is only an incident thereto, and therefore the right to take it is paramount to any right of user of a riparian owner. And the taking of the surplus water power over and above that necessary for navigation is equally incidental to such improvement and valid as against a riparian owner. Or against such owner therefore a sale by the State of any such supply of water power is valid. *Green Bay etc. Canal Co. v. Kaukauna etc. Co.*, 70 Wis. 635.

1. The public authorities may build wharves and levees on the banks of the Mississippi, and otherwise improve the navigation thereof, without the consent of the adjacent proprietor, and without making him compensation. *Barney v. Keokuk*, 94 U. S. 324.

The flooding of land in consequence of a duly authorized improvement of navigation is not *damnum obsequie injuria* as being properly incidental to an improvement of navigation. *Hackstack v. Keshena Imp. Co.*, 66 Wis. 439.

Authority to improve a stream to make it floatable within the natural flow of the stream gives no power to act outside of the channel of the stream

made navigable and declared a public highway by legislative authority, the riparian owner is entitled to be compensated.<sup>1</sup> But the paramount public right of navigation in waters in fact navigable and incidental power of the State to regulate, control and improve them, as against private rights therein, does not include the power to authorize the taking of the waters for other purposes.<sup>2</sup> Aside from the subordination of the right of user of the riparian owner to the public right of navigation and control of navigable waters in reference thereto, private property must not

or to interfere with riparian owners. *White Deer Creek Imp. Co. v. Sassaman*, 67 Pa. St. 414.

One who owns a towing path is entitled to compensation for obstructions thereby by a commission improving the navigation of the river. *Reg. v. Thames & Isis Navigation*, 5 A. & E. 804.

In *Ryan v. Brown*, 18 Mich. 196, erections on private property for dock purposes, not encroaching on the natural navigation of the river St. Mary, were held not to become unlawful by the subsequent opening of a canal which was thereby obstructed, and were therefore not removable by the State without compensation to the owners.

Where the charter of an improvement company provided for compensation in the case of lands taken from private owners, but was silent as to lands belonging to the State, it was held that subsequent purchasers of State lands had no claim to compensation against the company for the taking of such lands. *Black River Imp. Co. v. La Crosse Booming etc. Co.*, 54 Wis. 659.

A flowage of land between high and low water mark is such a taking thereof as renders a statute authorizing a company to improve the waters of a floatable stream and maintain the waters at high water mark without compensation, unconstitutional. *Foster v. Stafford Bank*, 57 Vt. 128.

The Connecticut legislature may authorize improvements to the navigation of waterways of the State without reference to remote and consequential damage to land within the State; for instance, diminution of water power. This does not amount to a "taking" of private property, etc., within the constitution. Otherwise as to such damage to land owners in other States. *Holyoke Water Power Co. v. Connecticut River Co.*, 20 Fed. Rep. 71.

The obstruction or deepening of the waters of a stream, which is a public highway, by authority of an act of assembly, is not the subject of a claim of damages by the owner of the adjoining land for an injury done to or destruction of a fording across the stream. *Zimmerman v. Union Canal Co.*, 1 W. & S. (Pa.) 346.

On the other hand, the straightening by the State for public purposes of a stream where it empties into another whereby five years later land on the opposite side is injured or destroyed by the current, is not a "taking" within Cal. Const. prior to 1879. *Hoagland v. State* (Cal. 1889), 22 Pac. Rep. 142.

A company authorized to erect a lock navigation in a river and required to make compensation for any damage done to lands or property by overflowing the same, is liable for all damage it causes by overflow, not merely for the damage done in excess of a reasonable use, and therefore is liable for flooding in high water, whereas a riparian owner would be exempt from liability by reason of his right of reasonable use. *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379; s. c., 47 Am. Dec. 474.

1. Where, by making an unnavigable stream navigable, a riparian owner is deprived of his right to use the water for hydraulic and other purposes he is entitled to compensation. *Walker v. Board of Public Works*, 16 Ohio 540.

A statute declaring river not in full navigable to be a public highway does not make it so if no provision for the compensation of riparian owners is made. *Olive v. State*, 86 Ala. 88. See also *Town of Pierrepont v. Loveless*, 72 N. Y. 211; *Morgan v. King*, 35 N. Y. 454; s. c., 91 Am. Dec. 58.

2. *Smith v. Rochester*, 92 N. Y. 463; s. c., 44 Am. Rep. 393, where diversion of the waters of nontidal navigable stream for supplying a city, authorized by the legislature, was held unlawful as against riparian owners for the loss

be taken in the exercise of the public right to control, regulate, and improve navigable waters.<sup>1</sup>

**VI. OBSTRUCTIONS—1. What Are—**(a) *In General.*—Obstructions to navigation are such impediments as boats and vessels cannot, by the exercise of skill and care, avoid being injured by in passing.<sup>2</sup> All such, if unauthorized, are *prima facie* nuisances.<sup>3</sup> But impediments which are only slight or temporary, or which are incidental to the exercise of the right of passage, are not action-

of whose rights the law provided no compensation.

2. *Avery v. Fox*, 1 Abb. (U. S.) 246; *Hollister v. Union Co.*, 9 Conn. 436; s. c., 25 Am. Dec. 36.

3. *Terre Haute Draw Bridge Co. v. Halliday*, 4 Ind. 36, 41.

4. **Obstructions Are Prima Facie Nuisances.**—*Walker v. Allen*, 72 Ala. 456; *Alden v. Pinney*, 12 Fla. 328; *Charleston etc. R. Co. v. Johnson*, 73 Ga. 306; *McLean v. Mathews*, 7 Ill. App. 599; *Knox v. Chaloner*, 42 Me. 150; *State v. Freeport*, 43 Me. 198; *Gerrish v. Brown*, 51 Me. 256; s. c., 81 Am. Dec. 569; *Davis v. Winslow*, 51 Me. 264, 296; s. c., 81 Am. Dec. 573; *Newark Plank Road Co. v. Elmer*, 9 N. J. Eq. 754; *State v. Babcock*, 30 N. J. L. 29; *People v. Vanderbilt*, 38 Barb. (N. Y.) 286; 26 N. Y. 287; *People v. Horton*, 5 Hun (N. Y.) 516; *Mayor etc. of N. Y. v. Baumberger*, 7 Robt. (N. Y.) 219; *Blanchard v. Western Union Tel. Co.*, 60 N. Y. 510; *State v. Dibble*, 4 Jones (N. Car.) 107; *Volk v. Eldred*, 23 Wis. 410; *State v. Carpenter*, 68 Wis. 165, 168.

No amount of benefit to an indefinite number of individuals or to a community can countervail the public inconvenience resulting from the obstruction of a navigable river, and evidence of such benefit is inadmissible. *Gold v. Carter*, 9 Humph. (Tenn.) 369; s. c., 49 Am. Dec. 712.

So the erection of an embankment in a port or public river is indictable if it hinder navigation, even though productive of collateral benefits. *Rex v. Ward*, 6 N. & M. (Eng.) 38; 4 A. & E. (Eng.) 384; 1 H. & N. (Eng.) 703.

A vessel is liable for damages resulting from stretching a line across a channel, and a passing raft is not bound to take precautions to avoid it. *McCord v. Steamboat Tiber*, 6 Biss. (U. S.) 409. See also *Pacific Mut. Tel. Co. v. Chicago etc. Bridge Co.*, 36 Kan. 118; *The Swan*, 19 Fed. Rep. 455.

But the temporary use of a line

across a narrow stream in mooring or handling vessels is not an unlawful obstruction. *The Echo*, 19 Fed. Rep. 453.

Whether a wire cable across a river for the purpose of a guy on which to run a ferry boat is or is not an unlawful obstruction may depend on the circumstances of the particular case. *The Vancouver*, 2 Sawy. (U. S.) 381; *Ladd v. Foster*, 31 Fed. Rep. 827; *The Imperial*, 38 Fed. Rep. 614.

A gas company, authorized to lay its pipes across a navigable river, should bury them beneath the bed; otherwise they constitute an unlawful obstruction. *Omslaer v. Philadelphia Co.*, 31 Fed. Rep. 354; *Milwaukee Gas Co. v. Gamecock*, 23 Wis. 154. And see, as to oil pipe lines in river beds, *Buffalo Pipe Line Co. v. New York etc. R. Co.*, 10 Abb. N. Cas. (N. Y.) 107; *United N. J. R. & Canal Co. v. Standard Oil Co.*, 33 N. J. Eq. 123.

Telegraph cables so laid as to come in contact with vessels navigating the stream, and which would otherwise pass without difficulty, injuriously obstruct navigation, and are *pro tanto* a nuisance. Nor can the companies so laying them justify under a statute, State or federal, authorizing them to be laid under water. *Stephens & C. Transp. Co. v. Western Union Tel. Co.*, 8 Ben. 502; *Blanchard v. Western Union Tel. Co.*, 60 N. Y. 510; *The City of Richmond*, 43 Fed. Rep. 85.

A weir, even if erected under authority, is unlawful if it subsequently become an obstruction to navigation. *Williams v. Wilcox*, 3 N. & P. (Eng.) 606; 8 A. & E. 314; 1 W. W. & H. 477.

A hidden structure placed between high and low water mark, for the use a wharf owner, and which obstructs navigation, is unlawful. *White v. Phillips*, 15 C. B., N. S. 245; 33 L. J., C. P. 33; 10 Jur., N. S. 425; 9 L. T. 388.

A riparian owner on a navigable tidal river has no right to construct a



able.<sup>1</sup> Floating docks, elevators, or storehouses in rivers or harbors are a public nuisance, unless authorized.<sup>2</sup> If, however, they are so located as to afford a passage for vessels they do not become a private nuisance.<sup>3</sup>

(b) *By Boats and Vessels.*—The right of navigation must be exercised with due regard to a similar right on the part of others. A boat or vessel may constitute an unlawful obstruction.<sup>4</sup>

jetty into the bed of the river to protect his soil if the public right of navigation is or may be impeded. *Atty. Gen. v. Lonsdale*, 7 L. R., Eq. 377.

Deposits of sewage that fill up a harbor or a portion to the obstruction of navigation are a nuisance. *Brayton v. Fall River*, 113 Mass. 218; s. c., 18 Am. Rep. 470; *Washburn etc. Mfg. Co. v. Worcester*, 116 Mass. 458; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Franklin Wharf v. Portland*, 67 Me. 46; s. c., 24 Am. Rep. 1; *Clark v. Peckham*, 10 R. I. 35; s. c., 14 Am. Rep. 654.

So are deposits of sediment and debris. *Garitee v. Baltimore*, 53 Md. 422; *Peeples v. Gold Run Ditch Min. Co.*, 66 Col. 138; s. c., 56 Am. Rep. 80.

1. *Slight or Temporary Obstructions.*—*State v. Carpenter*, 68 Wis. 165; s. c., 60 Am. Rep. 848; *Pennsylvania v. Wheeling etc. Bridge Co.*, 13 How. (U. S.) 581; *Dutton v. Strong*, 1 Black (U. S.) 23; *United States v. Rum R. Boom Co.*, 1 McCrary (U. S.) 397; *St. Louis v. Knapp etc. Co.*, 2 McCrary (U. S.) 516; *Rex v. Tindall*, 1 N. & P. (Eng.) 719; 6 A. & E. 143; *Reg. v. Russell*, 3 El. & Bl. (Eng.) 942; 18 Jur. 10. 22.

The true test as to a structure being a nuisance is whether or not it interferes as little as possible with navigation. *Illinois R. Packet Co. v. Peoria Bridge Assoc.*, 38 Ill. 467.

ALLEN, J.: "Slight inconveniences and occasional interruptions are incidental to many lawful uses of public highways and water courses, and are tolerated by reason of necessity and the benefits resulting to the public at large by the acts causing the interruption. If the obstructions are temporary and reasonable they will not be declared illegal merely because the public may not for the time have the full use of the highway." *People v. Horton*, 64 N. Y. 610, 616.

2. *Wetmore v. Atlantic White Lead Co.*, 37 Barb. (N. Y.) 70; *Neal v. Henry*, Meigs (Tenn.) 17; s. c., 33 Am. Dec. 125; *Bigelow v. Newell*, 10 Pick.

(Mass.) 348; *Hecker v. New York Balance Dock Co.*, 13 How. Pr. (N. Y.) 549; *Corning v. Lowerre*, 6 Johns. Ch. (N. Y.) 439.

3. *Harrington v. Edwards*, 17 Wis. 586; *Bainbridge v. Sherlock*, 29 Ind. 364; s. c., 95 Am. Dec. 644; *Dimes v. Petley*, 15 Q. B. 276.

The use of a floating elevator in the ship canal at Buffalo in the loading and unloading of vessels not aground or disabled, no actual injury, public or private, being complained of, is not such an obstruction as equity will interpose to prevent the harbor masters having full power to direct the location of vessels, and never having directed a change of location of the elevator and not having refused or neglected to perform their duty in this regard. *People v. Horton*, 5 Hun (N. Y.) 516; affirmed 64 N. Y. 610.

4. It is unlawful to let a boat lie so as to obstruct the passage of other boats. *King v. Sanders*, 2 Brev. (S. Car.) 111.

But the accidental grounding of a vessel is an obstruction incident to commerce, and, in the absence of negligence, is not an actionable nuisance. *Cummins v. Spruance*, 4 Harr. (Del.) 315; *Rex v. Watts*, 2 Esp. 675; *Brown v. Mallett*, 5 C. B. 599. See also *Colchester v. Brooke*, 2 Q. B. 339; 15 L. J., Q. B. 59; *White v. Crisp*, 10 Exch. 312.

A steamboat company owning a wharf adjacent to the slips of a ferry company have the same right of navigation in front of the slips as elsewhere in the river, and to moor their boats at their wharf, but must not wilfully obstruct the ferry company in using their slips. *Delaware R. Steamboat Co. v. Burlington etc. Steam Ferry Co.*, 81 Pa. St. 103.

A riparian owner on a navigable river has the right to moor a vessel of ordinary size at his wharf for the purpose of loading and unloading at all reasonable times and for a reasonable period, even though the vessel overlaps others' premises, provided that the others' access to the river is not inter-

(c) *By Rafts and Logs*.—The right of rafting must be so exercised as not to obstruct unnecessarily the equal right of navigation and rafting by others,<sup>1</sup> or to infringe on the rights of riparian

fered with. *Original Hartlepool Collieries Co. v. Gibb*, 5 L. R., Ch. D. 713.

One whose boat is lawfully at a wharf and the stern thereof is carried down by the current so as to overlap another's wharf, is not guilty of an unlawful obstruction to other boats thus prevented from landing at the latter wharf if he use reasonable skill, care and dispatch, and subjects others to as little inconvenience as possible. *Sherlock v. Bainbridge*, 41 Ind. 35; s. c., 13 Am. Rep. 302.

A vessel may lawfully pursue its course without regard to seines or nets across the way. *Anon.* 1 Camp. 517, note; *Colchester v. Brooke*, 7 Q. B. 339; *Moulton v. Libby*, 37 Me. 472; s. c., 59 Am. Dec. 57; *Com. v. Chapin*, 5 Pick. (Mass.) 199; s. c., 16 Am. Dec. 386; *Post v. Munn*, 4 N. J. L. 67; s. c., 7 Am. Dec. 570; *Lewis v. Keeling*, 1 Jones (N. Car.) 299; s. c., 62 Am. Dec. 168; *Davis v. Jerkins*, 5 Jones (N. Car.) 290; *Flanagan v. Philadelphia*, 42 Pa. St. 219; *Mason v. Mansfield*, 4 Cranch (U. S.) 580; *The City of Baltimore*, 5 Ben. (U. S.) 475.

The right of navigation is paramount to the right of crossing by a bridge. *Scott v. Chicago*, 1 Biss. (U. S.) 510; *Castello v. Landwehr*, 28 Wis. 522.

It is paramount to a ferry franchise. *Steamboat "Globe" v. Kutz*, 4 G. Greene (Iowa) 433; *Babcock v. Herbert*, 3 Ala. 392; s. c., 37 Am. Dec. 695.

The right of navigation must be so exercised as to do no needless harm to one exercising the right of fishery. *Colchester v. Brooke*, 2 Q. B. 339; *Post v. Munn*, 4 N. J. L. 67; s. c., 7 Am. Dec. 570; *Lewis v. Keeling*, 1 Jones (N. Car.) 299; s. c., 62 Am. Dec. 168; *Cobb v. Bennet*, 75 Pa. St. 326; s. c., 15 Am. Rep. 52.

The master of a vessel who, in the usual course of navigation, enters a fishery and anchors for the purpose of taking in the residue of his cargo, and not with a malicious intent to injure the fishery, and departs as soon as wind, weather and tide permit, is not liable for the damages caused to the owner of the fishery. *Mason v. Mansfield*, 4 Cranch (U. S.) 580.

It is unlawful for a steamer to run back and forth unnecessarily near a boom enclosing ice and thereby destroy

the same. *Peoples' Ice Co. v. Steamer Excelsior*, 44 Mich. 229; s. c., 38 Am. Rep. 246.

A vessel anchoring, or otherwise navigating negligently, is liable for injuring a telegraph cable at the bottom of the sea. *Submarine Tel. Co. v. Dickson*, 15 C. B., N. S. 759; *The Clara Killam*, L. R., 3 Adm. 161.

The owner of a wharf had a mast projecting therefrom over the river. The bowsprit of another vessel moored at an adjoining wharf overhung in front of the first wharf, and on the falling of the tide came in contact with the mast and broke it. The owner of the vessel was held not liable. *Dalton v. Denton*, 1 C. B., N. S. 672.

The right of navigation must be exercised with a due regard to the interest of others, and one is liable for injuries caused to another's wharf by his unskillful navigation, though the wharf, by reason of its location, was a public nuisance. *Dimes v. Pettey*, 15 Q. B. 276.

1. It is an unlawful obstruction so to let a raft lie as to obstruct the passage of boats or rafts. And such an obstruction may be removed by one whose passage is impeded, reasonable time being given and no unnecessary or wilful damage being done. *Beach v. Schoff*, 28 Pa. St. 196; s. c., 70 Am. Dec. 122; *The C. D. Jr.*, 1 Newb. Adm. 501; *Philiber v. Matson*, 14 Pa. St. 306.

An obstruction by logs for six weeks during the season of navigation is presumptively unreasonable and unlawful. *Enos v. Hamilton*, 27 Wis. 656.

It is an unlawful obstruction for one to select and occupy a particular portion of a floatable stream for the storage of logs and thereby prevent another from driving his logs into such stream from a tributary. *McPheters v. Moose River Log Driving Co.*, 78 Me. 329.

Giving such headway to a raft of logs while propelling it in the channel of the Mississippi river that it gets beyond control, is unlawful. *Hayward v. Knapp*, 23 Minn. 430.

Logs to be obstructions to other logs need not come in actual contact with them if the former are in the way of the latter so that the latter cannot be driven till they are out of the way,

## NAVIGABLE WATERS.—NAVIGATION.

owners,<sup>1</sup> or otherwise injure others.<sup>2</sup> But whatever is reasonably necessary to the exercise of the right may be done, reasonable care being exercised.<sup>3</sup>

**2. From Detention and Diversion.**—See WATERS AND WATER-COURSES.

**3. Remedies.**—The remedies for the obstruction of navigable waters are those applicable to nuisances generally: viz., by indictment or information in behalf of the public, by private action in the case of an individual sustaining special injury, by abatement, where such is permissible under the law governing nuisances generally, and by injunction on the presentation of a proper case. (See NUISANCE; INJUNCTION.)<sup>4</sup>

**NAVIGATION**—(See also NAVIGABLE WATERS; PRACTICE IN ADMIRALTY; SHIPPING).

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they obstruct the latter. *Anderson v. Meloy*, 32 Minn. 26.

The right to store or boom logs along river banks and in the harbors at their mouths, is incidental to the public right to use floatable streams as highways. *Canfield v. Erie*, 1 Mich. (N. P.) 105.

1. Using a stream for floating, collecting, dividing or storing their logs must not, for the sake of facilitating their use, raise the water so as to overflow adjoining lands. *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

2. The business of floating logs down the Mississippi in a mode that will injure an apron erected over the crest of St. Anthony Falls by the United States to protect the rock from washing away will be enjoined. *United States v. Mississippi etc. Boom Co.*, 1 McCrary (U. S.) 601.

When a bridge has been built across a floatable stream with a reasonably adequate passageway, it is unlawful to drive down a mass of logs exceeding the capacity of the passageway, and thereby injure the bridge. *Bucki v. Cone*, 25 Fla. 1.

The careless and negligent driving of logs down a floatable stream gives a right of action for the damages caused thereby. *Mandlebaum v. Russell*, 4 Nev. 551.

3. One floating logs down a floatable stream, and using reasonable efforts to keep them in it, is not liable for the injury caused to a riparian owner by their stranding, and may enter to reclaim them, doing no unnecessary dam-

age. *Carter v. Thurston*, 58 N. H. 104; s. c., 42 Am. Rep. 584.

If a jam is reasonably necessary to the driving of logs in a floatable stream, the company authorized to improve the navigation thereof and drive logs therein is not liable for injuries caused thereby. *Field v. Apple River Log Driving Co.*, 67 Wis. 569.

The test of due skill and care in navigating a raft is the ordinary skill and care of timber raftsmen on the river. And the right to drive logs down a navigable river is paramount to the right to construct a boom. *Sullivan v. Jernigan*, 21 Fla. 264.

**4. Bibliography.**—*English*—*De Jure Maris*, ascribed to Sir Matthew, afterwards Lord, Hale (see Gould on Waters, secs. 17, 18, 49), but not published until 1787; *Schultes' Aquatic Rights*, 1811 (Am. ed. 1839); *Callis on Sewers* (5th ed. 1824); *Phear, Rights of Water*, 1858 (Am. ed. 1859); *Woolrych's Law of Waters*, 1851 (Am. ed. 1853); superseding a work by the same author on *Sewers*. *Willcock's The Ocean, The River and The Shore*, 1863; *Hall's Rights on the Sea Shore* (2nd ed. 1875); *Higgins' Pollution of Watercourses*, 1877; *Coulson & Forbes on Waters*, 1880. *American*—*Angell on Tide Waters* (2nd ed. 1847); *Angell on Watercourses* (7th ed. 1877); *Houck, Navigable Rivers*, 1868; *Gould on Waters*, 1883. There is also quite an extensive periodical and fugitive literature on the subject which may be found by consulting Jones's Index to Legal Periodicals.

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**I. DEFINITION.**—Navigation is a term applied to the science or business of conducting vessels or materials over navigable waters.<sup>1</sup>

**II. LEGISLATIVE CONTROL.**—(See also INTERSTATE COMMERCE, 11 Am. & Eng. Encyc. of Law 539; NAVIGABLE WATERS; POLICE POWER)—1. **Power of Congress.**—The word commerce in the clause of the constitution of the United States, which declares that "congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes," comprehends, and has always been understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added.<sup>2</sup> All laws passed by congress in the regulation of navigation and trade, whether foreign or coastwise are therefore, but the exercise of an undisputed

1. *Gerrish v. Brown*, 51 Me. 256, 262.

"Navigation" is "the science or art of conducting a ship from one place to another. This includes the supply of necessary implements and skilful mariners. The instruments are useless without the skilful mariners, and, conversely, navigation includes two things—the supply of the instruments or organs of the ship and the living instruments, or seamen. If either of these is wanting by the negligence of the owner, or of those for whom he is responsible, there is improper navigation." Per FRY, L. J. *The Warkworth*, 9 P. D. 145. See, further, *Good v. London Steamship Assoc.*, L. R., 6 C. P. 563; 20 W. R. 33; *Carmichael v. Liverpool Sailing Ship Assoc.*, 56 L. T. 863.

The moving of a vessel in an unfinished state, from one place to another in the course of her construction, and not for the purpose of earning money, is not "navigation." *The Joshua Leviness*, 9 Bing. (Pa.) 339.

Neither a log nor any number of logs floating upon the surface of a stream, uncontrolled and uncontrollable, is navigation. *Harrigan v. Connecticut River Lumber Co.*, 129 Mass. 580, 585.

"Cases have decided that the word 'Navigation,' for some purposes, includes a period when the ship is not in motion; as for instance, when she is at anchor." Per DENMAN, J. *Hayn v. Culliford*, 3 C. P. D. 417; affirmed, 4 C. P. D. 182.

**Inland navigation** defined in 11 Am. & Eng. Encyc. of Law 1.

2. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Bark Chusan*, 2 Story (U. S.) 455; *Brig Wilson v. United States*, 1 Brock. (U. S.) 423; *Moor v. Veazie*, 32 Me. 343; *State v. Kennedy*, 19 La. An. 397; *Sweatt v. Boston etc. R. Co.*, 3 Cliff. (U. S.) 339; *South Carolina v. Georgia*, 93 U. S. 4; *Commrs. of Pilotage v. Steamboat Cuba*, 28 Ala. 185.

Commerce includes intercourse, navigation, and not traffic alone. *Lord v. Steamship Co.*, 102 U. S. 548.

Commerce embraces navigation and extends to all the instruments used in navigating inland waters and the ocean. *Pacific Coast Steamship Co. v. Board of Railroad Commrs.*, 18 Fed. Rep. 10, 11.

The term "commerce" includes the transportation of passengers as well as merchandise. *North River Steamboat Co. v. Livingston*, 3 Cow. (N. Y.) 713.

power.<sup>1</sup> So vessels engaged in commerce between the States, and however limited that commerce is, so far as it goes it is subject to the legislation of congress,<sup>2</sup> and it may be exercised with or without positive regulations.<sup>3</sup> But it does not extend to that commerce which is completely internal. It applies to all the external concerns of the nation and to those internal which affect the States generally, but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. So commerce strictly internal to each State, though carried on by means of the navigable rivers of the United States, is not within the control of congress.<sup>4</sup> But, where vessels in trading between ports and places within a State, navigate the high seas, congress has power to regulate the liability of the owners of such vessels.<sup>5</sup>

**2. Power of the States.**—A State may legislate concerning rivers which run exclusively within its own limits, when its own citizens are equally subject with those of other States to any inconveniences flowing from such legislation.<sup>6</sup> But it has no power to reg-

1. *Moran v. New Orleans*, 112 U. S. 69; *Pacific Coast S. S. Co. v. California R. Commrs.* 18 Fed. Rep. 10; *Hall v. De Cuir*, 95 U. S. 485; *Edge v. Robertson*, 112 U. S. 580; *Pennsylvania v. Wheeling Bridge Co.*, 18 How. (U. S.) 421; *People v. Downer*, 7 Cal. 169; *Mitchell v. Stedman*, 8 Cal. 363.

2. *The Daniel Ball*, 10 Wall. (U. S.) 557.

A State law which authorizes a State officer at a port to make a survey of sea-going vessels there arriving, and of damaged goods found on board—not for the purpose of certifying the quantity and value of the things inspected for the protection of consumers, but to furnish official evidence for the parties immediately concerned, and, where goods are found damaged, to provide for their sale—is not an inspection law, such as a State may pass, but a regulation of commerce and unconstitutional. *Foster v. Master etc. of New Orleans*, 94 U. S. 246.

3. *Bark Chusan*, 2 Story (U. S.) 455; *Moor v. Veazie*, 32 Me. 343; *State v. Kennedy*, 19 La. An. 397; *Brig Wilson v. United States*, 1 Brock. (U. S.) 423.

4. *The Bright Star*, 1 Woolw. (U. S.) 266; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1.

The power of congress to regulate steamboats employed in transporting passengers to require that they carry life-preservers, that they submit their boilers to inspection, etc., does not ex-

tend to vessels plying between ports in the same State and confining their business wholly to commerce within the State. *The Thomas Swan*, 6 Ben. (U. S.) 42.

5. *Lord v. Goodall, Nelson etc. S. S. Co.*, 102 U. S. 541.

6. *Hutchinson v. Thompson*, 9 Ohio 52; *Sands v. Manistee River Improvement Co.*, 123 U. S. 288; *Fitch v. Livingston*, 4 Sandf. (N. Y.) 492; *Houston etc. Navigation Co. v. Dwyer*, 29 Tex. 376; *Green & B. R. Nav. Co. v. Chesapeake etc. R. Co.* (Ky.), 10 S. W. Rep. 6; *Kellogg v. Union Co.*, 12 Conn. 7; *Veazie v. Moor*, 14 How. 568; *Livingston v. Van Ingen*, 9 Johns. (N. Y.) 507; *The Ann Ryan*, 7 Ben. (U. S.) 20.

A State law requiring masters of vessels bound to ports in this State to accept the services of the first licenced pilot offering is not unconstitutional. *Thompson v. Sprague*, 69 Ga. 409; 47 Am. Rep. 760. See *State v. Penny*, 19 S. Car. 218.

**Municipal Ordinance.**—The ordinance of the city of New Orleans, imposing a licence tax upon the owners of tow-boats running on the Mississippi river to and from the Gulf of Mexico, does not impose a duty upon tonnage, nor is it a regulation of commerce; and it is not, therefore, in conflict with the constitution of the United States. *New Orleans v. Eclipse Tow Boat Co.*, 33 La. An. 647; 39 Am. Rep. 279.

The local authorities of a port have a

ulate navigation which extends beyond its own jurisdiction.<sup>1</sup> A

right to prescribe at what wharf a vessel may lie, where she may remain at anchor in a harbor, and for what time, and what description of light she shall display at night, and similar regulations; and such directions are not in conflict with any law of congress regulating commerce, or with the general admiralty jurisdiction conferred on the courts of the United States, and are valid. *The James Gray v. The John Fraser*, 21 How. (U. S.) 184.

A duty imposed by a city ordinance, which provides that steam packets and other vessels trading steadily, and performing regular successive voyages to that port from the adjoining States of North Carolina and Georgia, shall pay to the harbor-master one cent per ton once every three months, or every quarter, as a tonnage duty; and the ordinance is in violation of section 10, article 1, of the constitution of the United States, by which it is ordained that "no State shall, without the consent of congress, lay any duty of tonnage." *Alexander v. Wilmington etc. R. Co.*, 3 Strobb. (S. Car.) 594. See *Steamship Co. v. Port Wardens*, 6 Wall. (U. S.) 31. Compare *Benedict v. Vanderbilt*, 1 Robt. (N. Y.) 194.

**Exclusive Privilege.**—The legislature of a State may grant an exclusive privilege of navigating the waters of the State with steamboats. *Livingston v. Van Ingen*, 9 Johns. (N. Y.) 507. But such grant is void so far as it attempts to restrain vessels, furnished with a United States coasting licence, from navigating the waters of the State navigable from the sea coast. *Odgen v. Gibbons*, 4 Johns. (N. Y.) Ch. 150; 17 Johns. (N. Y.) 488; 9 Wheat. (U. S.) 1; *North River Steamboat Co. v. Livingston*, 3 Cow. (N. Y.) 713. And it makes no difference whether such vessel proceeds from another State to a place in New York, or from one place in that State to another place in the same State. *North River Steamboat Co. v. Livingston*, 3 Cow. (N. Y.) 488.

1. *Halderman v. Beckwith*, 4 McLean (U. S.) 286; *People v. Compayne Général Transatlantique*, 107 U. S. 59; 20 Blatchf. C. Ct. 296; *Webb v. Dunn*, 18 Fla. 721; *People v. Pacific Mail S. S. Co.*, 8 Sawyer (U. S.) 640; 16 Fed. Rep. 344; *Neederhouser v. State*, 28 Ind. 257.

State statutes requiring the exhibition

of lights in certain circumstances, although valid as internal police regulations, are not applicable to vessels engaged in general commerce, and a foreign vessel which has a light within the requirements of the admiralty rule is not in fault for not showing a light conformable to the local statute. *The New York v. Rea*, 18 How. 223; *Snow v. Hill*, 20 How. 543; *Railroad Co. v. Fuller*, 17 Wall. 568. But compare *contra*, *The James Gray v. The John Fraser*, 21 How. 184. And see *The E. C. Scranton*, 3 Blatchf. 30; *Rathbun v. Payne*, 19 Wend. 399; *Fitch v. Livingston*, 4 Sandf. 492, 712; *The Santa Claus*, Olcott 428; 1 Blatchf. 370; *Halderman v. Beckwith*, 4 McLean, 286. But they do not control foreign vessels. *Halderman v. Beckwith*, 4 McLean 286; *The New York v. Rea*, 18 How. 223; *The Alert*, 1 Dods. 236; *The Christiana*, 7 Moore P. C. 160; *The Borussia*, Swabey 94.

A State law which requires those engaged in the transportation of passengers among the States to give all persons travelling within the State, upon vessels employed in such business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color, and subjects to an action for damages the owner of such a vessel who excludes colored passengers, on account of their color, from the cabin set apart by him for the use of whites during the passage, is a regulation of interstate commerce, and, therefore, to that extent, unconstitutional and void. *Hall v. DeCuir*, 95 U. S. 485.

In *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, it was held that where a State imposes a licence fee, either directly or through one of its municipal corporations, upon ferry boats plying across a navigable river between two States, not a regulation of commerce.

The provision of Mass. Gen. St., ch. 78, § 5, that "No person shall cause or permit to be floated down Connecticut river any masts, spars, logs, or other timber, unless the same are formed and bound into rafts, and placed under the care of a sufficient number of persons to govern and manage the same, so as to prevent damage thereby," is constitutional, even in the case of logs coming from another State, and passing

State has no power to regulate navigation between the States.<sup>1</sup> But where a State exercises her own sovereign power in a matter involving the interests of her citizens, though the exercise may touch upon a subject within the field of the power to regulate commerce, it is not for that reason invalid, if no law which congress has passed upon the same subject is violated.<sup>2</sup> Where an act of the legislature of a State prescribes a regulation of the subject of navigation, repugnant to and inconsistent with the regulation of congress, the State law must give way; and this, without regard to the source of power from whence the State legislature derived its enactment.<sup>3</sup> The same rule applies to municipal

through Massachusetts on their way to a third State. *Harrigan v. Connecticut River Lumber Co.*, 129 Mass. 580; 37 Am. Rep. 387.

**Municipal Ordinance.**—A municipal ordinance which imposes a tax on the privilege of navigating the Mississippi river between New Orleans and the Gulf of Mexico is an unlawful attempt to regulate commerce. *Moran v. New Orleans*, 112 U. S. 69.

1. *State v. Pittsburgh & S. Coal Co.* (La.), 6 So. Rep. 220.

2. *Craig v. Kline*, 65 Pa. St. 399; *McReynolds v. Smallhouse*, 8 Bush (Ky.) 447; *Morris v. State*, 62 Tex. 728; *Fitch v. Livingston*, 4 Sandf. (N. Y.) 492. See *Wilson v. Black Bird etc. Co.*, 2 Pet. (U. S.) 245. *Sherlock v. Ailing*, 93 U. S. 99.

An act of a State legislature incorporating a company to improve the navigation of a certain river, and authorizing it for a term of years to navigate the river with its boats and to charge tolls for the passage of other boats than its own, does not violate the United States constitution, as laying a duty of tonnage, or as infringing the power of congress to regulate commerce. *McReynolds v. Smallhouse*, 8 Bush (Ky.) 447. So a State may confer the right to construct a ship canal, and to levy tolls, congress not having legislated concerning the matter. *Morris v. State*, 62 Tex. 728.

While the action of congress prescribing a regulation of commerce, or the liability for its infringement, is exclusive of State authority, until action is taken by congress, the legislation of a State, not directed against commerce or any of its regulations, but relating generally to the rights, duties, and liabilities of citizens, is of obligatory force within its territorial jurisdiction, notwithstanding it may indirectly and

remotely affect the operations of foreign or interstate commerce, or persons engaged in such commerce. *Sherlock v. Ailing*, 93 U. S. 99.

The New York statute, enacted in 1826, and continued in the revised statutes, which requires every steamboat navigating the rivers and lakes of that State in the night time to carry and show two good lights, one near her bows and the other near her stern, is still valid and obligatory upon all such vessels, whether navigating from place to place within the State, or from foreign States, under a coasting licence, notwithstanding the subsequent enactment of congress in 1838, that every steamboat navigating at night shall carry one or more signal lights.

That statute applies to the class of steamboats known as propellers, as well as to those in use when it was enacted. *Fitch v. Livingston*, 4 Sandf. (N. Y.) 492. As to the right of a State to enact police regulations and to supervise immigration, see **POLICE POWER**, *infra*, and **IMMIGRATION**, 9 Am. & Eng. Encyc. of Law 936. Compare *Commissioners of Immigration v. Brandt*, 26 La. An. 29.

3. *Moran v. New Orleans*, 112 U. S. 69; *Henderson v. Mayor of New York*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *Wilson v. Black Bird etc. Co.*, 2 Pet. (U. S.) 245; *Kellogg v. Union Co.*, 12 Conn. 7; *People v. Rensselaer etc. R. Co.*, 15 Wend. (N. Y.), 113, 114; *Lott v. Morgan*, 41 Ala. 246; *Harbor Commrs. v. Pashley*, 19 S. Car. 315.

An act of a State legislature, imposing reasonable tolls, as a compensation for improving the navigation of a river within its own borders, is constitutional and valid, unless it conflicts with the powers of congress in actual



ordinances.<sup>1</sup> So any duty, or tax, or burden imposed under the authority of the States which is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, and which is assessed on a vessel according to its carrying capacity, is a violation of that provision in the federal constitution, which prohibits the State to lay any duty of tonnage, unless the consent of congress be obtained.<sup>2</sup> Where congress legislates, it does not repeal, but suspends State law upon the subject, and when the act producing this result is repealed, or so modified as to permit the operation of the State law, it becomes again valid and in force.<sup>3</sup>

**III. RULES OF NAVIGATION**—1. **Definition.**—Navigation rules are systematic rules and regulations to be followed in the navigation of ships or vessels when approaching each other under such circumstances that a collision may possibly ensue.<sup>4</sup>

exercise. *Thames Bank v. Lovell*, 18 Conn. 500.

Tenn. acts 1879, ch. 84, § 7, sub-sec. 36, imposing a privilege tax on agents of steamboats and railroad companies, other than officers of railroads terminating in the taxing district, is not an attempt to regulate commerce in a manner in contravention to the federal constitution. *Lightburne v. Taxing District*, 4 Lea (Tenn.) 219.

**Local Usage.**—A local usage of navigation, forming a part of the common law of a State is valid on the same ground, and no other, in respect of the power and legislation of congress on the subject, as is a statute of the State affecting commerce or navigation. *Perry v. Torrence*, 8 Ohio, 521.

1. *Northwestern etc. Co. v. St. Paul*, 3 Dill. (C. C.) 454.

2. *Cannon v. New Orleans*, 20 Wall. (U. S.) 577; *Booth v. Lloyd*, 33 Fed. Rep. 593; *Ex parte Insley*, 33 Fed. Rep. 680; *People v. Raymond*, 34 Cal. 492; *Hackley v. Geraghty*, 34 N. J. L. 332. A toll for the purpose of raising revenue, imposed by a State on logs and lumber floated down from that State into an adjoining one, is unconstitutional. *Carson River Lumbering Co. v. Patterson*, 33 Cal. 334. But laws may be enacted regulating the running and rafting of logs coming from another State, and passing through on their way to another State. *Horrigan v. Connecticut River L. Co.* 129 Mass. 580; 38 Am. Rep. 387; 13 Am. & Eng. Encyc. of Law 1038.

The Louisiana acts of 1867 and 1868, imposing a charge for weighing and inspecting each bale of hay brought to

the port of New Orleans for sale, irrespective of the State or place where the hay is made, do not involve a regulation of commerce between the States, nor do they operate to lay an impost or duty upon imports or exports; and they are not in violation of the constitution of the United States upon either of those grounds. *Hay Inspectors v. Pleasants*, 23 La. An. 349.

The La. Stat. 1855, relative to the board of master and wardens, which provides for the payment of services actually rendered, or the tender of such services, is not a violation of the clause of the constitution of the United States, which gives to congress the power of regulating commerce. The fees allowed to the master and wardens are in no sense imposts or duties on imports or exports. *Port Wardens v. The Martha J. Ward*, 14 La. An. 289.

The charges imposed on vessels by the Louisiana quarantine laws are exactions in compensation for services rendered, and are not taxes, duties, or imposts, within the prohibition of U. S. Const. art. 1, § 10. *Morgan's Louisiana & Texas R. R. & S. S. Co. v. Board of Health*, 36 La. An. 666. See *St. Louis v. McCoy*, 18 Mo. 238; *St. Louis v. Boffinger*, 19 Mo. 13.

3. *Henderson v. Spofford*, 59 N. Y. 131.

4. 2 Abb. L. Dict. 154; 2 Bouv. L. Dict. 271; *Anderson's Dict. of L.* 699.

**"Collision" Defined.**—"Collision," in the nautical acceptance of that term, imports the impinging of vessels together while both are being navigated. Common usage, however, applies the

**2. Origin and Nature.**—Sailing rules were ordained to prevent collisions between ships employed in navigation and to preserve life and property embarked in that perilous pursuit.<sup>1</sup> Such rules existed long before there was any legislation upon the subject, either in this country or in the country from which our judicial system was largely borrowed,<sup>2</sup> but these have more recently been superseded by express enactment in most of the commercial countries of the world.<sup>3</sup> There are two systems of rules to be followed by vessels of the United States: One system for the high seas and coast waters, and one system for the harbors, lakes and inland waters.<sup>4</sup>

**3. Application.**—The rights of parties in an action for a collision depend on the law of the place where the collision occurred.<sup>5</sup> Sailing rules and regulations prescribed by law furnish paramount rules of decision whenever they are applicable.<sup>6</sup> If the collision takes place in the high seas between vessels of different nationalities the rules of the maritime law are to determine which was in fault.<sup>7</sup> It has been held that the provisions of sections 4233, 4234, were intended to embrace all kinds of vessels, including rafts,<sup>8</sup> but it has also been held that a car-float is not required to

term equally to cases where a vessel is run afoul of when entirely stationary, or is brought in contact with another by swinging at her anchor. *The Moxey*, Abb. Adm. 73.

1. *The America*, 92 U. S. 432; *The Non Pareille*, 33 Fed. Rep. 524; *Sawyer v. Eastern Steamboat Co.*, 46 Me. 400.

2. *City of Washington*, 92 U. S. 31.

Many years before the rule of the road at sea was regulated by act of parliament, the practice of seamen had established rules to enable approaching ships to keep clear of each other. These rules, which are the foundation of those now in force, were well established by custom, and formed part of the general maritime law administered by the admiralty court. *Marsden's Law of Collisions* (2nd ed.) 296.

3. 2 Abb. L. Dict. 154. See *Sears v. The Scotia*, 14 Wall. (U. S.) 170.

Rules were laid down in *England* by orders in council in 1863 and in 1868. Those of 1863 were substantially re-enacted by the United States by act of April 29th, 1864, ch. 69, 13 St. 58; Rev. Stat., § 4233. Those rules were adopted by more than thirty of the principal states of the world, and were at once regarded as entitled to judicial notice. *The Scotia*, 14 Wall. 170; 3 Blatchf. 308; *The Sylvester Hale*, 6 Ben. 523.

The Revised Code was adopted by

Great Britain in 1884, and this and the regulations of 1863 are set out in paralleled columns in *Marsden's Law of Collision* (2nd ed.) 471, 485. This revised code has been adopted by the leading nations, and is the act of March 3rd, 1885, ch. 354, 23 St. 438.

4. See U. S. Stat. 1885, ch. 354, § 1 Rev. Int. Rules and Reg.

5. *Desty's Ship. & Adm.*, § 354; *The Peerless*, Lush. 30; *The China*, 7 Wall. 64; *The Scotia*, 7 Blatchf. 321; *Smith v. Condry*, 1 How. 28; *The Eagle*, 8 Wall. 21. And see *The Vernon*, 1 W. Rob. 319; *Gen. St. N. Co. v. Gullion*, 11 Mees. & W. 877; *The Annapolis*, Lush. 295; *The Dumfries*, Swa. 63; *The Zollverein*, *Ibid.* 96; *The Saxonia*, Lush. 410; *The Belle*, 1 Ben. 317; *Cope v. Doherty*, 4 Kay & J. 367; 2 De G. & J. 626; *The Chancellor*, 14 Moore P. C. 202.

6. *The City of Washington*, 92 U. S. 31.

7. *Desty's Ship. & Adm.*, § 354; *The Scotia*, 14 Wall. (U. S.) 170; 7 Blatchf. 326; *The Belle*, 1 Ben. 320; *The Chancellor*, 4 Ben. 153; *The Saxonia*, Lush. 410; *The Zollverein*, Swa. 96; *The Dumfries*, Swa. 63; *Williams v. Gutch*, 14 Moore P. C. 202; explaining *The Cleadon*, Lush. 158; 4 L. T., N. S. 157. Compare *The Fyenoord*, Swa. 374; *The New Ed. v. Gustow*, Holt R. R. 28.

8. *One Raft*, 13 Fed. Rep. 796.

carry lights.<sup>1</sup> Safe guides in cases outside the scope and operation of legislative enactments "are often found in the decisions of the courts, or in the views of standard text writers; but it is competent for the court, in such a case, to admit evidence of usage; and, if it be proved that the matter is regulated by a general usage, such evidence may furnish a safe guide as the proper rule of decision."<sup>2</sup>

**IV. LIGHTS<sup>3</sup>—1. Generally.**—By the general rules of the sea every vessel, whether close-hauled or at anchor, is bound to show a

1. The *Manhasset*, 34 Fed. Rep. 408.

2. See *LOCAL REGULATIONS, infra*; The City of Washington, 92 U. S. 31, 32, 39. In *St. John v. Paine*, 10 How. 557 there is a discussion of the old rules governing sailing and steam vessels in cases of collisions.

3. *Rules for the High Seas and Coast Waters.—Steam and Sail Vessels.*—

ARTICLE 1. In the following rules every steamship which is under sail and not under steam is to be considered a sailing ship, and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam.

*Lights.*—ART. 2. The lights mentioned in the following articles numbered three, four, five, six, seven, eight, nine, ten, and eleven, and no others, shall be carried in all weathers, from sunset to sunrise.

*Lights for Steamers.*—ART. 3. A sea-going steamship, when under way, shall carry—(a) On or in front of the foremast, at a height above the hull of not less than twenty feet, and if the breadth of the ship exceeds twenty feet, then at a height above the hull not less than such breadth, a bright white light, so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the ship, namely from right ahead to two points abaft the beam on either side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles.

(b) On the starboard side a green light, so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(c) On the port side a red light, so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(d) The said green and red sidelights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

*Lights for Towing Steamers.*—

ART. 4. A steamship when towing another ship shall, in addition to her side lights, carry two bright white lights in a vertical line, one over the other, not less than three feet apart, so as to distinguish her from other steamships. Each of these lights shall be of the same construction and character, and shall be carried in the same position, as the white light which other steamships are required to carry.

*Vessels Not Under Command.*—ART.

5. (a) A ship, whether a steamship or sailing ship, which from any accident is not under command, shall at night carry, in the same position as the white light which steamships are required to carry, and, if a steamship, in place of that light, three red lights in globular lanterns, each not less than ten inches in diameter, in a vertical line, one over the other, not less than three feet apart, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and shall by day carry in a vertical line, one over the other, not less than three feet apart, in front of but not lower than her foremast head, three black balls or shapes, each two feet in diameter.

*Vessels Laying Telegraph Cables.*—

(b) A ship, whether a steamship or a

sailing ship, employed in laying or picking up a telegraph cable, shall at night carry, in the same position as the white light which steamships are required to carry, and if a steamship, in place of that light three lights in globular lanterns, each not less than ten inches in diameter, in a vertical line, over one another, not less than six feet apart. The highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a character that the red lights shall be visible at the same distance as the white light. By day she shall carry, in a vertical line, one over the other, not less than six feet apart, in front of but not lower than her foremast head, three shapes not less than two feet in diameter, of which the top and bottom shall be globular in shape and red in color, and the middle one diamond in shape and white.

*When to Carry Side Lights.—(c)* The ships referred to in this article when not making any way through the water, shall not carry the side lights, but when making way shall carry them.

*(d)* The lights and shapes required to be shown by this article are to be taken by other ships as signals that the ship showing them is not under command, and cannot therefore get out of the way. The signals to be made by ships in distress and requiring assistance are contained in article twenty-seven.

*Lights for Sailing Vessels.—ART. 6.* A sailing ship under way or being towed shall carry the same lights as are provided by article three for a steamship under way with the exception of the white light, which she shall never carry.

*Exceptional Lights for Small Vessels.—ART. 7.* Whenever, as in the case of small vessels during bad weather, the green and red side lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for use, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the starboard side. To make the use of these portable lights more certain and easy, the lanterns containing them shall each be painted outside with the color of the light they respectively contain, and shall be provided with proper screens.

*Lights for Steam Vessels and Sailing Vessels at Anchor.—ART. 8.* A ship, whether a steamship or a sailing ship, when at anchor, shall carry, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light, in a globular lantern of not less than eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon at a distance of at least one mile.

*Lights for Pilot Vessels.—ART. 9.* A pilot vessel, when engaged on her station on pilotage duty, shall not carry the lights required for other vessels, but shall carry a white light at the mast-head, visible all round the horizon, and shall also exhibit a flare up light or (a) flare up lights at short intervals, which shall never exceed fifteen minutes. A pilot vessel when not engaged on her station on pilotage duty, shall carry lights similar to those of other ships.

*Lights for Open Boats and Fishing Vessels.—ART. 10.* Open boats and fishing vessels of less than twenty tons net registered tonnage, when under way and when not having their nets, trawls, dredges, or lines in the water, shall not be obliged to carry the colored side lights; but every such boat and vessel shall in lieu thereof have ready at hand a lantern with a green glass on the one side and a red glass on the other side, and on approaching to or being approached by another vessel such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

The following portion of this article applies only to fishing vessels and boats when in the sea off the coast of Europe lying north of Cape Finisterre:

*(a)* All fishing vessels and fishing boats of twenty tons net registered tonnage or upward, when under way and when not having their nets, trawls, dredges, or lines in the water, shall carry and show the same lights as other vessels under way.

*(b)* All vessels when engaged in fishing with drift nets shall exhibit two white lights from any part of the vessel where they can be best seen. Such lights shall be placed so that the vertical distance between them shall be not less than six feet and not more than ten feet, and so that the horizontal distance between them, measured in a line with

the keel of the vessel, shall be not less than five feet and not more than ten feet. The lower of these two lights shall be the more forward, and both of them shall be of such a character and contained in lanterns of such construction as to show all round the horizon, on a dark night with a clear atmosphere for a distance of not less than three miles.

(c) All vessels when trawling, dredging or fishing with any kind of drag nets shall exhibit from some part of the vessel where they can be best seen, two lights. One of these lights shall be red and the other shall be white. The red light shall be above the white light, and shall be at a vertical distance from it of not less than six feet and not more than twelve feet; and the horizontal distance between them, if any, shall not be more than ten feet. These two lights shall be of such a character and contained in lanterns of such construction as to be visible all round the horizon, on a dark night, with a clear atmosphere, the white light to a distance of not less than three miles and the red light of not less than two miles. [Omitted from copy of Revised Regulations received from the British Government.]

(d) A vessel employed in line fishing, with her lines out, shall carry the same lights as a vessel when engaged in fishing with drift nets.

(e) If a vessel, when fishing with a trawl, dredge, or any kind of drag net, becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall show the light and make the fog signal for a vessel at anchor.

(f) Fishing vessels and open boats may at any time use a flare up in addition to the lights which they are by this article required to carry and show. All flare up lights exhibited by a vessel when trawling, dredging, or fishing with any kind of drag net shall be shown at the after part of the vessel, excepting that if the vessel is hanging by the stern to her trawl, dredge, or drag net they shall be exhibited from the bow.

(g) Every fishing vessel and every open boat when at anchor between sunset and sunrise shall exhibit a white light, visible all round the horizon at a distance at least one mile.

(h) In a fog a drift net vessel attached to her nets, and a vessel when trawling, dredging, or fishing with any kind of drag net, and a vessel employed

in line fishing with her lines out, shall, at intervals of not more than two minutes, make a blast with her fog-horn and ring her bell alternately.

*Vessels Being Overtaken.*—ART. 11. A ship which is being overtaken by another shall show from her stern to such last mentioned ship a white light or a flare up light.

*Special Lights for Squadrons and Convoys.*—ART. 26. Nothing in these rules shall interfere with the operation of any special rules made by the government of any nation with respect to additional station and signal lights for two or more ships of war or for ships sailing under convoy.

*Harbors, Lakes and Inland Waters—Steam and Sail Vessels.*—RULE ONE. Every steam vessel which is under sail, and not under steam, shall be considered a sail vessel; and every steam vessel which is under steam, whether under sail or not, shall be considered a steam vessel.

*Lights.*—RULE TWO. The lights mentioned in the following rules, and no others, shall be carried in all weathers, between sunset and sunrise:

*Lights for Ocean Going Steamers and Steamers Carrying Sail.*—RULE THREE. All ocean going steamers and steamers carrying sail, shall, when under way, carry—

(a) At the foremast head, a bright white light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, and so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side.

(b) On the starboard side, a green light of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side.

(c) On the port side a red light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass and so fixed as to throw the light from right

ahead to two points abaft the beam on the port side.

The green and red light shall be fitted with inboard screens, projecting at least three feet forward from the lights, so as to prevent them from being seen across the bow.

*Lights for Towing Steamers.*—RULE FOUR. Steam vessels, when towing other vessels, shall carry two bright white masthead lights vertically, in addition to their side lights, so as to distinguish them from other steam vessels. Each of these masthead lights shall be of the same character and construction as the masthead lights prescribed by Rule Three.

*Lights for Steamers Not Ocean-Going Nor Carrying Sail.*—RULE FIVE. All steam vessels other than ocean going steamers and steamers carrying sail shall, when under way, carry on the starboard and port sides lights of the same character and construction and in the same position as are prescribed for side lights by Rule Three, except in the case provided in Rule Six.

*Lights for Steamers on the Mississippi River.*—RULE SIX. River steamers navigating waters flowing in the Gulf of Mexico, and their tributaries, shall carry the following lights, namely: One red light on the outboard side of the port smoke pipe, and one green light on the outboard side of the starboard smoke pipe. Such lights shall show both forward and abeam on their respective sides.

*Lights for Coasting Steam Vessels and Steam Vessels Navigating Bays, Lakes and Rivers.*—RULE SEVEN. All coasting steam vessels, and steam vessels other than ferry boats and vessels otherwise expressly provided for, navigating the bays, lakes, rivers or other inland waters of the United States, except those mentioned in Rule Six, shall carry the red and green lights as prescribed for ocean going steamers; and, in addition thereto, a central range of two white lights; the after light being carried at an elevation of at least fifteen feet above the light at the head of the vessel. The head light shall be so constructed as to show a good light through twenty points of the compass, namely: from right ahead to two points abaft the beam on either side of the vessel; and the after lights so as to show all around the horizon.

*The Lights for Ferry Boats* shall be regulated by such rules as the Board

of supervising inspectors of steam-vessels shall prescribe. (See additional rules below.)

*Lights for Sailing Vessels.*—RULE EIGHT. Sail vessels, under way or being towed, shall carry the same lights as steam vessels under way, with the exception of the white masthead lights, which they shall never carry. (See Rule Three, b and c.)

*Exceptional Lights for Small Sailing Vessels.*—RULE NINE. Whenever, as in case of small vessels during bad weather, the green and red lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for instant exhibition, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side. To make the use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and shall be provided with suitable screens.

*Lights for Steam Vessels and Sailing Vessels at Anchor.*—RULE TEN. All vessels, whether steam vessels or sail vessels, when at anchor or in roadsteads or fair ways, shall, between sunset and sunrise, exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon, and at a distance of at least one mile.

*Lights for Pilot Vessels.*—RULE ELEVEN. Sailing pilot vessels shall not carry the lights required for other sailing vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare up light every fifteen minutes.

*Lights for Coal Boats, Trading Boats, Rafts, and Other Like Craft.*—

RULE TWELVE. Coal boats, trading boats, produce boats, canal boats, oyster boats, fishing boats, rafts or other water craft, navigating any bay, harbor or river, by hand power, horse power, sail, or by the current of the river, or which shall be anchored or moored in or near the channel or fair way of any bay, harbor, or river, shall carry one or more good white lights,

light,<sup>1</sup> and where a vessel loses her admiralty lights by tempestu-

which shall be placed in such manner as shall be prescribed by the board of supervising inspectors of steam vessels.

Rule 12 shall be so construed as not to require row boats and skiffs upon the river St. Lawrence to carry lights. (Act June 19th, 1886.)

*Lights for Open Boats.*—RULE THIRTEEN. Open boats shall not be required to carry the side lights required for other vessels but shall, if they do not carry such lights, carry a lantern having a greenslide on one side and a red slide on the other side; and, on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, and in such a manner that the green light shall not be seen on the port side, nor the red light on the starboard side. Open boats, when at anchor or stationary, shall exhibit a bright white light. They shall not, however, be prevented from using a flare up, in addition, if considered expedient.

*Lights on Vessels of the United States Navy.*—RULE FOURTEEN. The exhibition of any light on board of a vessel of war of the United States may be suspended whenever, in the opinion of the Secretary of the Navy, the commander-in-chief of a squadron, or the commander of a vessel, acting singly, the special character of the service may require it.

*Sailing Vessels to be Furnished with Signal Lights and to Show Torches.*—RULE TWENTY-FIVE. Collectors or other chief officers of the customs, shall require all sail vessels to be furnished with proper signal lights, and every such vessel shall, on the approach of any steam vessel during the night time, show a lighted torch upon that point or quarter to which such steam vessel shall be approaching.

*Additional Rules.*—These additional rules (found in the proceedings of the board of supervising inspectors of steam vessels and decisions of treasury department) are published for the information of all concerned:

*Lights for Ferry Boats.*—RULE SIXTY-FIVE. All double ended ferry-boats on lakes and seaboard shall carry a central range of clear, bright white lights, showing all around the horizon, placed at equal altitudes forward and

ast; also such side lights as specified in section 4233 of the Revised Statutes, Rule Three, paragraphs b and c. Local inspectors, in districts having ferry boats, shall, whenever the safety of navigation may require, designate for each line of such boats a certain light, white or colored, which shall show all around the horizon, to designate and distinguish such lines from each other, which lights shall be carried on a flag staff amidships, fifteen feet above the white range lights.

The signal lights on ferry boats on waters flowing into the Gulf of Mexico and their tributaries, shall be the same as those on all other steam-boats on the same waters, except double ended ferry boats, which shall be governed by the rule governing double ended ferry boats on lakes and seaboards.

*Lights on Small Craft.*—RULE supplemental to RULE TWELVE, and by virtue thereof: All coal boats, trading boats, produce boats, canal-boats, oyster boats, fishing boats, and other water craft, navigating any bay, harbor or river, propelled by hand-power, horse power, sail, or by the current of the river, or which shall be moored in or near the channel or fair way of any bay, harbor, or river, shall carry one bright white light forward, not less than six feet above the rail or deck.

Rafts of one crib, and not more than two in length, shall carry one bright white light, on a pole, not less than six feet high; three or more cribs in length, shall carry one white light at each end of the raft at the same height.

Rafts of more than one crib abreast shall carry one white light on each corner of the raft, making four lights in all.

Row boats shall carry one white light two feet above the stem.

1. The Eclipse, The Saxonia, 8 Jur., N. S. 315; The Sarmatian, 5 Hughes (U. S.) 152; The Lizzie Henderson, 20 Fed. Rep. 524; The Philotaxe, 37 L. T., N. S. 540; The Indiana, 1 Abb. Adm. 330; Valentine v. Cleugh, 29 Eng. Law & Eq. 49; General Steam Navigation Co. v. Mann, 26 Eng. L. & Eq. 339; The Aliwal, 25 Eng. L. & Eq. 602; Smyrna etc. Steamboat Co. v. Whilldin, 4 Harr. (Del.) 228; The Continental, 8 Blatchf. (U. S.) 3; Chase v. Belden, 117 N. Y. 637; The Algiers, 28 Fed.

ous weather she is bound to obtain new lights on the first opportunity.<sup>1</sup> Yet it seems where a vessel without a light is injured by collision with another vessel the vessel inflicting the injury is liable, if the injury could have been prevented by proper care on her part.<sup>2</sup> So, where the lights carried by a vessel are not those

Rep. 240; *Dowell v. Steam Navigation Co.*, 38 Eng. L. & Eq. 64; *The Robert I. Poulson*, 3 Hughes (U. S.) 494; *The Haverton*, 31 Fed. Rep. 563; *The State of Alabama*, 17 Fed. Rep. 847; *The Frank P. Lee*, 34 Fed. Rep. 480; *Thomas Martin*, 3 Blatchf. (U. S.) 517; *The Parkesburgh*, 5 Blatchf. (U. S.) 247; *Bigley v. Williams*, 80 Pa. St. 107; *The Louisiana v. The Isaac Fisher*, 21 How. (U. S.) 1; *The Belle*, 1 Ben. (U. S.) 317; *The City of Troy*, 9 Ben. (U. S.) 466. *Compare* *Bark Delaware v. Steamer Osprey*, 2 Wall. Jr. (U. S.) 268; *R. B. Forbes, Sprague (U. S.)* 328; *The Owen Wallace*, 30 L. T., N. S. 41; *Baker v. Steamship City of New York*, 1 Cliff. (U. S.) 75.

A ship lying at anchor on a dark night is bound to keep a light always visible, and it is no excuse to free her from liability that the lamp had been temporarily taken down to be trimmed. *Tyne Steam Shipping Company v. Smith, The C. M. Palmer, and The Larnax*, 21 W. R. 702; 29 L. T., N. S. 120.

This rule applies only where a boat is in the path of vessels. It is not required where the boat is fastened to the shore, especially at a place set apart for such boats. *Culbertson v. Southern Belle*, 18 How. (U. S.) 584; *L'Homme-dieu v. The Mischief*, 39 Fed. Rep. 510.

**Vessels Under Way.**—A vessel driven from her anchors by a gale of wind, and setting sail to go out to sea, is, even if wholly unmanageable, under way, and is bound to exhibit colored lights. *The George Arkle, Lush*, 382.

A vessel with her anchor down, but not actually holden by and under the control of it, is under way. *The Esk and The Gitana*, 2 L. R., Adm. 350; 38 L. J., Adm. 33; 17 W. R. 1064.

**Vessel Aground.**—Where a propeller, being aground on a dark night, did not exhibit a proper light, but must have been seen when 800 or 1,000 feet distant from a tug, which ran into her—*held*, that both were in fault. The tug should have stopped immediately upon seeing an object ahead, although not

knowing what it was. *The Frank Moffat*, 2 Flipp. (U. S.) 291.

**Moonlight Night.**—Where the night was moonlight, and, although the light was occasionally obscured, yet it was not so to such a degree as to render the navigation at all dangerous if care, skill and vigilance had been employed, it was held, in a libel by the owners of a sailing vessel against a steamer for damages for a collision in the night-time, that no facts were disclosed which imposed upon the sailing vessel the obligation to show a light. *The Louisiana v. The Isaac Fisher*, 21 How. (U. S.) 1.

1. *The Aurora, Lush*, 327.

2. *Morrison v. The Gen. Steam Navig. Co.*, 20 Eng. L. & Eq. 455; *The Owen Wallis*, 4 L. R., Adm. 175; 30 L. T., N. S. 41; *Shields v. New York*, 18 Fed. Rep. 748; *The Avon*, 22 Fed. Rep. 905; *The City of Troy*, 9 Ben. (U. S.) 466; *The Gray Eagle*, 9 Wall. (U. S.) 505; *Cohen v. The Mary T. Wilder, Taney Dec.* (U. S.) 567; *Farwell v. The John H. Starin*, 2 Fed. Rep. 100.

A steamer with proper lights is not excused from doing everything possible to avoid a collision with a steamer without lights, and the latter is in fault in not governing her movements by the lights of the other. *Meigs v. The Northern*, 1 Wash. Ter. 91.

A close-hauled vessel exhibiting lights other than those required by the regulations for preventing collisions at sea, was run into by a vessel running free and whose duty it was to keep out of the way, but which, in consequence of not having a proper lookout, did not see the close-hauled vessel or her lights till the moment of the collision. *Held*, that as the proper lights, had they been exhibited, would not have been seen, neither their absence nor the exhibition of an improper light, which could have been seen, but which, by reason of the improper lookout, was not seen, could by any possibility have contributed to the collision, and therefore that the vessel infringing the regulation as to lights could not be deemed to be in fault for



which are prescribed by law, other vessels are not excused from the exercise of proper care in approaching or passing her.<sup>1</sup> So it seems compliance with statute regulations in regard to lights does not, in all cases, show a full performance of duty, for circumstances may arise that call for extraordinary diligence to observe all reasonable precautions.<sup>2</sup>

**2. Visibility.**—A vessel will be in fault for assuming a position in which her lights will be obscured.<sup>3</sup> So the lights must not be so powerful and placed in such a position as to prevent the look-out from seeing ahead.<sup>4</sup> Where a steamer approaches a sailing vessel during the night time the sailing vessel must show the

the collision within § 17 of the Merchant Shipping act, 1873. The Englishman, 37 L. T., N. S. 412.

1. *Hoffman v. Union Ferry Co.*, 47 N. Y. 176; *Meigs v. The Northerner*, 1 Wash. Ter. 91.

A green and red light placed in the center of a schooner, forward, and separated only by a board, do not fulfil the requirements of the act of congress of April 29th, 1864 (13 Stat. at L. 57). The lights must be placed at the sides of the vessel. But neglect by one vessel to show proper signal lights does not absolve the other from the obligation to observe the usual laws of navigation, or such reasonable precaution as the circumstances call for. *The Empire State*, 2 Biss. (U. S.) 216. And see *Silliman v. Lewis*, 49 N. Y. 379.

In *The Scottish Bride v. The Anthony Kelly*, 8 Phila. (Pa.) 151, it was held that the failure to display the exact statutory light by a vessel at anchor is not sufficient contributory negligence to prevent recovery of damages for a collision occasioned by the reckless navigation of the other vessel.

A yacht of seven tons, carrying, not the light required of enrolled and registered vessels by the sailing rules, but a light well understood by master of a propeller, *held*, not in fault for a collision due to the fault of the propeller in not making the light, the collision, moreover, occurring at a place where the propeller knew that light craft abounded. *The Gazelle*, 33 Fed. Rep. 301.

**Delinquency in Lights.**—Vessels may be properly excused for not carrying all the regulation lights, if the excuse is on the ground that such delinquency did not contribute to the collision. *The Haverton*, 31 Fed. Rep. 563, 568.

2. This may include moderate speed; by seeing to it that a tow is under

proper control and management; and if in a narrow stream on a dark and rainy night, by keeping well over to her own side of the stream. *The R. W. Burrows*, 7 Blatchf. (U. S.) 374.

3. *The Howard*, 30 Fed. Rep. 280; *The Seacaucus*, 34 Fed. Rep. 68; see *The Convoy*, 5 Hughes (U. S.) 143; *The Manhasset*, 34 Fed. Rep. 408; *Briggs v. Day*, 21 Fed. Rep. 727; *New York etc. R. Co. v. Cooper (Va.)*, 9 S. E. Rep. 321.

A vessel assuming a position in which her colored lights are obscured over considerable part of the area in which other vessels are moving does not comply with the law requiring lights to be visible for ten points around the horizon. *The Seacaucus*, 34 Fed. Rep. 68.

A tug is in fault, when navigating in a fog at night, in having her red light obstructed by a barge which she is towing, without having any corresponding light upon the barge to supply its place. *The Howard*, 30 Fed. Rep. 280.

On collision between two barques in a hazy night, nearly end on—*held*, that one was in fault for placing her red light aft near the taffrail, where it was liable to be obscured by the sails or by the swell of the ship's side in front. *The Johanne Auguste*, 21 Fed. Rep. 134.

4. *R. B. Forbes*, 1 Sprague (U. S.) 328; *Pope v. The R. B. Forbes*, 1 Cliff. (U. S.) 331.

In *England* the law does not appoint any particular place at which the lights should be fixed, but they ought to be placed so as to be properly visible. *Beal v. Marchais*, *The Bougainville*, and *The James C. Stevenson*, 5 L. R., P. C. 316. See *The Gustav*, *The New Ed.*, 9 L. T., N. S. 547; *The Germania*, 37 L. J., Adm. 59.

proper lights and hold her course,<sup>1</sup> and if her lights are not visible to the steamer, the sailing vessel must show a lighted torch upon that point or quarter to which such steam vessel shall be approaching.<sup>2</sup> If the lights are visible and the steamer is in fault for not seeing them she will be liable.<sup>3</sup> Approaching vessels have a right to expect compliance with the law, and exercise their judgment accordingly; and, even if the same circumstances should operate to lead, in one instance, to the erroneous belief that the faulty

1. The Atlas, 34 Fed. Rep. 543; The Excelsior, 33 Fed. Rep. 554; The Sarmatian, 5 Hughes (U. S.) 152; The Pottsville, 24 Fed. Rep. 655; The Lizzie Major, 8 Ben. (U. S.) 333; The New Orleans, 9 Ben. (U. S.) 303.

A bark and a steamer collided on the open sea in the night time. The bark had proper lights burning and kept her course, while the steamer's single lookout failed to see the bark, although a passenger on the steamer saw her from his state room. *Held*, that these facts, in addition to the presumption arising from the fact of a collision, justified a finding that the steamer was in fault. The Belgenland, 114 U. S. 355.

A steamer ran into a schooner in the night because the schooner had no light and showed none after she saw the steamer. *Held*, that the schooner alone was in fault. The Algiers, 28 Fed. Rep. 240.

A steamship sighted, two miles distant, a sloop-smack which kept her course and set no torch light at her bow, but whose red and green lights were not screened. *Held*, that they were both in fault in colliding, and the damages should be divided. The Alabama, 4 Wood (C. C.) 48.

**Wrong Light.**—A vessel which, by carrying a wrong light, conveys the erroneous impression that she is at anchor; The Conoho, 24 Fed. Rep. 758; or by carrying a white light instead of exhibiting a green light conveys the impression that she is going in the same direction as is the vessel that sights the light, is liable for a collision caused by her error. The Excelsior, 39 Fed. Rep. 393; affirming 33 Fed. Rep. 554.

2. Rev. Stat., § 4, 234; The Saratoga, 37 Fed. Rep. 119; The Eleanor, 17 Blatchf. (U. S.) 88; Leonard v. Whitwell, 10 Ben. (U. S.) 638; The Hercules, 17 Fed. Rep. 606; The New Orleans, 9 Ben. (U. S.) 303; The Caw, 23 Fed. Rep. 734.

A schooner and a steamer came into collision. The schooner's side lights were burning, but not properly, and were not seen from the steamer, though those on her were vigilant. The steamer did all that was incumbent on her to do when she discovered the schooner's light. The schooner did not exhibit any lighted torch, although she saw the approach of the steamer. *Held*, that the schooner was wholly in fault. The Narragansett, 20 Blatchf. (U. S.) 87. The rule must be observed by pilot boats when off pilot grounds. The New Orleans, 9 Ben. (U. S.) 303.

A becalmed pilot boat was run into by a steamer. The steamer could have been stopped after seeing the boat, but the boat's flare-up light was not shown seasonably. *Held*, a case for division of damages. The Columbia, 27 Fed. Rep. 238.

A schooner beating down, saw a steamer a mile distant, rapidly overtaking her, and knowing that her own colored lights were not visible to the steamer, till a few moments before collision, *held*, also in fault for not exhibiting to the steamer a flash light, or any other signal of her presence, as prescribed by Rev. St. U. S., § 4234, directing sailing vessels on the approach of a steam vessel during the night to show a lighted torch on that point or quarter to which the steam vessel is approaching. The Saratoga, 37 Fed. Rep. 119. The fact that the side lights of a sailing vessel could have been seen by a careful lookout from a steamer will not excuse the former's neglect to exhibit a torch, which might have prevented the collision. The Algiers, 21 Fed. Rep. 343.

The requirement that a sailing vessel shall show a torch to a steamer has no application to a foreign vessel on the high seas. Her not doing so creates no imputation of negligence. The A. M. Hathaway, 25 Fed. Rep. 926. See Leonard v. Whitwell, 10 Ben. (U. S.) 638.

3. The Gazelle, 33 Fed. Rep. 301.

vessel is a steamer, and, in another instance, to an erroneous belief that the faulty vessel is a sailing vessel, it by no means follows that either of the deceived parties is in fault. If they actually exercise proper vigilance and skill, and yet are, in fact, misled, they are not responsible that, under circumstances apt to create doubt, their judgment was, in fact, deceived. It is against such errors that the law was designed to guard, and precisely such errors the neglect of its observance is likely to produce.<sup>1</sup> On making the lights of another steamer, if there is the least uncertainty as to their position and motion, speed should be instantly checked, and, if necessary, the boat stopped and backed. Keeping a powerful steamer at full speed under such circumstances, is great recklessness.<sup>2</sup>

**3. Vessels Being Overtaken.**—A ship which is being overtaken by another must show from her stern to such last mentioned ship a white light or a flare-up light.<sup>3</sup> No vessel has a right to disregard this regulation because she thinks it unimportant. If she knows of the approach of a steam vessel she must exhibit the light, or take the risks of loss occasioned by its absence.<sup>4</sup> So when a vessel casting off from moorings in a navigable river places herself at night partly athwart the fairway, so that her regulation lights cannot be seen by vessels astern of her coming up the river,

1. *The Continental*, 8 Blatchf. (U. S.) 3.

2. *The Ogdensburg*, 1 Newb. Adm. 139; *The Pottsville*, 24 Fed. Rep. 655; *Bradley v. The John Pridgeon, Jr.*, 38 Fed. Rep. 261; *The Wydale*, 37 Fed. Rep. 26; *The Illinois*, 5 Blatchf. (U. S.) 256.

A steamer seeing lights close ahead of her, carried by some ship, and being unable to make out those lights, or the course of the ship carrying them, should slacken speed until she is able to ascertain the meaning of the lights, and so be able to avoid the vessel carrying them. *The Fanny M. Carvill*, *The Peru*, 44 L. J., Adm. 34; 32 L. T., N. S. 646; affirming the decision of the court of admiralty, 4 L. R., Adm. 417; 44 L. J., Adm. 1; 32 L. T., N. S. 129.

3. Rev. Int. Rules & Reg., art. 11; *The Oder*, 21 Blatchf. (U. S.) 26; *The Algiers*, 21 Fed. Rep. 343; *The Sarmatian*, 5 Hughes (U. S.) 152; *The Frank P. Lee*, 30 Fed. Rep. 277; *The Esse- quibo*, 13 P. D. 51; *The Palinurus*, 13 P. D. 14; *The Excelsior*, 39 Fed. Rep. 393; affirming 33 Fed. Rep. 554. *Compare The City of Brooklyn*, 1 L. R., Adm. Div. 276; *The Kirkland*, 5 Hughes (U. S.) 109.

By article 2 of the international regulations for preventing collisions at sea, a sailing vessel is forbidden to display a

flare-up light to an approaching vessel, except when she is being overtaken by such vessel, as provided in article 11. *The Algiers*, 38 Fed. Rep. 526.

4. *The Eleanora*, 17 Blatchf. (U. S.) 88. *Compare The Chanoury*, *The Leverington*, 28 L. T., N. S. 284.

A schooner failing to exhibit a lighted torch, as required by law, will not, because of the omission, be held chargeable with a collision which in no way resulted from such omission. *The C. Whiting*, 14 Phila. (Pa.) 566. And the fact that a vessel does not have lights burning after sunset, as required by law, cannot be set up as a defence to a libel for damages by a collision, unless the want of lights contributed to the collision. *The Buckeye*, 11 Biss. (U. S.) 92.

**Burden of Proof.**—Where a sailing-vessel fails to show the prescribed torch upon the approach of a steamer, and a collision occurs, which presumably would have been avoided had the torch been shown, the burden of clearly proving concurrent negligence on the part of the steamer is on the sailing vessel. *The Roman*, 14 Fed. Rep. 61.

**What Is Sufficient Light.**—Placing a service lantern, ordinarily used to give light in discharging the cargo,

she is bound to make use of some conspicuous signal to warn them of her position.<sup>1</sup> Where a steamer, at night, enters a harbor at too great a speed,<sup>2</sup> or proceeds at full speed on a dark night where there was probability of their being other vessels in the way,<sup>3</sup> she is liable in case of collision by overtaking a sailing vessel showing no light or signal, if a lower rate of speed would have given the steamer time to have avoided the collision upon sighting the vessel.

**4. Tugs and Tows.**<sup>4</sup>—Under rule 4 of the navigation rules, a steam-tug which has no masts and cannot carry a light at her masthead, must carry two bright white lights vertically, of a character to be visible five miles away on a dark night with a clear atmosphere, and so constructed as to show a uniform and unbroken light ahead, and from ten points on one side to ten points on the other of the tug.<sup>5</sup> Barges under tow need not carry side lights.<sup>6</sup>

**5. Vessels Anchored, Moored, etc.**—A vessel anchored where others are frequently passing must keep an anchor light burning.<sup>7</sup> When lying in a fair way the anchor light must be known to be all the time up, and this cannot be with certainty unless a watch be kept on deck to keep it burning, and to be able to say posi-

over the stern is not a sufficient precaution. *The John Fenwick*, 3 L. R., Adm. 500; 41 L. J., Adm. 38. See the *Patroclus*, 13 P. D. 54.

1. *The John Fenwick*, 3 L. R., Adm. 500.

2. *The Earle Spencer*, 33 L. T., N. S. 235, affirming 23 W. R. 661; 32 L. T., N. S. 370; 4 L. R., Adm. 431. In this case the exhibition of a stern light was not obligatory on the schooner, and the steamer was alone to blame.

3. *The City of Brooklyn*, 1 L. R., Adm. Div. 276, affirming 34 L. T., N. S. 932. See *The Badger State*, 15 Fed. Rep. 346. In this case it is held that a vessel, unless there is apparent danger, is not guilty of negligence in not showing a light to a vessel following her.

4. For the statutory rules, see *supra*.

5. *The Jesse Williamson, Jr.*, 17 Blatchf. (U. S.) 106.

6. *The Manhasset*, 34 Fed. Rep. 408. **Dumb Barges.**—When a collision occurs between a dumb barge without lights and a steamer, on a dark night in the Thames, there is no presumption of law that the steamer is to blame. *The Swallow*, 36 L. T., N. S. 231.

7. Art. 8, *supra*; *The Oliver*, 22 Fed. Rep. 848; *The Nurnberg*, 3 Hughes (U. S.) 505; *The Westfield*, 38 Fed. Rep. 366; *Lenox v. Winisimmet Co.*,

*Sprague* (U. S.) 160; *The Scioto*, Davies (U. S.) 359; *The Lizzie Henderson*, 20 Fed. Rep. 524; *The Mary Morgan*, 28 Fed. Rep. 333; *The Helen*, 5 Hughes (U. S.) 116; *Williams v. The Whisper*, 37 Fed. Rep. 495; *The Omega*, 5 Hughes (U. S.) 487; *Rogers v. St. Charles*, 19 How. (U. S.) 108; *The Erastus Corning*, 25 Fed. Rep. 572; *Cohen v. The Mary T. Wilder*, Taney Dec. (U. S.) 567; *The Willard Saulesbury*, 1 Low. (U. S.) 194; *The Saxonia*, *The Eclipse*, 8 Jur., N. S. 315.

By the established principles of maritime law, a vessel at anchor where vessels are constantly passing is in fault unless she shows at night the usual signal light of a vessel at anchor, to wit, a globe lamp, or one without any dark side to it, and hung high enough in the rigging to be seen at a distance. *Brig James Gray v. Ship John Fraser*, 2 How. (U. S.) 184.

If common prudence requires, a vessel lying in a certain place should hang out a light, it is no excuse that the common practice in the harbor was to neglect so to do. *Kelly v. Cunningham*, 1 Cal. 365.

A schooner was run down at night while at anchor by a steamer. The barge exhibited an anchor light; and the night was good for seeing lights. *Held*, that a vigilant lookout on the

tively that the light was up, in the event of a collision.<sup>1</sup> But where a boat is moored along side other vessels attached to the shore no light is required, especially if the boat is moored at a place set apart for such boats.<sup>2</sup> A steamer manœuvring to come to an anchor, in a place and manner such that her regulation

steamer would have discovered, in time to have avoided, the barge; but, the latter not having an anchor watch when lying in an exposed place, she was in fault also, and the damages should be divided. *The Guyandotte*, 39 Fed. Rep. 575. *The Achilles*, 13 Phila. (Pa.) 463.

In *Steamboat Blue Wing v. Buckner*, 12 B. Mon. (Ky.) 246, where a hay boat was laid up near a landing, in a usual place for laying up boats, and had no light, and a steamboat, in passing up the river, ran out of the usual course, and injured the hay boat, it was held that steamboats, in passing landing places where boats were usually laid up, should use such skill and caution as not to run foul of the boats laid up, and for a failure in skill and caution, injuries to the stationary boats, though they had no lights up, will be reduced by the law.

A vessel was elsewhere than she supposed herself to be at the time of a collision; but the error was caused by the absence of any light on a derrick boat with which she collided, and the absence of a light on the pier to which the boat was moored, both of which were required by rule 12. *Held*, the derrick boat could not escape liability by proving the other vessel to have been out of the usual course of passing vessels. *The Alabama*, 26 Fed. Rep. 866.

Where a steamboat, descending the Hudson river by night, with several barges in tow, and running at the rate of seven or eight miles an hour, struck a brig lying at anchor and exhibiting a light, though not in the manner required by the statutes of New York, the steamboat is grossly in fault, and liable for all damage done. *Steamboat New York v. Rea*, 18 How. (U. S.) 223.

**Wrecking Vessels.**—Where two wrecking vessels are stationed over a wreck they should either exhibit one light, or two, distinctly arranged. *The Austin*, 3 Ben. (U. S.) 11.

1. *The Worthington*, 19 Fed. Rep. 836; *The Henry Warner*, 29 Fed. Rep. 601; *Buzzard v. The Petrel*, 6 McLean

(U. S.) 491; *The Oscar Townsend*, 17 Fed. Rep. 43; *The Thomas Lea*, 35 L. T., N. S. 406; *The Fremont*, 3 Sawy. 571.

In *the Oliver*, 22 Fed. Rep. 848, *HUGHES, J.*, said: "I do not know that there is any rule of navigation which requires a vessel at anchor to keep a watch on deck; but, rule or no rule, it is very careless for a vessel lying in deep water, in the course pursued by sailing vessels, not to have a watch on deck. See *the Sapphire*, 11 Wall. (U. S.) 164, and *Buzzard v. The Petrel*, 6 McLean (U. S.) 491. Her master, I repeat, must *know* that his light is up; and how can he know this himself, and how can he prove the fact to the satisfaction of a court, in the event he is struck by another vessel, unless he have a watch on deck to see that it does not go out? He assumes great risk if he neglects this precaution. The Mechanic has failed to prove that her light was up for an hour before and at the time of the collision. Lying, as she was, in a fair way without a light, and presenting, as she lay, low down in the water, at midnight, but a small object to the vision of a vessel approaching her from her rear, she invited collision with no light up. The usual presumption of law, against the moving vessel, in favor of the one at anchor, is therefore reversed in this case, and the Mechanic must be held to have been in fault; for, to hold that a vessel lying where she was, without a light in the rigging or a watch on deck, was not in fault, would be to offer a premium for collision."

Unless a vessel, which is moored in a harbor in the usual track of steamers, keep a watch, and set a light in a dark night, she cannot recover damages for being run into by a steamer, if the latter be not grossly negligent nor intentionally wrong. *Innis v. The Steamer Senator*, 1 Cal. 459.

2. *Culbertson v. Southern Belle*, 18 How. (U. S.) 584; *L'Hommedieu v. The Mischief*, 39 Fed. Rep. 510; *Ure v. Coffman*, 19 How. (U. S.) 56.

The steam tug *Q* had taken a tow up Hunter's Point creek, and, having

lights cannot be seen by an approaching vessel, is bound to give timely notice of her presence by showing a light or some other sufficient means.<sup>1</sup> The presumption of fault is conclusive against a moving steamer which runs into and damages a vessel lying at anchor in a harbor on proper ground, and showing lights.<sup>2</sup> The fact that the light of a vessel at anchor is not in conformity to the statutory requirement will not render the vessel liable for her proportion of the damages of a collision, if such defect did not co-operate in causing the collision.<sup>3</sup>

**V. SOUND SIGNALS FOR FOG, ETC.<sup>4</sup>—1. Generally.**—Fog signals should

landed it in a proper place on the shore, was lying alongside the tow, stern down the creek, and with over 100 feet of clear water outside of her. In the early morning the tug M came up the creek and ran into the Q, doing the damage sued for. The M claimed that the absence of lights on the Q was the cause of the collision. *Held*, that the Q was not required to have a light, and the M was responsible for the collision. *L'Hommedieu v. The Mischief*, 39 Fed. Rep. 510.

1. *The Philotaxe*, 37 L. T., N. S. 540.

2. *The Florida*, 3 Hughes (U. S.) 488. See *The Milwaukee*, 2 Biss. (U. S.) 509.

3. *The Scottish Bride v. The Anthony Kelly*, 1 Pa. L. Gaz. Rep. 289. See *Hoffman v. Union Ferry Co.*, 47 N. Y. 176; *Whitehall Transportation Co. v. New Jersey Steamboat Co.*, 51 N. Y. 369.

If a vessel, lying at anchor in the harbor of New York at night exhibits a sufficient light, though not such as the statutes of New York require, her omission to comply with the statutes will not be a fatal objection to a libel in admiralty, brought by her owners against another vessel for collision. *DANIEL, J.*, dissenting. *Steamer New York v. Rea*, 18 How. (U. S.) 223.

4. **Rules for the High Seas and Coast Waters.**—ART. 12. A steamship shall be provided with a steam whistle or other efficient steam sound signals, so placed that the sound may not be intercepted by any obstructions, and with an efficient fog horn, to be sounded by a bellows or other mechanical means, and also with an efficient bell. (In all cases where the regulations require a bell to be used, a drum will be substituted on board Turkish vessels.) A sailing ship shall be provided with a similar fog horn and bell.

In fog, mist, or falling snow, whether by day or night, the signals described in this article shall be used as follows, that is to say:

(a) A steamship under way shall make with her steam whistle or other steam sound signal, at intervals of not more than two minutes, a prolonged blast.

(b) A sailing ship under way shall make with her fog horn, at intervals of not more than two minutes, when on the starboard tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam three blasts in succession.

(c) A steamship and a sailing ship, when not under way, shall, at intervals of not more than two minutes, ring the bell.

**Speed of Ships to be Moderate in Fog, and So Forth.**—ART. 13. Every ship, whether a sailing ship or a steamship, shall, in a fog, mist, or falling snow, go at a moderate speed.

**Harbors, Lakes and Inland Waters.**—RULE FIFTEEN. Whenever there is a fog, or thick weather, whether by day or night, fog signals shall be used as follows:

(a) Steam vessels under way shall sound a steam whistle placed before the funnel, not less than eight feet from the deck, at intervals of not more than one minute.

(b) Sail vessels under way shall sound a fog horn at intervals of not more than five minutes.

(c) Steam vessels and sail vessels, when not under way, shall sound a bell at intervals of not more than five minutes.

(d) Coal boats, trading boats, produce boats, canal boats, oyster boats, fishing boats, rafts, or other watercraft, navigating any bay, harbor, or river, by hand power, horse power, sail, or by the current of the river, or anchored or

be sounded,<sup>1</sup> especially when there is so much fog as to prevent vessels seeing each other for more than a short distance.<sup>2</sup> And the vessel that fails to give the proper signals will be in fault.<sup>3</sup> But error in locating a vessel's exact position by the sound of her whistle in a fog is not necessarily a fault, under the proved aberrations in the course of sound.<sup>4</sup> It may be laid down as a general rule of conduct that it is necessary to stop and reverse, not indeed, every time that a steamer hears a whistle or fog-horn, in a dense fog, but when in such a fog it is heard on either bow, and approaching, and is in the vicinity; because there must then be a risk of collision.<sup>5</sup>

moored in or near the channel or fair way of any bay, harbor, or river, and not in any port, shall sound a fog horn, or equivalent signal, which shall make a sound equal to a steam whistle, at intervals of not more than two minutes.

It is recommended by the board of supervising inspectors of steam vessels, that, whenever there is a fog by day or night, sailing vessels and every craft propelled by sails upon the ocean, lakes and rivers, when on the starboard tack, shall sound, with intervals of not more than two minutes, one blast of the fog horn; when on the port tack two blasts; when with the wind free or running large, three blasts; and that, when lying to or at anchor, they shall sound the bell with the same intervals.

**Fog Horns.**—The selection of an instrument to be employed in making the fog signals required by law must in all cases be left to the master or owner of the vessel, it being only necessary that this department shall so far regulate such selection that instruments not effective for the purpose shall be excluded.

Any instrument or device for this purpose, which produces a sound equivalent to that of a steam whistle, will be considered sufficient for the purposes of the law.

**Conflicting Rules.**—Any directions heretofore given by this department conflicting with the above instructions are hereby revoked.

1. *The Porter*, 2 Dill. (U. S.) 146; *The Exchange*, 10 Blatchf. (U. S.) 168; *The Bay State*, 1 Abb. Adm. 235.

A sailing vessel is bound to have and use in a fog mechanical means for sounding her fog horn. *The Wyanoke*, 40 Fed. Rep. 702.

**Sailing Vessel Hove To.**—A sailing vessel when hove to in a fog, should ring a bell and not blow a horn. *The Alfredo*, 32 Fed. Rep. 240.

**Tug Moving in a Slip.**—A steam-tug moving in a slip in a fog, and inside of the ends of the piers, is not required to sound her whistle as a signal to a steamer moving up the river outside of the slip, and which runs into the slip and collides with her. *The Shady Side*, 17 Blatchf. (U. S.) 132.

2. *The Ludwig Holberg*, 36 Fed. Rep. 914; *The Porter*, 2 Dill. (U. S.) 146; *The Monticello*, 1 Low. (U. S.) 184.

3. *Bradley v. The John Pridgeon, Jr.*, 38 Fed. Rep. 261; *Elliott v. The Stafford*, 37 Fed. Rep. 811; *The Milwaukee*, 2 Biss. (U. S.) 509; *The Exchange*, 10 Blatchf. (U. S.) 168; *The Porter*, 2 Dill. (U. S.) 146. See *Sawyer v. Eastern Steamboat Co.*, 46 Me. 400; *The Perkio-men*, 27 Fed. Rep. 573.

A tug towing a dredge to Sandy Hook in a fog, with a line some 400 or 600 feet moving across the course of a steamer, was grossly in fault where she neither blew a fog signal as required, nor the signal "three distinct blasts in quick succession repeated at intervals not exceeding one minute," to indicate that she had a tow, as required by Supervising Inspector's Rule 10, subd. 8. Especially is she guilty of fault in giving a signal of two whistles to the outgoing steamer, thus telling her to go astern, without giving the three towing whistles to apprise her of the danger of going astern and going across the line of the tow; and where the dredge in tow held the tug subject to the orders of the master of the dredge, such dredge will also be responsible for the misconduct of the tug, where she had a steam engine with whistles, by which her position in a fog could be indicated, and neglected to use them. *The City of Alexandria*, 31 Fed. Rep. 427. See *The Ludvig v. Holberg*, 36 Fed. Rep. 914.

4. *The Lepanto*, 21 Fed. Rep. 651.

5. *The Britannic*, 39 Fed. Rep. 395; *The Lepanto*, 21 Fed. Rep. 651; *The*

**2. Rate of Speed.**—As to what is the "moderate speed," required by article 13 of the international rules, for vessels in a fog, mist or falling snow must depend on circumstances.<sup>1</sup> Under ordinary circumstances it is such a rate as will place her headway under

Pottsville, 24 Fed. Rep. 655; The Frankland, L. R., 4 P. C. 529; Kirby Hall, L. R., 8 Prob. Div. 71; The Dordogne, L. R., 10 Prob. Div. 6; The John McIntyre, L. R., 9 Prob. Div. 135; The City of Atlanta, 26 Fed. Rep. 456; The Stamford, 27 Fed. Rep. 227; The State of Alabama, 17 Fed. Rep. 847; Morton v. Hutchinson, The Frankland and The Kestrel, 4 L. R., P. C. C. 529; 9 Moore P. C. C., N. S. 365; The Otter, 4 L. R., Adm. 203; 22 W. R. 557.

A steamship, upon hearing the fog signal of an invisible vessel, ought to stop at once, without waiting for her to come in sight. The Anna, 14 Phila. (Pa.) 521.

Two steam ferry boats collided in a fog. The one which had the other on her port hand—*held*, to be solely in fault, she having kept on, while the other had come to a standstill, each having heard the fog whistles from the other. The D. S. Gregory, 16 Blatchf. (U. S.) 542.

A large steamship came into collision with a bark. It appeared that the steamer was going too fast through a fog, and that she did not slacken speed after hearing the bark's horn. *Held*, that the steamer was liable for the collision. The City of New York, 35 Fed. Rep. 604.

1. The James Adger, 3 Blatchf. (U. S.) 515. See The Leland, 19 Fed. Rep. 771; The Luray, 24 Fed. Rep. 751; The Britannic, 39 Fed. Rep. 395; The Europa, 2 Eng. Law, Eq. Rep. 557; The City of New York, 35 Fed. Rep. 604; The Martello, 34 Fed. Rep. 71; The Milwaukee, 2 Biss. (U. S.) 509; The Colorado, 91 U. S. 602; The City of Alexandria, 31 Fed. Rep. 427, 431; The Pennland, 23 Fed. Rep. 551, 555; The State of Alabama, 17 Fed. Rep. 847, 852; The Pennsylvania, 19 Wall. (U. S.) 125; The Bristol, 10 Blatchf. (U. S.) 537; McCready v. Goldsmith, 18 How. (U. S.) 89; The Bay State, 1 Abb. Adm. 235; The Shady Side, 17 Blatchf. (U. S.) 132; The Omega, 5 Hughes (U. S.) 487; McCabe v. Old Dominion S. S. Co., 31 Fed. Rep. 234; Northern Indiana, 3 Blatchf. (U. S.) 92; The Nacoochee, 28 Fed. Rep. 462; Amoskeag etc. Co. v. The John Adams, 1 Cliff. (U. S.) 404; The Wyanoke, 40

Fed. Rep. 702; Dolner v. The Monticello, 1 Holmes (U. S.) 7; The St. John, 29 Fed. Rep. 221.

Five knots per hour in a thick fog is not "moderate speed" required by the new International Rules, art. 13, of a steamer nearing the port of New York, whose full speed is twelve knots. The Martello, 34 Fed. Rep. 71.

In the following cases it was held immoderate speed:

Eight miles an hour in a dense fog and in the usual track of vessels approaching a harbor. The City of Panama, 5 Sawy. (U. S.) 63. Ten and one half knots an hour in a dense fog in mid-ocean. The Marathon, 24 Fed. Rep. 653.

Seven knots in a dense fog for an hour and a half, before a collision in a much frequented highway of commerce, although, in fact, the vessel had nearly stopped before striking the other vessel. Leonard v. Whitwill, 10 Ben. (U. S.) 638.

Steaming nine knots an hour on a foggy night in the path of other vessels, no pressing emergency existing. Prescott v. United States, 19 Ct. of Cl. 684.

A steamer moving in a narrow channel against the tide at the rate of five and one-third miles an hour in a dense fog, with her whistle blowing feebly—*held*, liable for a collision with another steamer moving with the tide at the rate of four and three-fourths miles an hour. The Luray, 24 Fed. Rep. 751.

A speed of five miles an hour, in a fog, with some sea and wind, does not show negligence. Bradley v. The John Pridgeon, Jr., 38 Fed. Rep. 261.

It is faulty navigation for a vessel to continue her course at a speed of over five miles an hour, unnecessarily in the river, in a very dense fog, on a course where other vessels are liable to be encountered. The Raleigh, 31 Fed. Rep. 527.

Seven knots, in a dense fog, at night, is immoderate speed for a steamer whose full speed is only ten or eleven knots. The Wyanoke, 40 Fed. Rep. 702.

Six knots is immoderate speed for a sailing vessel, under nearly full sail in a dense fog at night. The Wyanoke, 40 Fed. Rep. 702.



such easy and ready command that she can be stopped within such distance as other vessels can be seen from her.<sup>1</sup> The rule that there must not be too much speed in a fog has been applied to sailing vessels under various circumstances, depending on the particular facts of the case.<sup>2</sup> But there is, however, no absolute rule that a vessel must lay to during a fog; her duty in this respect is a question of prudence under the circumstances.<sup>3</sup> Excess of speed on a steamer is a question of fact, in determining

**England.**—The rate of speed proper for a steamer must depend on circumstances, but in a thick fog and at a part of the ocean where frequently a great number of vessels is congregated, seven knots an hour is too great. *The Pennsylvania*, 23 L. T., N. S. 55; *The Steamship Westphalia*, 24 L. T., N. S. 75; *The Magna Charta*, 25 L. T., N. S. 512; *The Europa*, 2 Eng. L. & Eq. 71.

Four to five knots an hour is not a moderate speed for a steamer in a thick fog in the Baltic, twenty-five miles east of Gothland. *The Magna Charta*, 25 L. T., N. S. 512, Adm.

**Full Speed.**—A violation of article 13 of the international collision rules, by going full speed in a fog, requires, to excuse it, the existence of a present danger, and a necessity to go at full speed to avoid it; and a belief on the part of the master that a danger may in a certain event arise in the future, to avoid which he gives the full-speed order, is not the excuse permitted by article 23. *The Iberia*, 40 Fed. Rep. 893.

**Falling Snow.**—A steamer running at half speed, seven knots, in a snow storm at night, when the lights of approaching vessels are visible one-third or one-half mile distant, within which distance the steamer is able to stop, back, or slacken speed so as to effectually avoid collision, is running at a "moderate speed." *The Allianca*, 39 Fed. Rep. 476.

1. *The D. S. Gregory*, 2 Ben. 528; 6 Blatchf. (U. S.) 166; *McCready v. Goldsmith*, 18 How. (U. S.) 89; *Abb. Adm.* 235; *The Leo*, 11 Blatchf. (U. S.) 225; *The Colorado*, 1 Brown Adm. 406; *The Louisiana*, 2 Ben. 371; *The Western Metropolis*, 7 Blatchf. (U. S.) 214; 2 Ben. 399; *The Free State*, 91 U. S. 200; *The Louisiana*, 2 Ben. 374; *The City of Paris*, 9 Wall. (U. S.) 638; *The Great Eastern*, 11 L. T., N. S. 5; *Ward v. Ogdenburgh*, 5 McLean (U. S.) 638; *The Huntsville*, 8 Blatchf. (U. S.) 228; *The Favorite*, 4 Ben. (U. S.) 134; 8 Blatchf. (U. S.) 530; *The Leop-*

*ard*, 2 Ware (Dav.) 193; *The Syracuse*, 9 Wall. (U. S.) 676; *The Blackstone*, 1 Low. (U. S.) 438; *The Batavia*, 9 Moore P. C. 287; *The City of Paris*, Holt. R. R. 15; *The Hasna*, 5 Ben. (U. S.) 591; *The Dispatch*, Swa. (U. S.) 138; *The Europa*, 2 Eng. L. & E. 557; *The Lady of the Lake*, Holt. R. R. 24, 202; *The Rose*, 2 W. Rob. 1; *The Saxonia*, Lush. 410; *The Virgil*, 2 W. Rob. 201; *The Karl*, Holt. R. R. 203; *The Fanny Buck*, idem. 193; *The Sylph*, 2 Spinks 55; *The James Watt*, 2 W. Rob. 270; *The Ligo*, 2 Hagg. Adm. 356; *The Boldera*, Holt. R. R. 205; *Nelson v. Leland*, 22 How. (U. S.) 48; *The Hermann*, 4 Blatchf. (U. S.) 441; *The Northern Indiana*, 3 Blatchf. (U. S.) 92; 16 Law Rep. 433; *The Berkenhead*, 3 W. Rob. 75; *The Empire State*, 2 Biss. 216.

She must reduce her speed to a moderate rate or abide the consequences. *The Louisiana*, 2 Ben. (U. S.) 374; *The D. S. Gregory*, 166; s. c., 6 Blatchf. (U. S.) 166; *The Hasna*, 5 Ben. (U. S.) 526; *The Chancellor*, 4 Ben. (U. S.) 153; *The Blackstone*, 1 Low. (U. S.) 487; *The Monticello v. Mollison*, 17 How. (U. S.) 152; 1 Low. (U. S.) 184.

It is no excuse for excessive speed that the steamer could not otherwise fulfil a mail contract. *Rogers v. The St. Charles*, 19 How. (U. S.) 108; *The James Adger*, 3 Blatchf. (U. S.) 515; *The Northern Indiana*, 3 Blatchf. (U. S.) 92; *The Rose*, 2 W. Rob. 1; 7 Jur., N. S. 381; *The Vivid*, Swa. (U. S.) 88.

2. *The Chancellor*, 4 Ben. (U. S.) 164; *The Virgil*, 2 W. Rob. 201; *The Victoria*, 3 W. Rob. 49; *The Pepperell*, Swa. 12; *The Robert and Ann*, Holt. R. R. of the R. 55.

3. *Hoffman v. Union Ferry Co.*, 68 N. Y. 385. See *The Morning Light*, 2 Wall. (U. S.) 550.

A ferry boat is not exempt from the obligation of lying to when circumstances require it. *Hoffman v. Union Ferry Co.*, 68 N. Y. 385.

which, the locality and hour, state of the weather, and all the circumstances, are to be fully considered.<sup>1</sup>

**3. Vessels Anchored or Moored.**—A vessel anchored or moored during a heavy fog or snow storm in a channel where vessels naturally come must give the usual fog signals.<sup>2</sup>

**VI. STEERING AND SAILING RULES<sup>3</sup>—1. Sailing Vessels—(a) GENERALLY.**—The rules set out in the notes which are to be followed when two sailing vessels are approaching one another so as to involve risk of collision are the result of the practical experience and wisdom of navigators. Most of them were in use before any statutory regulations were made and the courts apply them strictly in all cases of collision, unless where a clear exception is established by the party seeking to excuse himself for a departure. They may have their exceptions in extreme cases, depending upon the special circumstances of the case, and in respect to which no general rule can be laid down or applied. Either vessel may find herself in a position at the time when it would be impossible to conform to them without certain peril to herself, or a collision with the approaching vessel. Under such circumstances, the master must necessarily be thrown upon the resources of his own judgment and skill in extricating his own vessel, as well as the vessel approaching from the impending peril. These cases cannot be anticipated, and, therefore, cannot be provided for by

Running on the Ohio River in a fog is not negligence *per se*. The Joseph W. Gould, 19 Fed. Rep. 785.

1. The Northern Indiana, 3 Blatchf. (U. S.) 92; The James Adger, 3 Blatchf. (U. S.) 515; The Florida, 4 Blatchf. (U. S.) 470; The Europa, 2 Eng. L. & E. 557; The Gazelle, 1 W. Rob. 471; The Iron Duke, 9 Jur. 476; The Virgil, 2 W. Rob. 201; The Bay State, Abb. Adm. 235; s. c., 18 How. (U. S.) 89; The New York v. Rea, 18 How. (U. S.) 223; Rogers v. The St. Charles, 19 How. (U. S.) 108.

A steamer should not go at full speed under steam and sail before the wind while her smoke is blown over her bows so as to obscure her lights, and to prevent her from seeing and from being seen by other ships approaching from an opposite direction. The Rona v. The Ava, 29 L. T., N. S. 781.

2. The Porter, 2 Dill. (U. S.) 146; The Exchange, 10 Blatchf. (U. S.) 168; Art. 12, § c, p. 289. Compare The Rockaway, 19 Fed. Rep. 449.

3. Rules for the High Seas and Coast Waters.—Sailing Vessels.—ART. 14. When two sailing ships are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the others, as follows, namely:

(a) A ship which is running free shall keep out of the way of a ship which is close-hauled.

(b) A ship which is close-hauled on the port tack shall keep out of the way of a ship which is close-hauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the ship which has the wind on the port side shall keep out of the way of the other.

(d) When both are running free, with the wind on the same side, the ship which is to windward shall keep out of the way of the ship which is to leeward.

(e) A ship which has the wind aft shall keep out of the way of the other ship.

**Harbors, Lakes and Inland Waters.—**

**Rule Sixteen.**—If two sail vessels are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

**Rule Seventeen.**—When two sail vessels are crossing so as to involve risk of collision, then, if they have the wind on different sides, the vessel with the wind on the port side shall keep out

any fixed regulation. They can only be examined, and the management of the vessel approved or condemned, as the case may arise.<sup>1</sup>

(b) ONE FREE AND ONE CLOSE-HAULED.—A vessel that has the wind free or sailing before or with the wind must get out of the way of the vessel that is close-hauled or sailing by or against it.<sup>2</sup>

of the way of the vessel with the wind on the starboard side, except in the case in which the vessel with the wind on the port side is close-hauled, and the other vessel free, in which case the latter vessel shall keep out of the way.

But if they have the wind on the same side, or if one of them has the wind aft, the vessel which is to windward shall keep out of the way of the vessel which is to leeward.

1. See *St. John v. Paine*, 10 How. (U. S.) 557.

2. ART. 14 (a), p. 293; *Sch'r Catharine v. Dickinson*, 17 How. (U. S.) 170; *St. John v. Paine*, 10 How. (U. S.) 557; *Dickinson v. The Gore*, 1 Newb. Adm. 45; *The Blossom*, Olc. Adm. 188; *The Argus*, Olc. Adm. 304; *The Emily*, Olc. Adm. 132; *The North Star*, 29 Fed. Rep. 151; *The Havilah*, 33 Fed. Rep. 875; *The Woodrop Sims*, 2 Dod. 85; *The Chester*, 3 Hagg. 318; *Sills v. Brown*, 9 Carr. & Payne, 601; *Jameson v. Dunkeld*, 12 Moore 148; *Vennal v. Gardiner*, 1 Crompt. & Mees. 21; *The Leopard*, *Davies* (U. S.) 193; *The Rose*, 7 Jur. 381; *The Ann & Mary*, 7 Jur. 999; *The Harriet*, 1 Rob. 182; *The Clement*, 2 Curtis (U. S.) 363; *The Saxonia*, Lush. 410; 15 Moore P. C. C. 262; *The Erastus Wiman*, 20 Fed. Rep. 245; *The Emily*, 1 Blatchf. (U. S.) 236; *The Pepita*, 3 Hughes (U. S.) 483; *The Jeremiah*, 10 Ben. (U. S.) 326; *The John Stuart*, 4 Blatchf. (U. S.) 445; *St. John v. Paine*, 10 How. (U. S.) 571, 581; *The Leopard*, *Davis* (U. S.) 193; *Smyrna Steamboat Co. v. Whilldin*, 4 Harr. (Del.) 228; *Handayside v. Wilson*, 3 C. & P. 528; *Sills v. Brown*, 9 C. & P. 601; *Mackay v. Roberts*, 9 Moore, P. C. C. 357; *The Chancellor*, 14 Moore P. C. C. 202. Compare *The Mary Evaline*, 16 Wall. (U. S.) 501; affirming 3 Ben. (U. S.) 438.

This is also the common law of the sea. *The Theodore H. Rand*, 12 App. Cas. 247; *The Peckforten Castle*, 3 Pro. Div. 11; *The Swan*, 2 Asp. 133; *The Halcyon*, 1 Lush. 100; *The Joseph Somes*, Swa. 185; *The Mobile*, Swa. 127 and 69; s. c., 10 Mo. P. C. C. 467; *The Dumfries*, 10 Mo. P. C. C. 461; *The*

*Immaganda Sara Ansina*, 8 Mo. P. C. C. 85; *The Commerce*, 3 W. Rob. 287; *The Speed*, 2 W. Rob. 229; *The Harriet*, 1 W. Rob. 185; *The Alt*, 3 Hagg. 321; *The Baron Halberg*, 3 Hagg. 244; *Jameson v. Drinkald*, 12 Mo. 148; *The Woodrop-Simms*, 2 Dods. 83; *The Thames*, 5 Rob. 345; *The Havilah*, 33 Fed. Rep. 875; *The Ella Warner*, 30 Fed. Rep. 203; *The North Star*, 29 Fed. Rep. 151; *The S. Anderson*, 27 Fed. Rep. 392; *The Maria and Elizabeth*, 7 Fed. Rep. 253; *Kiak v. The Osseo*, 8 Ben. (U. S.) 518; *The M. M. Hamilton*, 1 Hask. (U. S.) 489; *The Richard R. Higgins*, 1 Low. (U. S.) 290; *Bentley v. Coyne*, 4 Wall. (U. S.) 509; *Crowel v. Bark Radama*, 2 Cliff. (U. S.) 551; *The John Stuart*, 4 Blatchf. (U. S.) 444; *The Clara M. Porter*, 3 Ware (U. S.) 39; *The Sch'r Catherine Dickinson*, 17 How. (U. S.) 170; *Allen v. Mackay*, 1 Sprague (U. S.) 219; *The Blossom*, Olc. Adm. 188; *The Sch'r Catharine and Martha*, 11 N. Y. Leg. Ob. 225; *The Argus*, Olc. Adm. 304; *The Emily*, Olc. Adm. 132; *The Rebecca*, Blatchf. & H. Adm. 347; *Marsh v. Blyth*, 1 McCord (S. Car.) L. 360.

Where it appeared that a brig was sailing free and a schooner close-hauled, it was the duty of the brig to keep out of the way, and she was held negligent in not seasonably observing the schooner's lights and taking measures to avoid collision. *The Havilah*, 33 Fed. Rep. 875.

**Close-hauled Defined.**—A ship hove to, and making both headway and leeway is close-hauled, within navigation rules. *The Ada A. Kennedy*, 33 Fed. Rep. 623.

"'Close-hauled' (in the Regulations for Preventing Collisions at Sea, 1879), is not confined to a vessel sailing as close as possible to the wind; it may be applied to a vessel on a wind, although she may be able to luff a point or more without losing steerage way." 1 Maude & P. 599, 600, citing *Chadwick v. Dublin Steam Packet Co.*, 6 E. & B. 771.

**Running Free.**—In the Regulations for Preventing Collisions at Sea, 1879, "running free" is probably used as op-

The vessel that is close-hauled has the right of way<sup>1</sup> and should keep her course.<sup>2</sup> A vessel close-hauled on the wind has a right to rely to the last moment on the ability and care of another meeting her with the wind free, to avoid a collision, and is not responsible for a wrong movement on her part, caused by the negligence of the one running free; but a vessel close-hauled is bound to hold her tack so as not to come round in the way of one free and endeavoring to avoid her.<sup>3</sup> If a collision is caused by an unnecessary luff on the part of the vessel close-hauled she will be solely in fault.<sup>4</sup> Yet a change of course, for the purpose of attempting to escape a collision immediately impending, though the manœuvre may be a mistaken one, is not a fault.<sup>5</sup>

(c) BOTH CLOSE-HAULED.—A ship which is close-hauled on the port tack must keep out of the way of a ship which is close-hauled on the starboard tack and the latter must keep her course.<sup>6</sup> This part of the rule, that a close-hauled vessel on the port tack, must give way to one sailing by the wind on the starboard tack, close-hauled, is not more imperative than is the further branch of the

posed to close-hauled. 1 Maude & P. 599.

**Presumption of Fault.**—In case of a vessel sailing free and one close-hauled, the former is presumed to be in fault. *Carll v. The Erastus Wiman*, 20 Fed. Rep. 245.

1. *The Abby Ingalls*, 12 Fed. Rep. 217; *The F. W. Gifford*, 7 Biss. (U. S.) 249; *New York etc. S. S. Co. v. Rumball*, 21 How. (U. S.) 372; *Bentley v. Coyne*, 4 Wall. (U. S.) 1; 509; *The Ontario*, 2 Low. (U. S.) 40, affirmed on appeal; *Swift v. Brownell*, 1 Holmes (U. S.) 467; *The Mary Doane*, 2 Low. (U. S.) 428.

2. *The John Stuart*, 4 Blatchf. (U. S.) 444; *The Richard R. Higgins*, 1 Low. (U. S.) 290; *The Chester*, 3 Hagg. Adm. R. 316, 318; *The Rose*, 2 W. Rob. 1; *St John v. Paine*, 10 How. (U. S.) 557, 581; *Sch'r Catherine v. Dickinson*, 17 How. (U. S.) 170, 176; *The Tasmania*, 14 P. D. (C. A.) 53.

3. *The Argus*, Olc. Adm. 304.

4. *The Ella Warner*, 30 Fed. Rep. 203; *The North Star*, 29 Fed. Rep. 151.

A close-hauled vessel is justified in luffing so as to bring her, after she has sighted another vessel, as close to the wind as she can get so as to remain under command, and such luffing is not a deviation from her course that will relieve the other vessel, having the wind free, from the duty of getting out of her way. *The Marmion*, 27 L. T., N. S. 255.

5. *The Havilah*, 33 Fed. Rep. 875; *The City of Paris*, 1 Ben. (U. S.) 529;

*The Jupiter*, 1 Ben. (U. S.) 536, 537; *The Fairbanks*, 9 Wall. (U. S.) 420; *Bentley v. Coyne*, 4 Wall. (U. S.) 509; *New York etc. S. S. Co. v. Rumball*, 21 How. (U. S.) 372.

6. ART. 14 (b), p. 293; *The Mina A. Read*, 30 Fed. Rep. 205; *The Ada A. Kennedy*, 33 Fed. Rep. 623; *The Eliza S. Potter*, 35 Fed. Rep. 220; *The F. W. Gifford*, 7 Biss. (U. S.) 249.

This rule was the same before any statutory regulations were made. *The East Lothian*, 1 Lush. 241; *The North American*, Swa. 358; 12 Mo. P. C. C. 331; *The Fortune*, 9 Mo. P. C. C. 357; *The Jersey Tar*, 8 Ir. Jur. 317; *The Lady Ann*, 15 Jur. 18; s. c., 7 N. of C. 364; *The Test*, 11 Jur. 998; *The Seringapatam*, cited in 11 Jur. 998; *Swift v. Brownell*, Holmes (U. S.) 467; s. c., *sub nom.* *The Ontario*; *The Helen Mar*, 2 Low. (U. S.) 40; *The Mary C.*, 1 Hask. (U. S.) 474; *The Cynosure*, 7 Law. Rep. 222; *The Alexander Wise*, 2 W. Rob. 65; *The North American*, 12 Moore P. C. C. 331; *The Constitution*, 2 Moore P. C. C., N. S. 453; *St. John v. Paine*, 10 How. (U. S.) 577, 581; *The Jeremiah*, 10 Ben. (U. S.) 326; *The Summit*, 2 Curt. (U. S.) 150.

When a port-tacked vessel has thrown herself into stays and becomes helpless, she ought nevertheless to execute any practicable manœuvre in order to get out of the way of a starboard-tacked vessel. *Wilson v. Canada Shipping Co.*, 2 L. R., App. Cas. 389; s. c., *sub nom.* *The Lake St. Clair v. The Underwriter*, 36 L. T., N. S. 155.

same rule, as enforced by the courts, that the latter vessel must keep her course.<sup>1</sup> To relieve a vessel from fault in changing her course when the rule required her to keep it, she must show clearly that it was done after a collision had become inevitable, or, at least, after a courageous and skilful navigator would have thought it so.<sup>2</sup> This rule will not excuse the vessel on the starboard tack not taking other measures to prevent a collision, if circumstances render them necessary.<sup>3</sup> And where two sail vessels, both close-hauled, are sailing upon convergent courses, on the same tack, and the convergence is caused by the ability of the one to lie nearest the wind, the latter must give way.<sup>4</sup>

(d) BOTH FREE.—When two vessels are approaching each other, both having the wind free, the vessel on the larboard tack must give way, and each pass to the right.<sup>5</sup> The same rule governs vessels sailing on the wind, and approaching each other, when it is doubtful which is to windward; but if the vessel on the larboard tack is so far to windward that, if both persist in their course, the other will strike her on the lee side abaft the beam or near the stern, in that case the vessel on the starboard tack should give way.<sup>6</sup>

(e) INLAND WATERS.—The rule that when sail vessels are meeting end on or nearly end on, so as to involve a risk of collision, it is the duty of each to port the helm, which was formerly followed by vessels on the high seas, now applies only to the internal waters of the United States.<sup>7</sup> The rule was changed by the revised rules issued in *England* under the order in council of August 11th, 1884, and adopted in this country by Stat. 1885, ch. 354, § 1, art. 14; 23 Stat. at L. (U. S.) 441; upon the high seas the burden of acting is now placed upon one vessel only—the vessel considered to be the one best situated to manœuvre.

(1) *Application of Rules*.—The rule that when two vessels are meeting in opposite directions each one shall port her helm so as to pass the other on the larboard side applies only to cases

1. The *F. W. Gifford*, 7 Biss. (U. S.) 249, 253.

2. The *Richard R. Higgins*, 1 Low. (U. S.) 290.

3. The *Lady Anne*, 1 Eng. L. & Eq. 670.

4. The *Clement*, Sprague (U. S.) 257.

5. ART. 14 (c), p. 293; *St. John v. Paine*, 10 How. (U. S.) 581; *The Thomas Martin*, 3 Blatchf. (U. S.) 517, 519; *French v. The Victoria*, 10 Phila. (Pa.) 292.

This rule is subject to modification when one is to the windward of the other, and ahead of or above her in a narrow channel, so that an observance of it might probably produce a collision. *The Ann Caroline*, 2 Wall. (U. S.) 538.

6. *St. John v. Paine*, 10 How. (U. S.)

577, 581; *The Commodore Jones*, 25 Fed. Rep. 506.

7. See *supra*, also the *Maggie J. Smith v. Walker*, 123 U. S. 349; *The Anne Lindsley*, 104 U. S. 185; *The Dexter*, 23 Wall. (U. S.) 69; *The Sylvester Hale*, 6 Bin. (U. S.) 523; *The Nichols*, 7 Wall. (U. S.) 656; *The Chadwick v. Dublin Steam Packet Co.*, 38 Eng. L. & Eq. 197.

"End On Defined."—Sailing ships are meeting "end on" when they are approaching each other from opposite directions, or on such parallel lines as to involve risk of collision on account of their proximity, and when the vessels have advanced so near each other that the necessity for precaution begins. *The Nichols*, 7 Wall. (U. S.) 656; *The*

where both are sailing vessels or both are steamboats; not to cases where one is a steamboat and the other navigated only by sails.<sup>1</sup>

(2) *Sailing Vessels Crossing*.—If sailing vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack should keep her course, and the one on the larboard tack should bear up, or keep away before the wind.<sup>2</sup> When both vessels are going the same course in a narrow channel, the vessel to the windward is to keep away to avoid collision.<sup>3</sup>

(3) *One Sailing Vessel Overtaking Another*.—Where two sailing vessels are going in the same direction, the one behind is responsible, ordinarily, for a collision.<sup>4</sup> The rule does not apply where the vessel in front changes its course and the vessel behind is so circumstanced as to be unable to do the same.<sup>5</sup> So a vessel astern of another cannot be held in fault for not complying with the rule which obliges the rear vessel to keep out of the way of the one ahead, when it is so dark that the latter vessel cannot be seen by the former.<sup>6</sup>

2. *Steam Vessels* <sup>7</sup>—(a) *GENERALLY*.—The steam vessel violating the rule that, when two steamers are meeting each other on

Farnley, 8 Fed. Rep. 629; *The Dexter*, 23 Wall. (U. S.) 69.

1. *Haney v. The Louisiana*, Taney Dec. (U. S.) 602.

When two sailing vessels are approaching, the one crippled, and the other in good manageable condition, it is the duty of the latter, if possible, to give way to the former. *Thorp v. Hammond*, 42 How. (N. Y.) Pr. 314.

2. *St. John v. Paine*, 10 How. (U. S.) 577, 581.

3. *Smyrna etc. Steamboat Co. v. Willdin*, 4 Harr. (U. S.) 228.

**Crossing Defined**.—When two vessels are approaching, one heading N.N.E.  $\frac{1}{2}$  E., and the other S. W.  $\frac{1}{2}$  W., they are crossing and not meeting. *The Henry*, *The St. Cyran*, 12 W. R. 1014. See *The Ada*, *The Sappho*, 28 L. T., N. S. 825. See *Aurania*, 29 Fed. Rep. 98; *General Steam Navigation Co. v. Hedley*; *The Velocity*, 39 L. J., Adm. 20.

Vessels converging three points and differing in speed not more than one-half knots are crossing vessels, and the one leaving the other on her starboard was bound to keep out of the way. *The Aurania*, 29 Fed. Rep. 98.

4. *Simpson v. Spreckels*, 8 Sawy. (U. S.) 229; *The Peter Ritter*, 14 Fed. Rep. 173; *The Anglo-Indian*, 33 L. T., N. S. 233; *The Nellie D.*, 5 Blatchf. (U. S.) 245; *Aldridge v. Clausen*, 42

Hun (N. Y.) 473. See *The Leo*, 34 Fed. Rep. 140; *The Priscilla*, 3 L. R., Adm. 125; 23 L. T., N. S. 566.

Where a vessel astern in an open sea and in good weather with a fresh breeze, is sailing faster than the one ahead and pursuing the same general direction, if both are close-hauled, the vessel astern as a general rule is bound to give way or to adopt the necessary precautions to avoid a collision. *Whitridge v. Dill*, 23 How. (U. S.) 448.

5. *The Grace Gridler*, 7 Wall. (U. S.) 196.

6. *The Morning Light*, 2 Wall. (U. S.) 550.

7. **Rules for the Sea and Coast—Steam Vessels Meeting**.—ART. 15. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other. This article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other. The only cases to which it does apply are when each of the two ships is end on, or nearly end on, to the other; in other words, to cases in which by day each ship sees the masts of the other in a line, or nearly in a line, with

courses directly opposite or on courses so nearly opposite as to involve danger of collision, each shall pass on the port side of the other, will be in fault in case of collision.<sup>1</sup>

(b) APPLICATION OF RULES.—The rule that where two vessels are meeting in opposite directions, each one shall port her helm, so as to pass the other on the port side, applies only to cases where both are vessels propelled by steam,<sup>2</sup> and where they meet on courses parallel to each other.<sup>3</sup> It does not apply when two vessels are approaching in opposite directions, yet with berth to exclude the possibility of a collision, each pursuing their onward course, they are not required to port helm, as that would tend to bring about rather than avoid a collision.<sup>4</sup> Nor does it apply to

her own, and by night to cases in which each ship is in such a position as to see both the side lights of the other. It does not apply by day to cases in which a ship sees another ahead crossing her own course, or by night to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

*Two Steamers Crossing.*—ART. 16. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her starboard side shall keep out of the way of the other.

*Steamer in Narrow Channel.*—ART. 21. In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fair way or midchannel which lies on the starboard side of such ship.

*Harbors, Lakes and Inland Waters—Steam Vessels Meeting.*—RULE EIGHTEEN. If two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

*Two Steamers Crossing.*—RULE NINETEEN. If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

1. The Clifton, 14 Fed. Rep. 586; Ward v. The Ogdensburgh, 5 McLean (C. C.) 622; Wheeler v. The Eastern State, 2 Curtis (U. S.) 141; The Galatea, 92 U. S. 438; The Johnson, 9 Wall. (U. S.) 146; The Jesmond T. Earl of Elgin, 4 L. R. P. 1; Niagara, 3 Blatchf.

(U. S.) 37; Washington, 3 Blatchf. (U. S.) 276; Lockwood v. Lashell, 19 Pa. St. 344; The Johnson, 9 Wall. (U. S.) 146; The North Star, 8 Blatchf. (U. S.) 209; The Nautilus, Ware (U. S.) 529; The Mary Sanford, 3 Ben. (U. S.) 100; The Comet, 9 Blatchf. (U. S.) 323.

*Steamboat Defined.*—"Steamboat" (as used in the navigation laws). Any vessel propelled by steam, includes propellers. Fitch v. Livingston, 4 Sandf. 492, 506.

2. Haney v. The Louisiana, Taney Dec. (U. S.) 602; The Philadelphia etc. R. Co. v. Kerr, 33 Md. 331.

The rule applies to the case of a propeller having a barge in tow and meeting a side-wheel steamer. New York etc. Transp. Co. v. Philadelphia etc. Nav. Co., 22 How. (U. S.) 461.

But not to a tug moving slowly against the tide towing a heavy vessel out of the center of a channel left entirely free to the other vessel. The Sampson, 3 Wall. Jr. (U. S.) 14.

3. Hunt v. Hoboken Land Imp. Co., 1 Hilt. (N. Y.) 161.

4. Ward v. Ogdensburgh, 5 McLean (U. S.) 622; Rogers v. The S. B. Wheeler, 4 Cliff. (U. S.) 189; The Arthur Gordon, The Independence, Lush. 270; 14 Moore P. C. C. 103; The Earl of Elgin, 4 L. R., P. C. 1; The Santa Claus, Olc. Adm. 428.

The rule which requires two steamers approaching each other to port their helms, and so pass on the starboard hand, must be acted on when there is any probable chance of collision by keeping their courses. It is not enough for the party who departs from the rule to show that they would have gone clear if each had kept its course; he must also show the other party ought to have perceived there was no probable chance of collision by so do-

where those in charge know of circumstances rendering it unsafe.<sup>1</sup> The obligation of this rule depends partly on the distance between the courses on which they are sailing. They are not precluded from passing on the starboard side if the movement for that purpose is executed in ample season.<sup>2</sup> So the rules of navigation cannot always be applied literally to vessels backing. A steamer backing is, however, upon stopping her engine to change her course by reversing, in a situation analogous to that of sail vessels tacking when beating in rivers, and is bound to use reasonable despatch in order not to mislead or obstruct other vessels. If, backing out of a slip, and two-thirds of a mile across the river upon a defined course, for the purpose of turning about, she is not entitled to the immunities of a vessel getting under way.<sup>3</sup>

(c) STEAMERS CROSSING.—If the steamers are crossing or approaching each other by interfering courses, so as to involve risk of collision, the vessel which has the other on the starboard side must keep out of the way.<sup>4</sup> A steamer has no right to starboard and attempt to cross the bows of another steamer which has the right of way.<sup>5</sup> Where a steamer has the right of way and another approaches so as to involve a risk of collision, the approaching steamer has no right to attempt to pass to the left, unless there is an imperative necessity for it, if that involves a change of course or speed by the other, until she has obtained the consent

ing. *Wheeler v. The Eastern State*, 2 Curtis (U. S.) 141.

1. *Cooper v. Eastern Transp. Co.* 75, N. Y. 116; *The Santa Claus*, Olc. Adm. 428; *Ward v. Ogdensburgh*, 5 McLean (U. S.) 622.

2. *The James Bowen*, 10 Ben. (U. S.) 430.

3. *The Servia*, 50 Fed. Rep. 502.

4. *The Beryl*, 9 Pro. Div. 137; *The Peckforten Castle*, 3 Pro. Div. 11; *The Farragut*, 35 Fed. Rep. 617; *The Baltimore*, 34 Fed. Rep. 660; *The Britannia*, 34 Fed. Rep. 546; *The Greenpaint*, 31 Fed. Rep. 231; *The America*, 22 Fed. Rep. 845; *The Fanwood*, 28, Fed. Rep. 373; *The Frisia*, 28 Fed. Rep. 249; reversing *The Frisia* and *John N. Parker*, 24 Fed. Rep. 495; *The Bay Queen*, 27 Fed. Rep. 813; *The Columbia*, 25 Fed. Rep. 844; *The State of Texas*, 20 Fed. Rep. 254; *Studwell v. The E. H. Coffin*, 8 Repr. 297; *The Cayuga v. Hoboken L. etc. Co.*, 14 Wall. (U. S.) 270; *The Pennsylvania*, 3 Ben. (U. S.) 215; *The Corsica*, 9 Wall. (U. S.) 630; *The Chesapeake*, 5 Blatchf. (U. S.) 411; *The Helena v. The Lord O'Neill*, 26 Fed. Rep. 463; *The Hansa*, 2 Ben. (U. S.) 299; *The John Taylor*, 6 Ben. (U. S.) 227; *The Peshtigo*, 25 Fed. Rep. 488; See the *Vancouver*, 2 Sawy. (U. S.) 381.

Article 14 of the English rules for preventing collisions at sea, which provides that "if two vessels under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other," is not to be construed so that "keeping out of the way" means in all cases porting; a vessel may, within the meaning of that article, keep out of the way by stopping, or by going ahead, or by starboarding, or by porting, or by going astern, as the circumstances of the case may require. *The Nor*, 30 L. T., N. S. 576.

**Vessel Backing.**—Where a vessel is backing, her starboard side becomes the port side, and *vice versa*, and her port quarter her starboard bow. *The Servia*, 30 Fed. Rep. 502.

5. *The Clarion*, 27 Fed. Rep. 128; *The Alaska*, 33 Fed. Rep. 527. See *The Frisia*, 24 Fed. Rep. 495; *The City of Albany*, 34 Fed. Rep. 812; *The Admiral*, 39 Fed. Rep. 574; *The Columbia*, 10 Wall. (U. S.) 246; *The Farragut*, 35 Fed. Rep. 617; *The Esk*, *The Niord*, 24 L. T., N. S. 167; *The E. A. Packer*, 20 Fed. Rep. 327; *The Brothers*, 30 Fed. Rep. 75; *The Wm. H. Payne*, 20 Fed. Rep. 650; *The America*, 37 Fed. Rep. 813; *The Cambusdoon*, 30 Fed. Rep. 704.



of the other to such movement.<sup>1</sup> Yet where a steamer attempts to pass on the wrong side and a collision occurs, a failure on the part of the steamer to back when the collision could have been thus avoided, both are in fault.<sup>2</sup>

(d) ONE VESSEL OVERTAKING ANOTHER.—An overtaking steamer must keep out of the way of the one ahead, or she is liable for the collision which follows. Nor is it any excuse that the steamer ahead had not acquired full speed.<sup>3</sup> The overtaking

1. The *E. H. Coffin*, 16 Blatchf. (U. S.) 421.

2. The *Baltimore*, 34 Fed. Rep. 660.

3. The *Panther v. The Ajax*, 3 Pittsb. (Pa.) 328. And see *Portevant v. The Bella Donna*, Newb. 510; *The Ellen*, 4 Blatchf. (U. S.) 107; *Holgate v. The Illinois*, 6 Rep'r 40; *The Venetian*, 29 Fed. Rep. 460; *The Bay Queen*, 27 Fed. Rep. 813; *Erwin v. Neversink Steamboat Co.*, 88 N. Y. 184; *Kennedy v. American Steamboat Co.*, 12 R. I. 23; *The Rhode Island*, Olc. Admr. 505; *The Governor*, 1 Abb. Adm. 100, 108; *The Helen Hasbrouck*, 29 Fed. Rep. 463; *The Osceola*, 30 Fed. Rep. 383; *The Cephalonia*, 29 Fed. Rep. 332; *The Dentz*, 29 Fed. Rep. 525; *The Sylvan Grove*, 29 Fed. Rep. 336; *The City of Brocton*, 37 Fed. Rep. 897; *The Switzerland*, 38 Fed. Rep. 853; *The Eider*, 37 Fed. Rep. 903; *The Hackensack*, 32 Fed. Rep. 800; *The Helena*, 34 Fed. Rep. 425; *The Chanoury*, *The Leverington*, 28 L. T., N. S., 284; *The Franconia*, 35 L. T., N. S., 721; *The Narragansett*, 10 Blatchf. (U. S.) 475; *The Rhode Island*, 1 Blatchf. (U. S.) 363; *The Continental*, 31 Fed. Rep. 166.

The steam tug *H* was going out of the bay of New York toward the Scotland light ship. Overtaking her was the steamboat *B*. As the *B* came up with and began to draw ahead of the *H*, the latter gave a sudden sheer, and went into the side of the steamer. Both vessels were damaged, and cross-claims were filed. It appearing that the *H*'s sheer was caused by the suction from the wheels of the *B*, *held*, that the collision was caused by the failure of the *B*, as the overtaking vessel, to come up alongside of the *H* at a sufficient distance to pass her in safety. *The City of Brocton*, 37 Fed. Rep. 897.

A tug going up East River was overtaken by a ferry boat. The tug meeting at the same time the cross currents of the ebb-tide from Jackson street was swung involuntarily by the bows under the guard of the ferry boat's port quar-

ter, through the effect of the cross currents or the suction of the ferry boat, or both combined, and was sunk. *Held*, that the ferry boat was liable (1) for failure, as the overtaking vessel, to keep out of the way, as required by rule 22; (2) for running too near the tug, in violation of 4 Edm. St. (N. Y.) 60, requiring boats to navigate as near mid-river as possible, and 1 Rev. St. (N. Y.) \*684, § 7, requiring a steamer passing another to keep off 20 yards. *Standard Oil Co. v. The Garden City*, 38 Fed. Rep. 860.

The steamship *S* was going down the bay of New York at the rate of nine knots an hour. The steamship *L*, going down at the rate of 16 knots, had overtaken the *S* and was drawing ahead on her port side, when the vessels came in collision, the bow of the *S* striking the starboard quarter of the *L*. Cross-claims were filed for the resulting damage, the *L* contending that the collision was due to carelessness on the part of the wheelsman of the *S* in allowing her to swing to port as the *L* was going by; the *S* claiming that the *L* attempted to cross her bows under a port helm when the distance between the vessels was too small to permit of such a manœuvre. On conflicting evidence the court found that the collision was caused by a swing to port on the part of the *S* which was carrying a port helm in the strong northwest wind, and which would so swing under such circumstances by momentary carelessness on the part of the wheelsman, and that, therefore, the fault for the collision lay with the *S* in failing to hold her course. *The Switzerland*, 38 Fed. Rep. 853.

Where libellant's small boat, towed astern of a tug, was run down by a steamboat, the latter was solely responsible for consequences, being the overtaking vessel and bound to keep out of the way, and the tug was not at fault. *The Sylvan Grove*, 29 Fed. Rep. 336.

steamer is liable for the consequent collision, even though such collision was partly due to a sheer of the steamer ahead.<sup>1</sup> So the burden of proof is on the following boat to show that the collision was not caused by fault on her part.<sup>2</sup>

(e) DUTIES OF VESSEL AHEAD.—A vessel in advance is not bound to give way, or to give facilities to enable a vessel in her rear to pass her, though she is bound to refrain from any manoeuvres calculated to embarrass the latter in attempting to pass.<sup>3</sup> But where one vessel evidently attempts to pass ahead of another, although difficult, and the other disregards her attempt, keeps on her course, and thus comes into a collision which she might easily have avoided, both vessels are in fault.<sup>4</sup> So while the forward one of two vessels pursuing the same course has the right of way, if she is wilfully thrown across the path of the other, she cannot recover for a collision ensuing, though the rear vessel be not without fault.<sup>5</sup> When it is apparent that their movements are commenced simultaneously, neither can lawfully press ahead of the other in getting under way.<sup>6</sup>

(f) RIVER NAVIGATION—(1) *Generally*.—The uniform rule of navigation, followed by pilots on rivers, is for the descending boat to keep in the middle of the river where she finds the strongest current and deepest water,<sup>7</sup> and the ascending boat to hug the

This rule applies until the overtaking vessel has completely passed the other. *Kennedy v. American Steamboat Co.*, 12 R. I. 23. See *the Brothers*, 30 Fed. Rep. 75.

The leading boat must, however, so use her privilege as not intentionally to thwart or prevent the one in the rear from using her superior speed; but is not bound by law to accommodate her by moving to either side to give her more ample room. *The Rhode Island*, Olc. Adm. 505.

A vessel of superior speed, running in the same direction with a slower one, has a right to pass her if she can do so with safety to both; but the burden of proof is upon her, in case of collision, to show the prudence of her own conduct, and also to prove negligence or misconduct on the part of her rival. *The Governor*, 1 Abb. Adm. 100, 108.

One steamboat cannot approach another within a distance of 20 yards, in an attempt to run by. *The Rhode Island*. Olc. Adm. 505. *The Boston*, Olc. Adm. 407.

*Overtaking Vessel Defined*.—A ship is an overtaking and not a crossing vessel, within the meaning of these terms as used in the navigation rules, although there is a difference of three points in the courses of the two vessels.

*Aldridge v. Clausen*, 42 Hun (N. Y.) 473.

1. *The Osceola*, 25 Fed. Rep. 559. See *C. H. Seuff*, 32 Fed. Rep. 237. Compare *The Clytie*, 10 Ben. (U. S.) 588.

2. *The Continental*, 31 Fed. Rep. 166.

3. *The Governor*, Abb. Adm. 100, 108.

4. *West Virginia Central etc. R. Co. v. The Isle of Pines*, 24, Fed. Rep. 498.

5. *The St. Paul*, 3 Cin. L. Bul. 821.

6. *The Boston*, Olc. Adm. 407.

7. *The Natchez*, 1 Newb. Adm. 489; *The Dresden*, 1 Newb. Adm. 474. See *The Relief*, Olc. Adm. 104. See *The Hand of Providence*, Swa. 107; *The Smyrna*, 10 Jur., N. S. 977; *Smith v. Voss*, 2 H. & N. 97; 26 L. J. Exch. 233; *The Doris Eckhoff*, 32 Fed. Rep. 555; *The Bridgeport*, 1 Ben. (U. S.) 65; *Shirley v. The Richmond*, 2 Woods (U. S.) 58; *Cutter v. Columbia*, 1 Oreg. 101; *The Scranton and Wm. F. Burden*, 5 Blatchf. (U. S.) 400; *Smyrna etc. Steamboat Co. v. Whilldin*, 4 Harr. 228; *The Belle*, 34 Fed. Rep. 669; *Barratt v. Williamson*, 4 McLean (U. S.) 589. Compare *Moore v. Moss*, 14 Ill. 106.

In *The Alaska*, 33 Fed. Rep. 528, the steamboat *Morrisania* was going up the East River; she sheered over to the Brooklyn shore in order to pass the

shore as close as she can in order to avoid the resistance of the current.<sup>1</sup> A descending boat may hug the shore, yet if she meets an ascending boat, also hugging the same shore, and signalling her intention to keep the shore, the descending boat must give way, and take the middle of the river.<sup>2</sup> If the ascending boat signals her intention to pass to the left, it is the duty of the descending boat on answering the signal, to shut off steam, and go to the lar-

Superior, which was ahead, and thereby came in collision with the Alaska, which was properly coming down the river. BENEDICT, J., said: "Upon this issue, the clear weight of evidence is with the Alaska. The sheer charged on the Morrisania is proved by convincing evidence. I entertain no doubt that the Morrisania, when she saw that she could not pass inside of the Superior, owing to the vessels there, determined to pass the Superior on the outside, and to do this sheered sharply under a port helm, whereby she was brought directly in the way of the Alaska, coming down outside of the Superior. Such a sheer, under such circumstances, was a fault, and the fault that caused the collision. I find no fault in the navigation of the Alaska. She was going down the river, where she had the right to go. When the Morrisania sheered out, the Alaska was on a course that would have carried her down outside of the Morrisania at a safe distance. The Morrisania's sheer was seen as soon as it was begun, and the Alaska at once starboarded. By so doing she gave the Morrisania all the chance possible to break her sheer and pass on the New York side of her. This was attempted by the Morrisania, but there was not sufficient time, and a severe collision ensued. It is said that if the pilot of the Alaska had possessed enough presence of mind to port his helm an instant before the collision, he would have swung the Alaska's stern enough to have enabled the Morrisania to pass without touching. Perhaps so; but the failure to adopt a measure of that character at the last moment, in the hope of avoiding a danger brought upon him by the previous fault of the Morrisania, was no fault. The sole cause of the collision was the previous fault on the part of the Morrisania in suddenly sheering out from under the stern of the Superior, and across the course of the Alaska."

**Ohio River.**—The ascending boat on the Ohio river has a right to choose which side of the river she will take,

provided she gives the signal required to notify the descending boat of her choice; but she has no right to insist on the rule when its observance will incur the hazard of a collision. *Schenck v. The Fremont*, 1 Bond (U. S.) 57.

During high water in the Ohio river a descending boat should keep near the middle of the river without regard to the channel. *Keys v. The Ambassador*, 1 Bond (U. S.) 227.

1. *The Dresden*, 1 Newb. Adm. 474. A propeller, heavily laden, going up the Hudson River in the night, against an ebb tide, is justified by the usages of the river navigation and upon general principles of marine law, in hugging the western bank at or near Dunderbarrack Point, for the advantage of an eddy or slacker tide, supposed to be found there, and other boats passing in the opposite direction are to be presumed cognizant of such usage and opinion, and are bound to take precautions accordingly. *The Santa Claus*, Olc. Adm. 428.

A steam ferry boat has no right by law or usage to keep close to the shore when ascending the East River, so as to oblige a sailing vessel bound down to change her course to avoid collision. *E. C. Scranton*, 3 Blatchf. (U. S.) 50.

2. *The Dresden*, 1 Newb. Adm. 474. See *Thorp v. The Defender*, 1 Bond (U. S.) 397.

There is no general obligation upon vessels navigating rivers to keep to the right of the centre of the channel. *The Milwaukee*, 1 Brown Adm. 313.

In a collision between a steamer ascending and one descending the Mississippi river, the evidence shows that by the usage the ascending boat should keep the right bank; but where she deliberately crossed the river towards the left bank, and a collision occurred near the middle of the river, the descending boat having just rounded out from a wood yard, with a sufficient pilot and watch, the ascending one under full speed, but without sufficient watch, the ascending boat is wholly to blame. *Goslee v. Shute*, 18 How. (U. S.) 463.

board. The duty of manœuvring devolves upon the ascending boat, but these precautions of checking headway, and starboarding or porting helm, must be observed by the other.<sup>1</sup> When two boats are ascending a river abreast of each other and a collision occurs, if it appears that the one next the shore was as near as was safe, and the other had the whole river, the outer boat will be in fault.<sup>2</sup> A vessel going with the tide through a narrow, dangerous channel has the right of way; a boat going in the opposite direction is bound to wait until the descending vessel has come through.<sup>3</sup> But if it is a light steamer stemming the tide in a dangerous channel, and having her movements under command, it is her duty to slow down on observing a loaded steamer coming with the tide, until the positions and courses are known.<sup>4</sup> So, reasonable margin should be given by boats passing.<sup>5</sup> A boat is

Where two vessels with tugs alongside were going in opposite directions in the East River, both nearer the New York side than the statute allows, and exchanged contrary signals twice, and both persisted in steering to the westward until their tows collided, both tugs were in fault for persistent steering to the westward. *The John H. Dillon*, 30 Fed. Rep. 285.

1. *The Dresden*, 1 Newb. Adm. 474. See *The Baltimore*, 34 Fed. Rep. 660; *The Williamson v. Barrett*, 13 How. (U. S.) 101.

A tug going up East River with the tide has no right to expect a schooner coming down the New York side of the middle of the river to change her position so as to enable the tug to pass inside. *The Charles R. Stone*, 18 Fed. Rep. 190.

There is no rule requiring vessels, passing in a river channel, under all circumstances, to pass each other on the right. Each must take such a course as will be the least likely to injure the other, and the vessel having the greatest facilities for choosing and taking its adopted course, and the greater control over its movements, is called upon to give the preference to the other, and to yield the choice of route. *Blanchard v. New Jersey Steamboat Co.*, 59 N. Y. 292.

2. *The Portrant v. The Bella Donna*, 1 Newb. Adm. 510.

3. *The City of Springfield*, 26 Fed. Rep. 158.

A tug with a tow descending a narrow river channel has the right of way; nor is she obliged to notify an ascending steamer which sees her plainly. *The Rescue*, 24 Fed. Rep. 44.

Pilot rule No. 3 requires an ascending vessel, before entering a narrow channel, to lie by until a descending vessel has passed through. An ascending steamer came to the mouth of a narrow channel. Up the channel one of several barges in tow was aground. The steamer, after waiting and signalling, proceeded up, and, as she neared the barges, one of them broke her cable lashings, and drifted down on the steamer, which reversed her engine and did all in her power to avoid a collision, which resulted in the loss of the barge and her cargo. *Held*, that the steamer was not in fault. *The Cherokee*, 15 Fed. Rep. 119.

A steamboat, the P, following another steamboat on a flood tide, overtook her near the upper end of Blackwell's Island. Several tows were met, the P crossed to the South channel as the other steamboat was passing down the channel towards the end of the island, and, in crossing her bows, came into collision. *Held*, that the P was in fault, being the following vessel, for not stopping when she could easily do so, to allow the other vessel to get ahead enough for the P to pass under her stern in safety. *The Providence*, 9 Ben. (U. S.) 188.

4. *The Sots Greys v. The Santiago de Cuba*, 19 Fed. Rep. 213.

5. *The Anne E. Valentine*, 22 Fed. Rep. 620; *The Rosedale*, 22 Fed. Rep. 737; *The Active*, 22 Fed. Rep. 175; *The Abbotsford*, 98 U. S. 440; *Scott v. The Drew and The Camelia*, 38 Fed. Rep. 858.

Vessels of moderate size, moving at moderate speed, upon direct lines, in the daytime and in clear weather, in

not at liberty to cast herself upon another boat, merely because the latter may be out of her proper course, and in that of the former. Both are bound to use ordinary diligence to avoid a collision, and if a collision happens from the want of a proper degree of diligence on the part of either, the owner may be held answerable for the consequences.<sup>1</sup>

(2) *Vessel Following*.—A vessel following another vessel on flood tide should keep at a sufficient distance to be able to avoid the leading vessel in case she makes a stop.<sup>2</sup>

(3) *Rivers Crowded with Boats*.—Long experience has demonstrated the importance, to the protection of vessels navigating up and down rivers crowded with boats, to hold to the center of them, as nearly as may be, and it is culpable conduct to move a steam tug from place to place, by running her along near the ends of the piers.<sup>3</sup>

(4) *Boats Crossing River*.—The rule, both of statute and the general law of navigation, which requires steamboats approaching one another to turn to the right, applies to steamboats crossing a river.<sup>4</sup> A ferry boat running across a river, and compelled to make so many trips an hour, is not exempted from the duty of ordinary care to avoid other craft. She has a right to her usual path, but this right is not to be enjoyed at all times without

the harbor of New York, are not guilty of culpable navigation by shaping their courses so as to pass 100 feet from each other. *The St. Johns*, 34 Fed. Rep. 753.

1. *Moore v. Moss*, 14 Ill. 106; *Ward v. Armstrong*, 14 Ill. 283.

A steamboat is not necessarily liable for sinking a flat boat by being out of the usual channel. There must be some negligence on the part of the officers of the steamboat to render her liable. *The Steamboat Western Belle v. Wagner*, 11 Mo. 30.

A steamer, used as a ferry boat, and in the act of transporting passengers in the harbor of Boston, in violation of law, came, by accident, in collision with a vessel which was in the lawful use of the waters of the harbor. *Held*, that the steamer was liable for the damage done by such collision. *The Maverick*, *Sprague* (U. S.) 23.

2. *The Hackensack*, 32 Fed. Rep. 800.

3. *The Relief*, *Olc. Adm.* 104; *The Maryland*, 19 Fed. Rep. 551; *The Doris Eckhoff*, 32 Fed. Rep. 555; *The Hattie M. Spraker*, 29 Fed. Rep. 457; *The Wings of the Morning*, 5 Blatchf. (U. S.) 15; *The Columbia*, 29 Fed. Rep. 716; *The American Eagle*, 29 Fed. Rep. 302; *The Greenpoint*, 31 Fed. Rep. 231; *The C. F. Starin*, 10 Ben.

(U. S.) 404; *Culberg v. The Continental*, 3 Woods (U. S.) 32.

A ferry boat and a tug came into collision in the North River. The tug kept too near the mouth of the slip and held her course and speed too long, while the ferry boat disregarded the approach of the tug. *Held*, a case for a division of damages. *The Susquehanna*, 35 Fed. Rep. 325.

A large steamship and a ferry boat came into collision in the East River. The steamship instead of being near the middle of the river, as she should have been, was near the wharves. She failed to reverse when the collision was imminent. The ferry boat, on the other hand, failed to keep a sufficient lookout. *Held*, that both were in fault, and that the damages should be divided. *The Monticello*, 15 Fed. Rep. 474.

A tug towing, and moving out of a pier at ebb tide, without first giving an alarm and continuing it until a passing tug is clear of the pier, whereby a collision occurs, is not exonerated from liability by the fact that the other tug was passing too near the pier. *The Edmund Levy*, 8 Ben. (U. S.) 144.

4. *Hunt v. Hoboken Land Improvement Co.*, 3 E. D. Smith (N. Y.) 144; *The Greenpoint*, 31 Fed. Rep. 231.

regard to those which may be passing.<sup>1</sup> A steamer coming up, though more powerful than the ferry-boat, is not on that account bound to steer clear of her.<sup>2</sup> And a ferry-boat plying across a river is bound to remain in her slip, notwithstanding her appointed time of departure has arrived, if any vessel is seen or is in a position to be seen from on board her, with which she will be in danger of coming in collision if she goes out.<sup>3</sup> So the only duties of a tug in the river towards a steamer coming out from her slip, having the tug on her starboard side are, first, to keep her course, and, second, to do what she can to avoid collision when the danger becomes apparent.<sup>4</sup> It is the duty, however, of vessels to keep away, when they can, from the known path of ferry boats, close to the slips.<sup>5</sup> Old and weak boats have no right to expose themselves along the slips and wharves, to the danger of ordinary contact with other boats, without giving notice of their weakness.<sup>6</sup> A steamboat should not be backed into a slip crowded with ships without getting a line out to steady her.<sup>7</sup> And if a steamer at a pier in a slip is so situated that she cannot haul out under her own power, even with the exercise of due care, without swinging outside in the open water, through which she undertakes to manœuvre, she is liable for a collision resulting from the swinging of her stern outside of her own berth.<sup>8</sup>

(5) *Steamboats and Barges*.—Steamers must keep out of the way of barges and flat-boats floating down the river guided by oars.<sup>9</sup> In the case of collision the presumptions as to negligence

1. The United States, 1 Newb. Adm. 497; The Nereus, 23 Fed. Rep. 448.

Compare The Chesapeake, 5 Blatchf. (U. S.) 411.

Ferry boats have no prior navigation rights over other boats. The Manhas-set, 34 Fed. Rep. 408.

A tug with tow alongside, starting down North River against a flood tide, attempted to go between a ferry slip and a ferry boat which was heading up and about to enter the slip diagonally, each vessel on the other's starboard hand, and, the ferry boat failing to stop, they collided. *Held*, that both were in fault. The John S. Darcy, 29 Fed. Rep. 644. Compare The Columbia, 29 Fed. Rep. 716.

2. The United States, 1 Newb. Adm. 497.

In The Relief, Olc. Adm. 104, it was held that a steamer coming upon or crossing the tracks of ferry boats plying upon the East River, between New York and Brooklyn, is bound to special watchfulness not to interfere with their course, or impede their passages.

3. The Columbus, 1 Abb. Adm. 384. See The Susquehanna, 35 Fed. Rep.

325; The Hudson City, 38 Fed. Rep. 446.

A ferry boat must not cross a steamer's path when the steamer is abreast of her slip and hampered by the presence of other vessels. If the ferry boat starts out of her slip when her bow is astern of the steamer and afterward crosses the steamer's bows, she will be considered as a following and not a crossing vessel. The Venetian, 29 Fed. Rep. 460.

4. The Greenpoint, 31 Fed. Rep. 231.

5. The John S. Darcy, 29 Fed. Rep. 644.

A steamer coming down East River on ebb tide must avoid a ferry boat crossing the river, and the ferry boat must keep her course. The Pequot, 30 Fed. Rep. 839.

6. The N. B. Starbuck, 29 Fed. Rep. 797.

7. Phoenix, 3 Blatchf. (U. S.) 273.

8. Downes v. The Excelstor, 40 Fed. Rep. 271.

9. Bigley v. Williams, 80 Pa. St. 107; The Owen Wallis, 30 L. T., N. S. 41; 22 W. R. 695.

are in favor of the flat-boat and against the steamboat.<sup>1</sup>

(g) SIGNALS.<sup>2</sup>—Vessels approaching each other should give the proper signals, so that each will understand the course of the other.<sup>3</sup> So when a vessel agrees by signal to take a certain course and deviates without reasonable necessity, she is liable for a collision caused thereby.<sup>4</sup> A vessel that overtakes another without giving the signals required by the international rules will be in fault for the consequent collision occasioned by the sheering of the leading vessel.<sup>5</sup>

Where a flat boat, descending the river Mississippi, in broad daylight, in a place where the river was nearly a mile wide, was driven by the force of an eddy against a steamboat, also descending the river, the steamboat was held responsible. *Fretz v. Bull*, 12 How. (U. S.) 466.

Where a steamer collided with a flat boat by attempting to land where the latter was moored, it being proved that the latter was in her right place under the local regulations, the former was held liable for the damage. *The Southern Belle*, 1 Newb. Adm. 461.

1. *Seamen v. The Crescent City*, 1 Bond (U. S.) 105.

2. *Rules for the Sea and Coast.—Signals of Steamers Showing Course.*—ART. 19. In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, namely:

One short blast to mean "I am directing my course to starboard."

Two short blasts to mean "I am directing my course to port."

Three short blasts to mean "I am going full speed astern."

The use of these signals is optional, but if they are used the course of the ship must be in accordance with the signal made.

*Distress Signals.*—ART. 27. When a ship is in distress and requires assistance from other ships or from the shore, the following shall be the signals to be used or displayed by her, either together or separately, that is to say:

In the daytime—

First. A gun fired at intervals of about a minute.

Second. The international code signal of distress indicated by N. C.

Third. The distant signal, consisting of a square flag, having either above or below it a ball, or anything resembling a ball.

At night—

First. A gun fired at intervals of about a minute.

Second. Flames on the ship (as from a burning tar barrel, oil barrel, and so forth).

Third. Rockets or shells, throwing stars of any color or description, fired one at a time, at short intervals.

3. *The Racilia*, 25 Fed. Rep. 111; *The Wesley A. Grove*, 27 Fed. Rep. 311; *The Farragut*, 35 Fed. Rep. 617; *The Michael Davitt*, 38 Fed. Rep. 886; *The Manitoba*, 122 U. S. 97; *The Doris Eckhoff*, 32 Fed. Rep. 555.

*Signals by Bells.*—As a matter of law, no signals by bells are a proper precaution for avoiding steamboat collisions, without regard to custom or usage. *Rogers v. McCune*, 19 Mo. 557.

4. *The St. Johns*, 29 Fed. Rep. 221; *The William H. Vanderbilt*, 37 Fed. Rep. 116; *The Quickstep*, 2 Bis. (U. S.) 291; *The City of Albany*, 34 Fed. Rep. 812; *The Sammie*, 37 Fed. Rep. 906; *The Minnie R. Childs*, 9 Ben. (U. S.) 200.

Thus a vessel that agrees by signal to pass ahead of another vessel implies that the overtaking one will fulfil her statutory duty of keeping out of the way. *The Dentz*, 29 Fed. Rep. 525; *The St. Johns*, 34 Fed. Rep. 763; *The Armitage*, 9 Ben. (U. S.) 108; *The William H. Vanderbilt*, 37 Fed. Rep. 116.

A vessel running a course parallel with a steamboat, signals her intention to cross the course of the latter, and, while attempting to do so, stops and backs immediately before a collision takes place, she must take the hazard of such departure from the ordinary rules of navigation, and, to escape liability, must show clearly an allegation that the steamboat disregarded her signals, and imperiled her own safety by continuing her former course at a negligent rate of speed. *The Gratitude*, 14 Fed. Rep. 479.

5. *The Osceola*, 30 Fed. Rep. 33.

Nothing appearing to the contrary, a signal made and assented to without any signal of misunderstanding, will be presumed to have been made within the proper distance.<sup>1</sup> Where a change of course is indicated by whistle she must make her course correspond with such whistles.<sup>2</sup> And where there is an exchange of signals between two vessels, one of which is astern of the other, that the overtaking vessel may pass the other, the overtaken vessel must keep her course so far as she consistently can; and she has a right to keep in mid-channel so long as there is sufficient room for the other vessel to pass her on the side agreed upon.<sup>3</sup> So the signal of the second steam vessel, going more rapidly than the first in the same direction, and intending to pass, must be repeated if not responded to, and the possibility of collision avoided, if necessary, by slackening speed and changing course.<sup>4</sup> A vessel should keep her course,<sup>5</sup> or wait to see whether her signal indicated by whistle is understood.<sup>6</sup> This is especially necessary where one of the vessels desires to pass the other in a different manner from what the rules of navigation prescribe, and signals the other steamer to that effect. The steamer thus desiring to pass in the unusual manner, has no right to change her course until it is certain that she had made the other steamer hear and understand her signals.<sup>7</sup> The steamer which undertakes to reverse the statutory rule and pass starboard to starboard, assumes the risk

1. *The Charles Morgan*, 115 U. S. 69.

Two large steamers, one going out of East River and the other coming in, came into collision. Each saw the other in season, and proper signals were made. The outgoing steamer afterwards stopped unnecessarily without signalling her change of intention, and then lay still, and did nothing after the danger became imminent. The other steamer, in coming in, did not keep far enough to the westward. *Held*, that each was chargeable. *The Britannia*, 34 Fed. Rep. 546.

Where two steamboats going in the same direction both fail to comply with each other's signals upon the desire of one to pass the other, they are equally liable for damages from collision. *The Captain Miller*, 33 Fed. Rep. 585.

2. *The Standard*, 23 Fed. Rep. 207; *The Captain Miller*, 33 Fed. Rep. 585.

3. *The Deutz*, 29 Fed. Rep. 525.

A steamer, having the right of way, that seasonably indicates to another by her own original signal of two whistles that the latter shall go ahead of her, takes on herself the duty to go astern of the other, and is bound to give way or stop in time to prevent collision, and is solely responsible if the other keeps on

as agreed, and could not, by stopping or backing, avoid collision when the danger first appeared. *The Susquehanna*, 35 Fed. Rep. 325.

4. *Erwin v. Neversink Steamboat Co.*, 23 Hun. (N. Y.) 573; *The Pegasus*, 15 Fed. Rep. 921; *Greenwood v. The William Fletcher and The Grapeshot*, 38 Fed. Rep. 156.

5. *The B. C. Terry*, 30 Fed. Rep. 711.

6. *Conover v. The City of Chester*, 24 Fed. Rep. 91; *The Hudson*, 14 Fed. Rep. 489; *The John H. Dillon*, 30 Fed. Rep. 285; *Kiernan v. The Leonard Richards*, 38 Fed. Rep. 767. *Compare* *The E. H. Coffin*, 9 Ben. (U. S.) 20.

7. *The Johnson*, 9 Wall. (U. S.) 146. See *The Rockaway*, 38 Fed. Rep. 856.

Where tugs are approaching on converging lines, and one gives the signal to pass to the left, to which the other answers that she means to pass to the right, and the first repeats her signal, the first has not the right to presume from a failure to answer her second signal that the other has yielded her course, but should proceed cautiously and not run across the lines of the other. She must take notice of the fact that there is danger of a collision, even though the other tug may be in the



of any misunderstanding of signals properly given by the other steamer.<sup>1</sup> And an assenting signal by the boat having the right of way is merely an announcement to the other, that her intention is known. It gives her no immunity from the responsibility cast upon her by law, and constitutes no fault in the event of subsequent collision.<sup>2</sup> One steamboat cannot evade all responsibility for the collision by merely showing that the other did not respect her signal as the laws require; she must also show that she herself, in prudence, afterwards endeavored to avoid the peril by backing.<sup>3</sup>

### 3. Steam and Sail Vessels<sup>4</sup>—(a) GENERALLY.—Steamers must

wrong place and on the wrong course. *The Louis Dole*, 5 Biss. (U. S.) 172.

An ascending steamer, not seeing or understanding a signal of a descending one must wait until the two come to a complete understanding as to the course. If the ascending one fails to return the other's signal, and chooses to make a cross-signal, the other's acceptance thereof does not excuse the pilot's original fault. *United States v. Keller*, 19 Fed. Rep. 633.

1. *The Frostburg*, 25 Fed. Rep. 451.

2. *The Admiral*, 39 Fed. Rep. 574; *The Greenpoint*, 31 Fed. Rep. 231.

3. *The Mary Ida*, 20 Fed. Rep. 741.

4. **Rules for the High Seas and Coast Waters.—Steamships to Keep Out of Way of Sailing Vessel.**—ART. 17. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

**Steam Vessel Approaching Another Vessel.**—ART. 18. Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary.

**Vessels Overtaking Another.**—ART. 20. Notwithstanding anything contained in any preceding article, every ship, whether a sailing ship or a steam ship, overtaking any other shall keep out of the way of the overtaken ship.

**Right of Way.**—ART. 22. Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course.

**Special Circumstances and Dangers.**—ART. 23. In obeying and construing these rules: due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules

necessary in order to avoid immediate danger.

**No Ship, Under any Circumstances, to Neglect Proper Precautions.**—ART.

24. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

**Reservation of Rules for Harbor and Inland Navigation.**—ART. 25. Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland navigation.

**Harbors, Lakes and Inland Waters.—Sail and Steam Vessels Meeting.**—

RULE TWENTY. If two vessels, one of which is a sail vessel and the other a steam vessel, are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sail vessel.

**Steam-vessel Approaching Another Vessel, or in a Fog.**—RULE TWENTY-ONE. Every steam vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam vessel shall, when in a fog, go at a moderate speed.

**Vessel Overtaking Another.**—RULE TWENTY-TWO. Every vessel overtaking any other vessel shall keep out of the way of the last mentioned vessel.

**Right of Way.**—RULE TWENTY-THREE. Where, by rules seventeen, nineteen, twenty, and twenty-two, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of rule twenty-four.

keep out of the way of sailing vessels,<sup>1</sup> and must, to avoid

**Special Instructions.**—**RULE TWENTY-FOUR.** In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger.

1. The Adriatic, 107 U. S. 512; The Luna, 14 Phila. (Pa.) 567; The Cynthia, 14 Phila. (Pa.) 411; The Raritan, 32 Fed. Rep. 847; The City of Springfield, 29 Fed. Rep. 923; The Prince Edward, 4 Woods (C. C.) 17; The City of New Bedford, 10 Ben. (U. S.) 17; The Ancon, 6 Sawy. (U. S.) 118; The Columbia, 9 Ben. (U. S.) 254; The Maggie S. Hart, 38 Fed. Rep. 765; Thrush v. United States, 14 Ct. of Cl. 435; Ayer v. The Glaucus, 4 Cliff. (U. S.) 166; The Java, 14 Blatchf. (U. S.) 524; The Benefactor, 14 Blatchf. (U. S.) 254; The Gerard Stuyysant, 8 Ben. (U. S.) 183; The Pennland, 23 Fed. Rep. 551; The George Murray, 22 Fed. Rep. 117; Martello, 39 Fed. Rep. 505; The St. Johns, 34 Fed. Rep. 814; The Manhansett, 5 Hughes (U. S.) 104; McCabe v. Old Dominion S. S. Co., 31 Fed. 234; The I. Harris, 29 Fed. Rep. 926; *Str* Oregon v. Rocca, 18 How. (U. S.) 570; Crockett v. Isaac Newton, 18 How. (U. S.) 581; The Beta, 40 Fed. Rep. 809; Fashion v. Ward, 6 McLean (U. S.) 152; Ward v. The M. Dousman, 6 McLean (U. S.) 231; New York etc. Steamship Co. v. Calderwood, 19 How. (U. S.) 241; The Washington Irving, 1 Abb. Adm. 336; The Cornelius C. Vanderbilt, 1 Abb. Adm. 361; The Pearl, 1 Newb. Adm. 129; The M. Dousman, 1 Newb. Adm. 326; Haight v. Bird, 26 Fed. Rep. 539; Mershon v. The Ramapo, 35 Fed. Rep. 612; The Carolus, 2 Curt. (U. S.) 69; Chadwick v. City of Dublin Steam Packet Co., 6 El. & Bl. 771; The Great Eastern, 3 Moore P. C. C., N. S. 31; The Warrior, 3 L. R., Adm. 553; 21 W. R. 82; The Norma, 35 L. T., N. S. 418; The Saratoga, 37 Fed. Rep. 119; The Lady Jocelyn, 12 Jur., N. S. 965; The Una v. The Thomas Lea, 14 L. T., N. S. 834; The Fruiter v. The Fingal, 13 L. T., N. S. 611; The Carroll, 8 Wall. (U. S.) 302; The City of Truro, 35 Fed. Rep. 317; The Laura V. Rose, 28 Fed. Rep. 104; The Thomas P. Way, 22 Fed. Rep. 739; The Illinois, 103 U. S. 298; The Prop. Badger State, 8 Fed. Rep. 526; Crock-

ett v. The Kentucky, 4 Blatchf. (U. S.) 325; The Carroll, 1 Ben. (U. S.) 286; The Germania, 21 L. T., N. S. 44; The Herbert Manton, 14 Blatchf. (U. S.) 37; 5 Ben. (U. S.) 469; The Fairbanks, 9 Wall. (U. S.) 420; The Kentucky, 4 Blatchf. (U. S.) 325; Peck v. Sanderson, 17 How. (U. S.) 178; The Northern Indiana, 3 Blatchf. (U. S.) 92; Fretz v. Bull, 12 How. (U. S.) 466; The Genesee Chief v. Fitzhugh, 12 How. (U. S.) 443; Newton v. Stebbins, 10 How. (U. S.) 586; St. John v. Paine, 10 How. (U. S.) 557. See The New Orleans, 8 Ben. (U. S.) 101; The Palatine, 27 L. T., N. S. 631; The Tweedsdale, 14 Prob. D. V. 164; The Arthur Gordon, The Independence, Lush. 270; 14 Moore P. C. C. 103; Hancy v. The Louisiana, Taney Dec. (U. S.) 602; Philadelphia etc. R. Co. v. Kerr, 33 Md. 331; The Free State, 91 U. S. 200; Wakefield v. The Governor, 1 Cliff. (U. S.) 93; The Island City, 5 Blatchf. (U. S.) 264; The Empire State, 1 Ben. (U. S.) 57; Osprey, Sprague (U. S.) 245; R. B. Forbes, Sprague (U. S.) 328; The Howard Carroll, 41 Fed. Rep. 159.

Steam vessels are regarded in the light of vessels navigating with a fair wind; and they are always under obligations to do not only whatever a sailing vessel going free, or with a fair wind, would be required to do under similar circumstances, but even greater care is required of them, from their being more under the command of the master. Therefore, in the case of a steamer meeting a sailing vessel, whether close-hauled or with the wind free, the latter has a right to keep her course, and the steamer must adopt proper precautions to avoid her. *St. John v. Payne*, 10 How. (U. S.) 557, 581; *Lockwood v. Lashell*, 19 Pa. St. 344; *The Leopard*, 2 Ware (U. S.) 193; *Smyrna Steamboat Co. v. Whilldin*, 4 Harr. (Del.) 228; *Fashion v. Ward*, 6 McLean (U. S.) 152; *Newb. Adm. 8*; *Dickinson v. The Gore*, *Newb. Adm. 45*; *The New Jersey*, *Olc. Adm. 415*; *The Neptune*, *Olc. Adm. 483*; *Sanderson v. The Columbus*, 4 Pa. Law J. Rep. 493; *Lyle v. The Conestoga*, 5 Pa. Law J. Rep. 95; *Washington Irving Abb. Adm. 336*.

A collision occurred between a steamship and a schooner on the ocean when the weather was clear. The lat-

liability, keep away by a reasonably safe margin.<sup>1</sup> The sailing

ter, having seen the steamship when six or seven miles away, kept steadily on her course. The steamship saw the schooner when three miles off, and from that time until a collision between them occurred, both vessels were sailing on courses which crossed each other, so as to involve the risk of collision. *Held*, that it was the duty of the steamship to keep out of the way of the schooner, and, the latter having held to her course, the former was liable. *The Benefactor*, 102 U. S. 214.

A steamer was sighted by a sailing vessel at a sufficient distance to have avoided a collision. The steamer took no steps until the vessels were very near to each other, when she starboarded her helm, and the sailing vessel ported her helm to avoid a collision, which, notwithstanding, took place. *Held*, that the steamer was alone to blame, as it was the duty of a steamer to keep out of the way of the sailing vessel, provided she could do it, either by starboarding or porting her helm, and that, on the other hand, it was the duty of the sailing vessel to keep her course, and that she could only be excused from deviating from it by showing that it was necessary to do so in order to avoid immediate danger. *The Velasquez*, 4 Moore P. C. C., N. S. 426; 1 L. R., P. C. 494.

Where a schooner and a steamer each saw the other at a distance of a mile or a mile and a half, but the schooner was navigated in an unseamanlike manner, and instead of holding her course, changed it once or twice, and brought about a collision by which she was sunk, while the steamer, while she saw the unskilful and dangerous way in which the schooner was being navigated, did not use due and timely caution, nor proper measures to prevent the impending danger, it was held that both vessels were in fault. *Boggs v. Parr*, 3 Hughes (U. S.) 504.

The fact that a steamer has barges in tow does not alter the rule that she should keep out of the way of an approaching sailing vessel. *Favorite*, 10 Biss. (U. S.) 536.

**Beating Against the Wind.**—A steamer must keep out of the way of a sailing vessel beating against the wind when there is nothing to prevent. *The Renovator*, 30 Fed. Rep. 104.

**Sailing on the Wind.**—Where a

steamer has shaped her course to keep out of the way of a sailing vessel on the wind, the latter is bound to beat out her tack. *The A. W. Thompson*, 39 Fed. Rep. 115.

**Application of the Rule.**—U. S. Rev. St., § 4233, Rules 20 and 23, requiring steam vessels to keep out of the way of sail vessels, apply strictly to the open sea; in case of a channel as narrow as the Bolivar in Galveston harbor the attendant circumstances govern. *The I. C. Harris*, 29 Fed. Rep. 926.

A steamer proceeding up a narrow channel of a river at a rate of eight or ten knots an hour should slacken speed upon meeting a fleet of sailing vessels. *Newton v. Stebbins*, 10 How. (U. S.) 586.

**Exceptions.**—In *The Buffalo*, 1 Newb. Adm. 115, it was held that the only exception to the rule that a steamer must give way to a sail vessel, is where the steamer could by no diligence have discovered the other in season to avoid her. *Hall v. The Buffalo*, 1 Newb. Adm. 115.

1. *The Laura V. Rose*, 28 Fed. Rep. 104; *The Alaska*, 33 Fed. Rep. 107; *Wells v. Armstrong*, 29 Fed. Rep. 216; *The Farnley*, 5 Hughes (U. S.) 298; *The William Young*, Olc. Adm. 38.

Where a large and swift steamer, without sufficient cause, attempts to pass dangerously near to a sailing vessel, one of the risks she takes is that the man at the helm of the sailing vessel shall not lose his presence of mind, or form a different estimate from that of the steamboat pilot as to the danger of collision. *The Columbia*, 9 Ben. (U. S.) 254.

If a steamboat approach so near a sailing vessel, without any fault on her part as to create a reasonable apprehension that a change in the course is necessary to save the vessel or the lives of the crew, and an error of the moment, committed by the helmsman or lookout, brings on the disaster he meant to avoid, his error will not be imputed to his vessel as a fault. *Haney v. The Louisiana*, Taney Dec. (U. S.) 602; *The Carroll*, 8 Wall. (U. S.) 302.

This rule does not apply, however, where the dangerous contiguity of the vessels is occasioned by incompetency or mismanagement of those in charge of the schooner. *Haney v. The Louisiana*, Taney 602.

vessel should keep on its course.<sup>1</sup> And a steamer may presume that a sailing vessel will hold its course.<sup>2</sup> These rules are obligatory upon vessels approaching each other, from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain.<sup>3</sup> They do not apply to a vessel required to keep her course after the approach is so near that the collision is inevitable,<sup>4</sup> and are equally inapplicable to vessels of

1. The *Cornelius C. Vanderbilt*, 1 Abb. Adm. 361; The *Illinois*, 103 U. S. 298; *McAvoy v. Mignon*, 35 Fed. Rep. 319; The *St Johns*, 34 Fed. Rep. 814; The *Laura V. Rose*, 28 Fed. Rep. 104; The *Plymouth*, 26 Fed. Rep. 879; The *Clara Davidson v. The Virginia*, 24 Fed. Rep. 763; The *Illinois*, 103 U. S. 298; The *Herbert Manton*, 14 Blatchf. (U. S.) 37; 5 Ben. (U. S.) 469; The *Sunnyside*, 91 U. S. 208; The *Free State*, 91 U. S. 200; The *Fairbanks*, 9 Wall. (U. S.) 420; The *Potomac*, 8 Wall. (U. S.) 590; The *Kentucky*, 4 Blatchf. (U. S.) 325; The *Revenue*, 41 Fed. Rep. 445; The *Bermuda*, 10 Ben. (U. S.) 693; *Peck v. Sanderson*, 17 How. (U. S.) 178; The *Northern Indiana*, 3 Blatchf. (U. S.) 92; The *William Young*, Olc. Adm. 38; The *Free State*, 91 U. S. 200; *Baker v. City of New York*, 1 Cliff. (U. S.) 75; *Wakefield v. The Governor*, 1 Cliff. (U. S.) 93; *Mellon v. Smith*, 2 E. D. Smith (N. Y.) 462; The *St. John v. Paine*, 10 How. (U. S.) 557; The *Allianca*, 39 Fed. Rep. 476; The *R. B. Forbes*, 1 Sprague (U. S.) 328; *Aff'd*, 1 Cliff. (U. S.) 331; *Haney v. The Louisiana*, Taney Dec. (U. S.) 602; *Hall v. The Buffalo*, Newb. Adm. 115; The *Osprey*, 1 Sprague (U. S.) 245; The *Charles Morgan*, 6 Fed. Rep. 913.

A schooner and a steamer came into collision. The schooner without apparent necessity, had changed her course from starboard to port and then back again. Negligence on the part of the steamer did not appear. *Held*, that the schooner alone was liable. The *St. Johns*, 34 Fed. Rep. 812.

A steamer shaped her course too near a schooner, and the schooner suddenly changed her course, and a collision resulted. *Held*, a case for the division of damages. The *Laura V. Rose*, 28 Fed. Rep. 104.

2. The *Harrisburg*, 14 Phila. (Pa.) 499; The *Kanawha*, 28 Fed. Rep. 329; The *Free State*, 91 U. S. 200.

Where a steamer and sailing vessel

were passing through a channel, both going in the same direction, and a collision occurred because the master of the steamer expected that the sailing vessel would stop and tack without running out her course, and would thus let the steamer pass, *held*, that the master of the steamer should have assumed that the schooner would fulfil her duty, and should have navigated his steamer accordingly. The *Bridgeport*, 6 Blatchf. (U. S.) 3.

Where a collision between a sloop and a steam yacht is shown to be due to the fact that the sloop luffed without perceiving the proximity of the yacht, the sloop must be deemed in fault. *McAvoy v. The Mignon*, 35 Fed. Rep. 319.

3. *New York etc. S. S. Co. v. Rumball*, 21 How. (U. S.) 372. The *Beta*, 40 Fed. Rep. 899. See The *Clement*, 2 Curt. (U. S.) 363; The *Johnson*, 9 Wall. (U. S.) 146; The *Coleman*, 1 Brown Adm. 456; The *Thomas A. Scott*, 1 Brown Adm. 503; The *Charlotte Raab*, 1 Brown Adm. 453; The *Masten*, 61 N. Y. 436; The *Colorado*, 61 N. Y. 393; The *Masters*, 1 Brown Adm. 342; The *Milwaukee*, 1 Brown Adm. 313; The *H. P. Baldwin*, 1 Brown Adm. 300; The *David Morris*, 1 Brown Adm. 273; The *Free State*, 1 Brown Adm. 251; The *Sunny Side*, 1 Brown Adm. 227; The *Avon*, 1 Brown Adm. 170; The *Morton*, 1 Brown Adm. 137; The *Planet*, 1 Brown Adm. 125; The *Nabob*, 1 Brown Adm. 115; *Mailler v. Express Propeller Line*, 61 N. Y. 312.

Where two vessels are approaching each other from opposite directions, the fact that each does not discover the other at the same moment cannot materially affect the question as to which was in fault, if each makes the discovery of the approach of the other in season to adopt every necessary precaution. *Crowel v. The Radama*, 2 Cliff. (U. S.) 551.

4. The *Fairbanks*, 9 Wall. (U. S.) 420; *Baker v. Steamship City of New York*, 1 Cliff. (U. S.) 75.

every description, while they are yet so distant from each other that measures of precaution have not become necessary to avoid a collision. Sailing vessels approaching a steamer are required to keep their course on account of the correlative duty which is devolved upon the steamer to keep out of the way, in order that the steamer may know the position of the object to be avoided, and may not be led into error in her endeavor to comply with the requirement.<sup>1</sup> The rules do not forbid such necessary variations in a vessel's course as will enable her to avoid immediate danger arising from natural obstructions to navigation,<sup>2</sup> or changes that do not contribute in any degree to the disaster.<sup>3</sup> So a sailing vessel on the wind, meeting or converging toward a common point with a steamer, has no right to persist in her course in such a manner as to make a collision probable, or so as to drive the steamboat into danger or exposure in order to avoid her, particularly after being hailed to change her course.<sup>4</sup> But if the sailing vessel makes unnecessary changes which mislead the steamer into so changing her course as to produce a collision, the steamer is not liable.<sup>5</sup> Under the rule that a steamer must keep out of the way, she must of necessity determine for herself and upon her own responsibility, independently of the sailing vessel, whether it is safer to go to the right or the left, or to stop; and in order that she may not be deprived of the means of determining the matter wisely, and that she may not be defeated or baffled in the

1. *New York etc. S. S. Co. v. Rumball*, 21 How. (U. S.) 372; *The Nessmore*, 41 Fed. Rep. 437.

The rule applicable to the management of vessels approaching each other must depend upon the actual situation at the time when the necessity of precaution begins. Everything prior to that is immaterial, except as it may give to each a knowledge of the other's intentions. *The Aurania and The Republic*, 29 Fed. Rep. 98.

2. *The John L. Hasbrouck*, 93 U. S. 405; *The Fairbanks*, 9 Wall. (U. S.) 420; *The Western Metropolis*, 6 Blatchf. (U. S.) 210.

3. *Baker v. Steamship City of New York*, 1 Cliff. (U. S.) 75.

An immaterial departure from her course by a yacht, which does not contribute to a collision caused by the steamer's fault, will not affect the steamer's liability. *The Thomas P. Way*, 22 Fed. Rep. 739. And so the rule that a sailing vessel must hold her course does not apply to the case of a sailing vessel changing her course at sight of a steamer some seven or eight miles off, not in a narrow channel, but a wide lake. *The Propeller Monticello v. Mollison*, 17 How. (U. S.) 152.

A sailing vessel is not required to remain in stays or overreach longer than usual, when these measures are not apparently necessary to avoid a collision with a steamer. Bearing away at the last moment to avoid instant collision therewith is not a fault. *The Renovator*, 30 Fed. Rep. 194.

4. *The Cornelius C. Vanderbilt*, 1 Abb. Adm. 361.

5. *The Adriatic*, 107 U. S. 512; *The Clara Davidson*, 24 Fed. Rep. 763; *The Potomac*, 8 Wall. (U. S.) 590; *The Ellen Holgate*, 13 Phila. (Pa.) 470; *The Illinois*, 103 U. S. 298.

The pilot steamer P sunk the pilot schooner G, as both, after making for a brig to proffer pilot service, and passing on opposite sides of her, were in open sea, turning away to their cruising grounds. *Held*, that the P was not in fault; the G having violated the rule that a sail vessel, when collision appears imminent, must keep on its course without manœuvring (see diagram, 20 Fed. Rep. 865). *The Pilot*, 20 Fed. Rep. 860.

A sailing vessel is at fault, which, after seeing a steamer, changes its course in a dark night, on the assumption that it has not been seen by the steamer. *The Scotia*, 5 Blatchf. (U. S.) 227.

attempt to perform her duty in the emergency, it is required in the admiralty jurisprudence of the United States that the sailing vessel shall keep her course, and allow the steamer to pass either on the right or left, or to adopt such measures of precaution as she may deem best suited to enable her to perform her duty, and fulfil the requirement of the law to keep out of the way.<sup>1</sup> And the steamship, from the moment the sailing vessel is seen, shall watch, with the highest diligence, her movements, so as to be able to adopt timely measures of precaution to prevent a collision.<sup>2</sup> The general rule requires that a steam vessel, when approaching a sail vessel, should take whatever measures and precautions are necessary to avoid a collision.<sup>3</sup> If a steamer possesses extraordinary means for avoiding a collision with a sailing vessel she is bound to use them, and is liable for the consequence of a collision occurring through her neglect to use them.<sup>4</sup> A steamer

1. *New York etc. S. S. Co. v. Rumball*, 21 How. (U. S.) 372; *The Fannie*, 11 Wall. (U. S.) 238; *The Illinois*, 103 U. S. 208; *St. John v. Paine*, 10 How. (U. S.) 557; *The Oregon v. Rocca*, 18 How. (U. S.) 570; *Baker v. The City of New York*, 1 Cliff. (U. S.) 75; *The R. B. Forbes*, 1 Sprague (U. S.) 328; *The Falcon*, 19 Wall. (U. S.) 75; *Hall v. The Buffalo, Newb. Adm.* 115; *The Narragansett, Olc. Adm.* 246; *The Kentucky*, 4 Blatchf. (U. S.) 325.

Where a steamer approaches a schooner tacking and it appears that there is nothing to prevent the schooner's continuing her course at least a quarter of a mile farther, the schooner will be in fault for not beating out her track, as in effect required by rule 24. The steamer will be also in fault for not observing her tacking, and not keeping out of the way, as she might have done, notwithstanding the schooner's fault. *The A. W. Thompson*, 39 Fed. Rep. 115.

Where the vessels are suddenly brought close together, and the ordinary rules of navigation will not prevent a collision, it is the duty of each to act according to the emergency, and to take any measures likely to obtain that object. Stopping the engine and backing may be proper under these circumstances. *Peck v. Sanderson*, 17 How. (U. S.) 178.

2. *The Carroll*, 8 Wall. (U. S.) 302; *Mailler v. Express Propeller Line*, 61 N. Y. 312; *The Zouave*, 1 Brown Adm. 110; *The Nabob*, 1 Brown Adm. 115; *The Planet*, 1 Brown Adm. 125; *The Avon*, 1 Brown Adm. 170; *The Morton*, 1 Brown Adm. 137; *The Sunny*

*Side*, 1 Brown Adm. 227; *The Free State*, 1 Brown Adm. 251; *The David Morris*, 1 Brown Adm. 273; *The H. P. Baldwin*, 1 Brown Adm. 300; *The Milwaukee*, 1 Brown Adm. 313; *The Masten*, 1 Brown Adm. 436; *The Colorado*, 1 Brown Adm. 393; *The Masters*, 1 Brown Adm. 342; *The Charlotte Raab*, 1 Brown Adm. 453; *The Coleman*, 1 Brown Adm. 456; *The Thomas A. Scott*, 1 Brown Adm. 503.

3. *Hall v. The Buffalo, Newb. Adm.* 115; *The Falcon*, 19 Wall. (U. S.) 75; *The Narragansett, Olc. Adm.* 246; *The Kentucky*, 4 Blatchf. (U. S.) 325; *The R. B. Forbes*, 1 Sprague (U. S.) 328; *Baker v. City of New York*, 1 Cliff. (U. S.) 75; *The Illinois*, 103 U. S. 208; *The Fannie*, 11 Wall. (U. S.) 238; *New York etc. S. S. Co. v. Rumball*, 21 How. (U. S.) 372; *The Oregon v. Rocca*, 18 How. (U. S.) 570; *St. John v. Paine*, 10 How. (U. S.) 557.

4. *The Bay State*, 11 N. Y. Leg. Obs. 297; *Butterfield v. Boyd*, 4 Blatchf. (U. S.) 356; 18 How. Pr. 527; *The Empire State*, 12 N. Y. Leg. Obs. 259; *Twibell v. The Keystone*, 9 N. Y. Leg. Obs. 289; *The Jamaica Steam Ferryboat Collision*, 11 N. Y. Leg. Obs. 242; *The Iola*, 11 N. Y. Leg. Obs. 263; *The Sampson*, 3 Wall. Jr. (C. C.) 14; 3 Am. L. Reg. 337; *Carpenter v. The Island City*, 2 Int. Rev. Rec. 109; *Holmes v. Watson*, 29 Pa. St. 457.

The master of a vessel who, seeing that a collision is imminent through the fault of the other vessel, fails to use every means in his power to avert the collision, is guilty of contributory negligence, which makes proper a division of the loss between both vessels. The

ought not to take a course which will carry her across the bows of the sailing vessel.<sup>1</sup>

(b) PRESUMPTION OF FAULT.—The duty of avoiding collisions with sail vessels being upon steamers, the fact of a collision raises a presumption of fault on the part of the steam vessel, and throws on her owners the burden of proving that those navigating her took all precautions proper under the circumstances, and that the collision was caused by fault on the part of the sail vessel or by inevitable accident.<sup>2</sup>

4. Right of Way.—Where the rules require a vessel to keep out of the way, the other shall keep her course.<sup>3</sup> But the right of

B. & C., 18 Fed. Rep. 543; *The Warren*, 18 Fed. Rep. 559.

It is the duty of a steamer where there is risk of collision, whatever may be the conduct of the sailing vessel, to do everything in her power that can be done consistently with her own safety in order to avoid a collision. *Inman v. Reck*, *The City of Antwerp* and *Triedrich*, 37 L. J. Adm. 25.

1. *Beal v. Marchais*, *The Bougainville* and *The James C. Stevenson*, 5 L. R., P. C. 316.

2. *New York etc. S. S. Co. v. Rumball*, 21 How. (U. S.) 372; *The Oregon v. Rocca*, 18 How. (U. S.) 570; *The Colorado*, 91 U. S. 692; affirming 1 Brown Adm. 393; *The Fannie*, 11 Wall. (U. S.) 238; *The Pennland*, 23 Fed. Rep. 551; *Perkins v. The Hercules*, 1 Fed. Rep. 925; *Butterfield v. Boyd*, 4 Blatchf. (U. S.) 356; *The Wenona*, 8 Blatchf. (U. S.) 499; *The West of England*, 36 L. J. Adm. 4; *The Java*, 14 Blatchf. (U. S.) 524; affirming 6 Ben. (U. S.) 245; *The City of Truro*, 35 Fed. Rep. 317; *The New Orleans*, 8 Ben. (U. S.) 101; *The Pacific and The Fashion*, 1 Newb. Adm. 8; *The William Young*, Olc. Adm. 38; *The Washington Irving*, 1 Abb. Adm. 336; *The Golden Rule*, 20 Fed. Rep. 198; *The North Indiana*, 3 Blatchf. (U. S.) 92; *The New Champion*, 1 Abb. Adm. 202. Compare *The Benefactor*, 8 Ben. (U. S.) 426.

Under the rule which requires a vessel propelled by steam to keep out of the way of a sailing vessel, the mere proof that she collided with the latter, unaccompanied by circumstances exonerating her, raises a presumption of fault in the former, which she must overcome or be condemned. *The Wenona*, 8 Blatchf. (U. S.) 499.

3. *The Moderation*, 1 Moore P. C. C., N. S. 528; *The Great Eastern*, 3 Moore P. C. C., N. S. 31; 11 L. T., N.

S. 5; *Waldorf v. The New York*, 1 Flip. (U. S.) 49; *The Cornelius C. Vanderbilt*, 1 Abb. Adm. 361; *The Norma*, 35 L. T., N. S. 418; *The Ellen Tobin*, 8 Ben. (U. S.) 446; *The Helena*, 34 Fed. Rep. 425; *The America*, 32 Fed. Rep. 845; *The Peshtigo*, 25 Fed. Rep. 488; *The John Taylor*, 6 Ben. (U. S.) 227; *The Hausa*, 2 Ben. (U. S.) 299; affirmed 7 Blatchf. (U. S.) 288; *The Chesapeake*, 5 Blatchf. (U. S.) 411; affirming 1 Ben. (U. S.) 23; *The Columbia*, 10 Wall. (U. S.) 246; *The Cayuga*, 7 Blatchf. (U. S.) 385; affirming 1 Ben. (U. S.) 171; *The Columbia*, 29 Fed. Rep. 716.

There is no absolute right of way at the peril of immediate collision. If the vessel having the right of way fails, in the presence of immediate danger, to do what it can to avoid collision, it is liable. *The Non Pareille*, 33 Fed. Rep. 524.

A starboard tacked vessel, when apprised of the helpless condition of a vessel which by the ordinary rule of navigation ought to get out of her way, is bound to execute any practicable manœuvre which would tend to avoid a collision. *Wilson v. Canada Shipping Co.*, 2 L. R., App. Cas. 389; *The Lake St. Clair v. The Underwriter*, 36 L. T., N. S. 155.

When a sailing vessel and a steamer are approaching each other, the former may change her course, if it is manifest that a collision cannot otherwise be prevented, or in the face of imminent and impending collision. *Waldorf v. The New York*, 1 Flip. (U. S.) 49; *The Benefactor*, 14 Blatchf. (U. S.) 254; *The Excelsior v. The Bruce* and *The Hamilton Fish*, 38 Fed. Rep. 271; *Hamilton Fish v. The Excelsior*, 38 Fed. Rep. 272; *The I. C. Harris*, 29 Fed. Rep. 926; *The Cornelius C. Vanderbilt*, 1 Abb. Adm. 361.

The liability of a steamer for violat-

way is not the right to run into unnecessary collision.<sup>1</sup> When there is risk of collision, a boat having the right of way must stop and back.<sup>2</sup> So it is a condition of the duty to keep out of the way that the other vessel shall act intelligently, and afford reasonable evidence of her intentions. Until this is done it is the duty of the latter to keep on her course.<sup>3</sup>

(a) CHANGE OF COURSE.—Where a vessel has the right of way, and should hold her course, and a collision results from an unnecessary violation of the rule, she is in fault.<sup>4</sup> But an error

ing U. S. Rev. Stat., § 4233, rule 20, in not keeping out of the way of a schooner bound down the South pass, —*held*, not affected by an effort of the schooner, *in extremis*, to work nearer the right bank. The Cadiz, 20 Fed. Rep. 157.

An excursion steamer, coming from Rockaway to New York, overtook, off Coney Island, a schooner on her return from a catch of menhaden, and towing behind her two boats holding her seine, and the steamer struck one of the boats and caused the loss of the seine. *Held*, 1. That the steamer was liable for the damages. 2. That a change of course made by the schooner to avoid the steamer was *in extremis*, and not a fault. The Columbia, 9 Ben. (U. S.) 254.

**Slight Deviations.**—When a ship close-hauled is bound to keep her course, luffing as close to the wind as she can without losing headway, is not a deviation such as will render her liable for a collision with another vessel, whose duty it is to keep out of her way. The Aimo, The Amelia, 29 L. T., N. S. 118; 21 W. R. 707.

1. The Baltimore, 34 Fed. Rep. 660.

Where a vessel sailing on the starboard tack, with the right of way, crosses the track of another vessel sailing in the opposite direction, on the port tack, and the latter fails to fall off and give the right of way, the former, on finding a collision imminent, is justified in starboarding her helm, and letting her main sheet run, in order to lessen the force of the collision, and will not be liable for a breach of rules in doing so. The Eliza S. Potter, 31 Fed. Rep. 687.

Where the primary fault is on the vessel bound to keep out of the way for improperly attempting to cross the other's bows, the latter will not be held in fault except on a preponderance of proof that she did not stop and back as soon as she had reason to apprehend danger, because the other could not or

would not clear without her co-operation. The Cement Rock, 38 Fed. Rep. 764.

2. The C. H. Seuff, 32 Fed. Rep. 237.

The steamer C, while coming down the North River and approaching her wharf in New York city, was run into by the ferry boat B. It was found that the course of the C was laid direct for her berth, which took her directly across the bows of the B; but that the latter did not reverse until within two hundred feet of the place of collision; and there was evidence showing that the intention of the C to keep on her course was manifested by disregarding the repeated signals of the B. *Held*, that the B was in fault, although she had the right of way. The Catskill, 38 Fed. Rep. 367.

3. The B. C. Terry, 30 Fed. Rep. 711.

4. The Baltimore, 35 Fed. Rep. 613; The Farragut, 35 Fed. Rep. 617. See The Favorite, 1 Ben. (U. S.) 30; The Ellen Holgate, 13 Phila. (Pa.) 470; The Spring, 1 L. R., Adm. 99; The Dapper v. The Lady Normanby, 14 L. T., N. S. 895; The Queen, 8 Blatchf. (U. S.) 234; The Wenona, 8 Blatchf. (U. S.) 499.

Under the rule providing that, "If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other,"—if a collision occurs from such other vessel's not having kept on her course, the obligation rests on the latter to show sufficient causes existing in the particular case to render a departure from the rule necessary. The Corsica, 9 Wall. (U. S.) 630, affirming 6 Blatchf. (U. S.) 190.

By mistake the wheelsman of a sailing vessel ported his helm when ordered to starboard it, the result being a collision with a steamer. *Held*, that the sailing vessel alone was liable. Carlisle v. The Pomona, 34 Fed. Rep. 919; 35 Fed. Rep. 921.



committed by the vessel required to keep her course, after the collision is inevitable, will not impair her right to recover for the injuries resulting from the collision, if she was otherwise without fault.<sup>1</sup> If there are special circumstances from which it clearly appears that the sailing vessel can prevent a collision, otherwise inevitable by a departure from her course, she is bound to make it.<sup>2</sup> If a collision occurs because a vessel does not keep her course, the obligation rests on her to show sufficient excuse in the particular case for a departure from the rule.<sup>3</sup> And in justifying her departure from the rule she takes upon herself the obligation of showing both that her departure was, at the time it took place, necessary in order to avoid immediate danger, and also that the course adopted by her was reasonably calculated to avoid that danger.<sup>4</sup> Where two steamships are navigating open waters, one has no right to assume that the other will at a given time or place alter her course and take another course up or down channel, but the former must, as the other ship approaches, take such measures as are required by the regulations in reference to the course upon which such other ship actually is.<sup>5</sup>

(b) WHEN RULES ARE OBLIGATORY.—The rules of navigation prescribed for avoiding collisions, such as the rule that "when sailing ships are meeting end on or nearly so, the helms of both shall be put to port," are obligatory from the time that necessity for precaution begins, and continue to be applicable so long as the means and opportunity to avoid the danger remain. They do not apply to a vessel required to keep her course after the approach is so near that the collision is inevitable, and are equally inapplicable to vessels of every description while they are yet so distant from each other that measures of precaution have not become necessary to avoid a collision.<sup>6</sup>

(c) CHANGES—*In Extremis*.—A change of course *in extremis* is

1 The *Fairbanks*, 9 Wall. (U. S.) 420; The *Western Metropolis*, 6 Blatchf. (U. S.) 210; *Baker v. Steamship City of New York*, 1 Cliff. (U. S.) 75; The *Belle*, 1 Ben. (U. S.) 317; The *Jupiter*, 1 Ben. (U. S.) 536; *Bartlett v. Williams*, 1 Holmes (U. S.) 229; *Bentley v. Coyne*, 4 Wall. (U. S.) 509.

2 The *Cornelius C. Vanderbilt*, 1 Abb. Adm. 361; The *Maggie J. Smith v. Walker*, 123 U. S. 349.

This principle is especially applicable to sailing vessels and steamers meeting in the harbor of New York. The *Cornelius C. Vanderbilt*, 1 Abb. Adm. 361.

3 The *Corsica*, 9 Wall. (U. S.) 630; The *Chesapeake*, 5 Blatchf. (U. S.) 411.

4 The *Agra*, The *Elizabeth Jenkins*, 36 L. J. Adm. 16; 16 L. J., N. S. 755; The *Gratitude*, 14 Fed. Rep. 479.

If a sailing vessel bound, under the

sailing rules, to keep her course, would justify her departure on the ground of special circumstances and immediate danger, she must show the necessity, and must show that her change of course was reasonably calculated to avoid the danger. The *Elizabeth Jones*, 112 U. S. 514.

5 The *Franconia*, 35 L. J., N. S. 721.

6 The *Dexter*, 23 Wall. (U. S.) 69.

As a general rule, a sailing vessel, when a steamer is approaching, should keep her course, but her right to recover on account of a collision with a steamer is not lost by a slight change of course, after seeing the steamer, when the vessels are five miles apart, which does not contribute in any degree to the disaster. *Baker v. Steamship City of New York*, 1 Cliff. (U. S.) 75.

not negligence.<sup>1</sup> So an error of judgment *in extremis* is not a fault.<sup>2</sup> Mere apprehension of danger will not exonerate a sailing vessel for changing her course when meeting a steamer, unless the danger is imminent.<sup>3</sup> A mistake in manœuvring, which contributes to a collision, to be pardonable because made *in extremis*, must have been induced by the fault of the other vessel.<sup>4</sup>

5. **Speed**—(a) **GENERALLY**.—Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary.<sup>5</sup> This rule does not mean that she may wait until the danger is imminent before she slackens her speed, nor that she need not slacken her speed, if the risk of collision is caused by some fault in the approaching vessel. It is imperative. When risk of collision appears, it is the absolute duty of the steamer to slacken her speed, and not to trust to avoiding it by other means.<sup>6</sup> Risk of a collision begins the moment the two vessels have approached so near that a collision

1. The *Eliza S. Potter*, 35 Fed. Rep. 220; *Waldorf v. The New York*, 3 West. L. Monthly, 249; *The Havre*, 16 Blatchf. (U. S.) 427.

2. The *Oseola*, 33 Fed. Rep. 719; *The Carroll*, 8 Wall. (U. S.) 302; *The Nichols*, 7 Wall. (U. S.) 656; *The Belle*, 1 Ben. (U. S.) 317; *The John Mitchell*, 12 Fed. Rep. 511; *The New Orleans*, 8 Ben. (U. S.) 101; *The John D. Abeel*, 4 Ben. (U. S.) 28; *The Elizabeth Jones*, 112 U. S. 514; *The State of Alabama*, 17 Fed. Rep. 847; *The Ella B.*, 19 Fed. Rep. 792; *The Cadiz*, 20 Fed. 157; *The Renovator*, 30 Fed. Rep. 194.

A mere error of judgment in the excitement of a peril *in extremis*, the peril being caused by the other vessel, is not a fault. *The City of Springfield*, 29 Fed. Rep. 923.

3. *Winter v. The Hercules*, 1 Holmes (U. S.) 465.

4. *The Elizabeth Jones*, 112 U. S. 514.

5. Rev. Int. Rules & Reg., art. 18. See *The Syracuse*, 9 Wall. (U. S.) 672; *Dowell v. Steam Navigation Co.*, 38 Eng. Law & Eq. 64; *The Manitoba*, 2 Flip. (U. S.) 241; *The Blenheim*, 17 Fed. Rep. 608; *The Columbia*, 27 Fed. Rep. 704; *The Aurania*, 29 Fed. Rep. 98; *Hall v. The Buffalo*, 1 Neb. Adm. 115; *Johnson v. City of New York*, 40 Fed. Rep. 601; *The Manhansett*, 5 Hughes (U. S.) 104; *The Louisiana v. The Isaac Fisher*, 21 How. (U. S.) 1; *The City of Albany*, 34 Fed. Rep. 812; *The Kate Irving*, 5 Hughes (U. S.) 146; *The Frank Moffat*, 2 Flip. (U. S.) 291; *The Jay Gould*, 19 Fed. Rep. 765; *The Lepanto*, 21 Fed. Rep. 651; *Newton v.*

*Stebbins*, 10 How. (U. S.) 586; *Bazin v. Liverpool Steamship Co.*, 3 Wall. Jr. (C. C.) 229; *The Westover*, 5 Hughes (U. S.) 133.

This rule applies notwithstanding the existence of a gale. *The Fred W. Chase*, 31 Fed. Rep. 91.

Where a collision occurred between a steamer and a ferry boat, and the evidence showed that the steamer, just before the accident, stopped her engine, but afterwards started it again, it was held that the ferry boat had a right to suppose that the steamer intended to let her pass across her bows, and was justified in keeping her course. *The Cayuga*, 1 Ben. (U. S.) 171.

6. *The Huntsville*, 8 Blatchf. (U. S.) 228.

When two steam vessels are approaching each other from opposite directions, if, from darkness, fog or the haziness of the atmosphere, it is difficult to ascertain the character, position or direction of each other, it is the duty of each, when the other is observed, instantly to check speed, and then, if necessary, to stop and back. *Ward v. Ogdensburgh*, 5 McLean (U. S.) 622.

A steam vessel, which is bound to keep out of the way of another steamboat, will be held in fault if collision happen through her delay in backing, where the circumstances of wind and tide and signals exchanged were sufficient to have shown her that such backing could not be delayed without risk of collision. *New York etc. R. Co. v. The Breakwater*, 39 Fed. Rep. 511.

A steamer going ten knots an hour on a dark night up the Horse Channel,

might be brought about by any departure from the rules of navigation, and continues up to the moment when they have so far progressed that no such result could ensue.<sup>1</sup> So the rule does not throw a steam vessel in fault for not slackening speed, as long as the vessels are so placed that, if the sailing vessel observes ordinary precautions and rules of navigation, there is no danger of collision. The article does not contemplate a case where a collision is the result of sheer negligence and disobedience of well-known rules; but applies to cases where, supposing the parties intend to perform and do reasonably perform their respective duties, the emergency is such that there is still danger that a collision may occur.<sup>2</sup>

(b) CROWDED CHANNELS.—Vessels coming into harbors and rivers crowded with craft must slacken speed and proceed cautiously,<sup>3</sup> and if in the night time, they must slacken speed so as

at the entrance of the Mersey, saw a sail three points on her port bow, less than half a mile distant. She ported her helm but did not ease her engines. *Held*, that the steamer was in fault for the collision which ensued, for not having stopped or eased her engines when she made out the other vessel, and that maintaining such a rate of speed was unwarrantable. The Dispatch, Swa. 138.

1. The Milwaukee, 1 Brown Adm. 313.

2. The Free State, 91 U. S. 200. See *The North American v. The Wild Rose*, 14 L. T., N. S. 68.

3. The A. Rossiter, 1 Newb. Adm. 225; The Earle Spencer, 33 L. T., N. S. 235; The Germania, 21 L. T., N. S. 44. See *Case v. The Susquehanna*, 35 Fed. Rep. 325; *The City of Brooklyn*, 1 L. R., Adm. Div. 276; *Dowell v. Steam Navigation Co.*, 38 Eng. L. & Eq. 64; *The Pepperell*, Swa. 12; *Netherlands Steamboat Co. v. Styles*, 9 Moore P. C. C. 286; *The St. John*, 29 Fed. Rep. 221; *The American Eagle*, 29 Fed. Rep. 302; *Ure v. Coffman*, 19 How. (U. S.) 56; *The City of Paris*, 9 Wall. (U. S.) 634; *The Allegheny*, 9 Wall. (U. S.) 522; *The Eider*, 37 Fed. Rep. 903; *Lenox v. Winisimmet Co.*, Sprague 160.

A steamer coming into a difficult harbor in the wake of a sailing vessel, is bound to proceed with extreme caution. If they collide, and the steamer was grossly negligent, she is liable, even though the sailing vessel may have been not entirely free from blame. *Ward v. The M. Dousman*, 6 McLean (U. S.) 231.

A steam tug, held to be in fault for proceeding in a crowded thoroughfare, like the Chicago River, at the rate of over five miles an hour. *The Little Giant*, 2 Biss. (U. S.) 23; *The Allegheny*, 2 Biss. (U. S.) 29.

For a steamer navigating the East river in New York to pass along the shore on the Brooklyn side in close proximity to the mouths of the ferry slips, at such a rate of speed as not to be able to stop when danger of collision with an outcoming ferryboat appears imminent, is gross fault. *The Favorita*, 8 Blatchf. (U. S.) 539.

Where a fast steamboat, on her regular run down the North river to Coney Island, was making for a landing near the Hoboken ferry, and came at full speed close to the piers, and struck a ferry boat just coming out of her slip, *held*, that the steamer was in fault for running at such high speed in that locality, with knowledge of the position of the ferry slip and the presence of the ferryboat there; that the ferry boat was not in fault for attempting to back to avoid the collision. *The D. R. Martin*, 10 Ben. (U. S.) 532.

A ferry boat is in fault when running at full speed in her slip in a fog. *The Howard*, 30 Fed. Rep. 280.

Where the slip into which it was customary to breast claimants' vessels off the dock was the private slip of the claimants, used in their business only, it was negligence for a tug accustomed to go there frequently, and chargeable with knowledge of the claimants' custom in mooring their vessels, and having knowledge that a steamer had but just arrived and was within the slip, with

to be able to stop at a moment's notice.<sup>1</sup> Where large steamers proceed up or down a river at a speed dangerous to small craft and cause such swells that barges are sunk, they are liable.<sup>2</sup>

**VII. STEAMERS AND ROW BOAT.**—Row boats must keep out of the way of steamers. A steamer has a right to assume that such boats are properly manned and equipped, and will take the usual precautions to escape collision.<sup>3</sup>

**VIII. TUGS AND TOWS**<sup>4</sup>—1. **Generally.**—Where a tow is in charge of a tug, the tug and tow are to be treated as being one vessel, and that a steam vessel.<sup>5</sup> Although tugs with vessels in tow are

lights visible, showing that the work of breasting her off was incomplete, to attempt to enter the slip at *considerable speed*, with no attention to the usages of the slip or the circumstances under which the attempt was made. *The Fulda*, 31 Fed. Rep. 351.

1. *The A. Rossiter*, 1 Newb. Adm. 225; *The Bay State*, 1 Abb. Adm. 235. Steamers running into a harbor, or through a common thoroughfare of vessels, will be held chargeable with the consequences of collisions when kept at high speed during the night, or during weather so thick that objects cannot be discerned at a distance sufficient to avoid them. *The Rocket*, 1 Biss. 360; *The Rose*, 2 W. Rob. 1; *The Bay State*, Abb. Adm. 235; *Bullock v. The Lamar*, 8 Law Rep. 275; 1 West. L. J. 444; *The Perth*, 3 Hagg. Adm. 414; *The Neptune*, Olc. 483; *The Rose*, 2 W. Rob. 1; 7 Jur. 381.

2. *Netherlands Steamboat Co. v. Styles*, 40 Eng. L. & Eq. 19; *The Massachusetts*, 10 Ben. (U. S.) 177; *The Southfield*, 19 Fed. Rep. 841; *The Rhode Island*, 24 Fed. Rep. 295; *Wright v. Brown*, 4 Ind. 95. See *The New York*, 34 Fed. Rep. 757; *De Lelle v. The Atalanta*, 34 Fed. Rep. 918.

A large ocean steamer has no right to leave her moorings in a narrow slip crowded with other craft, by the use of her own propeller, without taking the utmost care to prevent accidents by the disturbance of the water which necessarily follows. *The Nevada*, 17 Blatchf. (U. S.) 122.

In an action against the captain of a steam vessel for swamping a loaded wherry on the river, by a swell produced by a too rapid rate of passage, the jury, to find for the plaintiff, must be satisfied that the mischief was occasioned by the swell alone; and if they think it doubtful whether it was or not, or think that the plaintiff contributed to the injury he sustained by his own

improper conduct, either in mismanaging or overloading the boat, they must find their verdict for the defendant. *Luxford v. Large*, 5 C. & P. 421.

3. *Philadelphia etc. R. Co. v. Adams*, 89 Pa. St. 31; *Fisher v. Camden etc. Ferry Co.*, 124 Pa. St. 154; *The Plymouth*, 26 Fed. Rep. 879; *Brown v. French*, 104 Pa. St. 604.

The plaintiff's intestate, with two other persons, was rowing in a small boat in New York harbor, when they were overtaken and run over by a steamboat. A moment before the collision took place the plaintiff's intestate jumped overboard and was drowned. There was proof that the crew of the boat had not seen the steamboat until she was within forty or fifty feet, owing to want of vigilance on their part, and that even then the collision might have been avoided if they had not lost presence of mind. *Held*, that the plaintiff could not recover against the owners of the steamboat. *Beck v. East River Ferry Co.*, 6 Robt. (N. Y.) 82.

A man in a small boat, seeing a steamboat two hundred feet off, is presumed to have time to get out of the way. *The Missisquoi*, 8 Ben. (U. S.) 6.

While a steamer would not be justified in recklessly colliding with a row-boat, yet, when a boat is discovered at such a distance that a few strokes of the oars would back it safely out of the way, the steamer has a right to assume that those in charge of the boat will exercise the proper skill to avoid her, and where a collision is the result of their ignorance of the proper management of the boat, the steamer is not liable. *Fischer v. Camden etc. Co.*, 124 Pa. St. 154.

4. See **LIGHTS**, *supra*.

5. *The Cleadon*, 14 Moore P. C. C. 92; *Lush*, 158; *Anglo-Australian Steam Nav. Co. v. Cornell Steamboat Co.*, 32 Fed. Rep. 798; *New York etc. Transp. Co. v. Philadelphia etc.*

not to be held to the strict responsibility of a vessel under steam,<sup>1</sup> yet they are bound to yield to sailing vessels, and, in general, to be liable as though without tows.<sup>2</sup> A tug engaged in towing a fleet has not the same control over her movements as an ordinary steamer. Where a tug has neglected no precaution, she should not be held responsible to the same extent or under the same law as a detached steamer. But where a voyage is attended with special hazards she must avoid enhancing them. She may occupy a large space and move with less caution on an open bay than in a narrow, eccentric and crowded channel.<sup>3</sup>

Upon the view taken of the law of principal and agent, in connection with the contract of towage, the tug is held to be the sole principal, and the ship exempted, when her navigation is, by contract, exclusively in charge of the tug.<sup>4</sup> This rule is limited to cases where the ship is in the exclusive charge and control of the tug, without officers or men of her own in any way participating

Nav. Co., 22 How. (U. S.) 461; Herbert Manton, 14 Blatchf. (U. S.) 37, affirming The J. H. Gautier, 5 Ben. (U. S.) 469; s. c., *sub nom.* Sturgis v. Boyer, 24 How. (U. S.) 110; The Civilta v. Perres, 103 U. S. 699, affirming Ben. (U. S.) 309; The Philadelphia etc. R. Co. v. The J. H. Gautier, 11 Am. L. Reg., N. S. 769; 5 Am. L. T. 87. See The American and The Lyria, 6 L. R., P. C. 127; The Jesse Williamson, Jr., 17 Blatchf. (U. S.) 106; The Pennsylvania, 3 Ben. (U. S.) 215.

1. The Kingston by Sea, 3 W. Rob. 152; The Cleadon, 1 Lush. 158; The Independence, The Arthur Gordon, 1 Lush. 270; The Marion W. Page and The Missouri, 36 Fed. Rep. 329; The A. P. Cranmer, 8 Fed. Rep. 523; 1 Fed. Rep. 523, and 19 Blatchf. (U. S.) 507; The Maria Martin, 12 Wall. (U. S.) 31. Compare The Warrior, L. R., 3 Adm. & Ecc. 553; The America and The Lyria, L. R., 4 Adm. & Ecc. 431; The Civilta v. Perry, 103 U. S. 699.

It is the duty of an unencumbered steamer to keep out of the way of a cumbersome tow going slowly with the tide. The Mayumba, 21 Fed. Rep. 476.

A steam tug *have* to during fine weather in a fair way and waiting for employment, is bound to keep out of the way of sailing ships using the fairway. The Jennie S. Barker, The Spin-drift, 33 L. T., N. S. 318.

2. The Galileo, 28 Fed. Rep. 469; The Ping On v. The Blethea, 11 Fed. Rep. 607; The James Bowen, 10 Ben. (U. S.) 430; The Herbert Manton, 14 Blatchf. (U. S.) 37; s. c., 5 Ben. (U. S.) 469; Sturgis v. Boyer, 24 How. (U. S.)

110; The Carolus, 2 Curt. (U. S.) 69; The Philadelphia etc. R. Co. v. The J. H. Gautier, 11 Am. Law Reg. (N. S.) 769; The Maggie S. Hart, 38 Fed. Rep. 765; R. B. Forbes, Sprague (U. S.) 328; Union Steamship Co. v. The Aracan, 6 L. R., P. C. 127; The Civilta v. Perry, 103 U. S. 699. Compare The A. P. Cranmer, 19 Blatchf. (U. S.) 507.

A tug with a tow on a hawser in the East river is bound to keep out of the way of a schooner close-hauled. The Sam Rotan, 20 Fed. Rep. 333.

Tugs which undertake to tow large railroad floats about the harbor of New York must be of sufficient power to handle their floats easily and promptly, and able to avoid sailing vessels which they may meet in the course of their navigation. The Howard Carroll, 41 Fed. Rep. 159.

Where a schooner, close-hauled on a N.N.W. breeze, met a tug with three barges in tow, nearly head on, and, keeping her course, came in collision with a tow—*held* that the facts proved showed the tug to have been unable to change her course as required by rule 20 of the navigation rules (U. S. Rev. Stat., § 4233), but that she was in fault for not making known such inability to the schooner by hoisting two vertical lights as required by rule 24. The C. F. Ackerman, 9 Ben. (U. S.) 179.

3. Flannery v. The Ontario, 4 Pa. L. J. 312.

4. Sturgis v. Boyer, 24 How. (U. S.) 110; The Doris Eckhoff, 32 Fed. Rep. 555. Compare The Ticonderoga, Swa. 215.

in the ship's navigation.<sup>1</sup> Cases arise undoubtedly where both the tug and the tow are liable for the consequences of a collision, as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, fail to take due care, or are guilty of negligence in their navigation.<sup>2</sup> So if a tow injured in a collision is so far identified with its own tug that it is affected by the fault of that tug, it can have no other or greater rights, and no other or better standing in court, against the other tug than would the tug to which it was attached.<sup>3</sup> If the vessel in tow has the full control of her own movements, she will be liable for any damages inflicted by her coming in contact with another vessel.<sup>4</sup> If a collision between the tow and another vessel is caused by the negligence of the owners of the tug, they are responsible.<sup>5</sup> And the burden is on them to show that such acci-

1. *The Doris Eckhoff*, 32 Fed. Rep. 555; *Sturgis v. Boyer*, 24 How. (U. S.) 110; *The James Bowen*, 10 Ben. (U. S.) 430.

If the tug acts independently of all authority or direction of the tow while executing the employment for which she is engaged, and the tow is master of her own movements, the analogy of principal and agent does not apply. *The Express*, Olc. Adm. 258.

Both the tug and tow were under the command of the master of the tug, who gave all the orders. None of the ship's crew were on board except the mate, who did not interfere with the management of the vessel, the persons on board being all under the command of a head stevedore. *Held*, that the master of the tug was the agent of her owners and not of the owners of the ship, and that the tug was responsible for the whole loss. *Sturgis v. Boyer*, 24 How. (U. S.) 110.

A bark towed by a hawser, and having a pilot aboard, who had general control of the navigation of both tug and tow—*held*, liable, in part, for a collision that occurred through the negligence of both pilots. *The C. P. Raymond*, 26 Fed. Rep. 281.

Where a steam tug with a ship in tow, both vessels being in charge of a pilot appointed by the owners of the ship, negligently caused the ship to collide with another vessel, it was held that the tug was liable. *The Rescue*, 2 Sprague (U. S.) 16.

**On the Lakes.**—As the business of towing is conducted upon The Lakes, the tug has the general control, but the vessel in tow has certain duties to per-

form, and each one is responsible for its own negligence. *Frank Moffat*, 2 Flip. (U. S.) 291.

2. *The Virginia Ehrman v. Curtis*, 97 U. S. 309, 313. See *The Mabey v. Cooper*, 14 Wall. (U. S.) 204; *The Civilta*, 103 U. S. 701; *The Nettie*, 35 Fed. Rep. 615; *The Civilta v. Perry*, 103 U. S. 699.

A collision between a towed canal boat and a boat lying at a dock resulted from the tow line being too long, considering the rapidity of the current, the height of the water, and the intricacy of the channel. *Held*, that the tug and the tow should both be deemed in fault. *The Nettie*, 35 Fed. Rep. 315.

3. *McNally v. The L. P. Dayton*, Bk. 30 U. S. L. ed. 669.

4. *The Express*, Olc. Adm. 258; *The Edgar Baxter*, 8 Ben. (U. S.) 162. See *The Packer*, 24 Blatchf. (U. S.) 27; *The Don Juan*, 8 Ben. (U. S.) 489; *The Niobe*, 13 P. D. 55.

A schooner in tow, being under after sail only, became unmanageable, and thus brought about a collision, for which she sought to charge the other vessel. *Held*, that the libel should be dismissed. *Law v. Baker*, 26 Fed. Rep. 164.

If the tow, at a critical point, when about to enter a harbor, carries such sail as to take her out of the control of the tug, either as to her headway or course, the tug should not be held at fault for any disaster that ensues. *The Margaret*, 2 Flip. (U. S.) 640.

5. *Green v. Croce*, 17 La. An. 3; *The Express*, Olc. Adm. 258; *The Anglo Norman*, *The Jane E. Williams*, 1 Newb. Adm. 492; *The Mariel*, 32 Fed.

dent was an unavoidable one, if such was the fact.<sup>1</sup> Where the tow is sunk by a collision brought about by the concurrent negligent acts of the tug and another vessel, the owner of the innocent tow or its cargo may proceed against the two vessels jointly, or either one of them severally, to recover his entire damages, and no apportionment of the loss between the offending vessels will be made, but the owner of the tow or its cargo may resort to either

Rep. 103; *The Gratitude*, 31 Fed. Rep. 232; *The Westhoff v. Oluf*, 3 Woods (U. S.) 667; *The Alpha*, 27 Fed. Rep. 759; *The Walverton*, 28 Fed. Rep. 381; *The Willie*, 29 Fed. Rep. 153; *The Bridgeport*, 35 Fed. Rep. 222. See *Harris v. Anderson*, 14 C. B., N. S. 499; *The Night Watch*, 8 Jur., N. S. 1161; 11 W. R. 189; *The Swallow*, 8 Ben. (U. S.) 223; *Deems v. Albany & Canal Line*, 14 Blatchf. (U. S.) 474; *The William H. Beaman*, 18 Fed. Rep. 334; *Hunt v. The Mischief*, 32 Fed. Rep. 304; *New Philadelphia*, 1 Black (U. S.) 62.

Where a steam tug, with two tows, one ahead of the other, going abreast of a steam barge, in the same direction, increases her speed so that the stern of the rear tow, coming abreast with the wheel of the barge, is sheered by its suction and comes into collision with a passenger steamer, the tug is liable. *The Mariel*, 32 Fed. Rep. 103.

A steamboat was towing a canal boat in New York bay, the latter being attached to the former by a hawser from her stern, when the canal boat sheered and came into collision with and damaged a third vessel. The captain of the steamboat was warned, before he took on the canal boat, that she steered badly, and ought to be taken alongside. The canal boat was under the command of her own captain, who did all in his power to stop the sheer. The steamboat was under the command of her own captain, who did not take proper measures to arrest the sheer and avoid the collision. *Held*, that the steamboat was liable for the damage to the third vessel, and this, although the master of the canal boat might have been in fault in not exhibiting proper skill or attention in steering his vessel, and was therefore properly responsible for the collision. *The Express*, 1 Blatchf. (U. S.) 365.

A tug which was towing a schooner around a wharf with a tow line 50 to 60 fathoms in length, and at a distance of half a hawser's length from the line of the wharf, when she had ample sea

room to keep at a safe distance from the wharf—*held*, liable for damages caused to the tow by collision with a vessel moored to the wharf. *The Favorite*, 5 Sawy. (U. S.) 226.

A tug, while attempting to assist a drifting steamer, which was in great danger, and blowing signals of distress, collided with and sunk her. *Held*, that the tug was not liable, having acted in good faith and with reasonable skill. *Gilman v. The Tyler*, 3 Woods (U. S.) 111.

A vessel, while being towed into a harbor by a steam tug, got aground, and the defendant's vessel, which was being towed in at the same time by the same tug, astern of the plaintiff's vessel, without any active default on the defendant's part, struck and damaged the plaintiff's vessel. *Held*, no evidence of negligence for which the defendant was liable. *Harris v. Anderson*, 14 C. B., N. S. 499.

1. *Creen v. Croce*, 17 La. An. 3.

#### Presumption of Negligence Generally.

—The fact that a boat in tow is brought into a collision raises a presumption of negligence on the part of the tug. *The Delaware*, 20 Fed. Rep. 797.

Where both contracting parties understood that the towage service was to be performed under circumstances of peculiar peril, in which a mistake of judgment was not improbable, and that the liability of such an error was one of the incidents of risk, the ordinary presumption of negligence on the part of the tug in case of injury is materially weakened; and it is not unreasonable to require the owner of the tow, who imputes fault to the tug, to locate the fault with precision. *The Packer*, 24 Blatchf. (U. S.) 27; 28 Fed. Rep. 156.

The fact that a tug, in towing two canal boats astern of each other, allows the second to be fastened stern foremost, does not necessarily raise a presumption of negligence; but such a mode of towing imposes on the tug the duty of using great care. *The Edmund Levy*, 8 Ben. (U. S.) 144.

or both of the offenders for his whole loss.<sup>1</sup> So if a tow is injured by a collision with the tug to which it is attached, through the latter's negligence, the tug will be liable for the damage.<sup>2</sup> If a tow is injured by collision between the tug to which it is attached and another one, the burden of proof is upon it to establish negligence against each of the tugs separately and independently.<sup>3</sup> But a tow cannot hold her tug liable for the consequences of a collision caused by no fault of the tug, but solely by the fault of a steamer.<sup>4</sup> So if a collision is brought about by a lack of watchfulness and care on the part of those on board a steam vessel colliding with the tow of a tug, the steam vessel will be liable.<sup>5</sup> If the collision occurs through the contributory negligence of the tug and the other steamer, both will be liable,<sup>6</sup> or if collision

1. *The Franconia*, 16 Fed. Rep. 149. See *Brady v. Jefferson*, 5 Del. 60.

A collision occurred between a steamer and a steam tug with a vessel in tow. The tow was wrecked and sunk. The steamer and tug were solely in fault. *Held*, in a suit in the name of the owner of the cargo, against the steamer only, that libellant was entitled to recover full compensatory damages for the loss (to the extent of the value of the steamer as limited by act of 1851). The libellant was not bound to join both the colliding vessels as defendants. Nor was his right to recover limited to one-half his damages, against each vessel. The doctrine of apportionment of damages, where there is mutual fault, between two vessels coming in collision, does not apply against a third vessel injured. *The Atlas*, 93 U. S. 302; *S. P. The Juniata*, 93 U. S. 337.

2. *The Thetis*, 2 L. R. Adm. 365.

When a collision between two vessels in tow of the same tug is chiefly attributable to negligence of the persons in charge of the tug, some contributory negligence on the part of one of the vessels in tow will not prevent the other from recovering against the tug. *The Morton*, 1 Brown Adm. 137.

3. *McNally v. The L. P. Dayton*, bk. 30, U. S. (L. ed.) 669.

4. *The B. B. Saunders*, 23 Blatchf. (U. S.) 378; 25 Fed. Rep. 727; *The City of Springfield*, 29 Fed. Rep. 923; *The City of Norwich*, 8 Ben. (U. S.) 206.

A steamboat ran into a tow. The collision was caused by the steamboat suddenly attempting to go to starboard of the tug, after having signified her intention to go to port. *Held*, that

the steamboat, not the tug, was liable for the damage. *The Richmond*, 28 Fed. Rep. 332.

In *The Alabama and The Gamecock*, 1 Ben. (U. S.) 476, it is held that a vessel in tow of a tug is not responsible for the management of the tug, so as to bar her from recovering damages against a third vessel for a collision, which was partly attributable to the fault of the tug.

A tug whose tow is injured during the towage service, though without fault on the part of the tug, must use reasonable diligence to assist the tow and shield it from additional injury. *The Young America*, 24 Blatchf. (U. S.) 479; 31 Fed. Rep. 749.

5. *The Lynx*, 21 Fed. Rep. 815.

6. *The Frisia*, 28 Fed. Rep. 249; *The Sicilia v. The Lord Worden*, 27 Fed. Rep. 467; *The Fanwood*, 28 Fed. Rep. 373; *The Oregon*, 27 Fed. Rep. 751; *The Plymouth Rock*, 26 Fed. Rep. 40; *The A. Demarest*, 25 Fed. Rep. 921; *The Enterprise*, 3 Wall. Jr. (C. C.) 58; *The Rio Grande*, 30 Fed. Rep. 849; *The Ogemaw*, 32 Fed. Rep. 919; *The Galileo and The Edgar Baxter*, 24 Blatchf. (U. S.) 111; 28 Fed. Rep. 469; *Shaw v. The Reading and The David Smith*, 38 Fed. Rep. 269.

A steamship ran into a tow. The steamship might and should have stopped and reversed. The tow's tug was in fault in attempting to cross the steamship's bows, and in persisting after getting no response to her whistles. *Held*, that both steamship and tug were liable to the tow. (*Reversing*, s. c., 24 Fed. Rep. 495.) *The Frisia*, 28 Fed. Rep. 249.

A steamer came into collision with the tow of a tug. The steamer, after her signal to pass to the right was an-



occurs through the negligence of the tow, she will be held responsible for the damages.<sup>1</sup> A tug may be in fault for running free with tide and current down a river at too great a speed in a fog;<sup>2</sup> or attempting to take her tow through a perilous passage;<sup>3</sup> or getting into a position where she could neither advance nor retreat, and where her movements could not be anticipated, so that a collision follows.<sup>4</sup> If circumstances are such as to make it proper for a tug to use a long hawser in towing a boat, she should be specially careful not only to notify approaching vessels that a tow is following, but, as near as may be, where it is.<sup>5</sup> So, in such case, if a collision is caused by the sheering of the tow, the tug will be liable.<sup>6</sup>

**2. Sudden Emergencies.**—Where the officers of a tug boat in the confusion of a sudden emergency caused by another's fault, fail to adopt the most prudent measures of safety, they are not chargeable with negligence on that account.<sup>7</sup> So where a schooner is about to strike the tow, the tug is justified (as an act *in extremis*) in putting herself between them to fend off the blow and prevent a more injurious collision, and is not responsible for consequent damage to the schooner.<sup>8</sup>

**3. Duty in Making up Tow.**—It is the duty of the tug where the

sawered, backed athwart the course of the tug, and the tug failed to slacken speed. *Held*, that the tow was entitled to a decree against both the tug and steamer. *The Galileo*, 28 Fed. Rep. 469.

1. *The Herald*, 8 Ben. (U. S.) 263.

2. *The Katy Wise*, 3 Hughes (U. S.) 589; *The Mary Shaw*, 5 Hughes (U. S.) 266.

3. *Miller v. The John C. Ingram*, 37 Fed. Rep. 910; *The Willie*, 29 Fed. Rep. 153; *The Venus*, 16 Fed. Rep. 792; *The Minnie*, 31 Fed. Rep. 301.

Extraordinary precautions should be taken by a tug with a large tow in navigating a narrow channel, where the tug and tow virtually occupy the whole width of the channel. *The Lucy D.*, 21 Fed. Rep. 142.

4. *The Gratitude*, 31 Fed. Rep. 232; *The Gorgas*, 10 Ben. (U. S.) 541.

5. *The Jesse Williamson, Jr.*, 17 Blatchf. (U. S.) 106.

A passenger steamer on a starlight night, going thirteen miles an hour, met at an angle a tug going three miles an hour and towing two barges. The tug made no change of course or speed. The steamer did not discover the foremost barge till close thereto, and thereupon sheered sharply to port, stopped engine and backed, but struck the other barge, which was one thousand feet be-

hind the tug, and nearly one hundred and fifty feet behind the first barge, and on which was a bright light. *Held*, that even if one of the lights on the tug was dim, the steamer was in fault for attempting to cross between, as if supposing the barge's light was of separate crafts, when so close that no change of her course was possible without collision on her port bow. *The Rhode Island*, 8 Ben. (U. S.) 50.

6. *The Annie Williams*, 20 Fed. Rep. 866.

**Sheer Caused by the Tide.**—Where a tow going up the Hudson River was moving so slowly when approaching the western of two channels, formed by a shoal in the river, that the ebb tide coming out of the easterly channel swung the tail of the tow towards the westward, so that the rear boat was struck by a tow coming down the western channel and passing within seventy-five feet of the ascending tow, both vessels, having signaled each other at a considerable distance, are in fault—the ascending tow for occupying any part of the western side of the narrow channel, and the other for attempting to pass so near her. *The Belle*, 34 Fed. Rep. 669.

7. *The Ella B.*, 19 Fed. Rep. 792.

8. *The George L. Garlick*, 20 Fed. Rep. 647.

captains of the tow have no voice in making up the tow, to see that it was properly constructed and that the lines are sufficient and securely fastened. This is an equal duty whether she furnishes the lines to the boats or the boats to her. In the nature of the employment her officers can tell better than the men on the boats what sort of a line will be required to secure boats together and to keep them in their positions.<sup>1</sup> But where the tug has nothing to do with arranging the tow and is signalled to start too soon, the tug will not be liable for a collision occasioned thereby.<sup>2</sup>

**4. Vessel Shifting Tow.**—A vessel engaged in shifting her tow is entitled to the undisturbed use of a sufficient area of the water to execute her movements. But if she moves voluntarily while a navigating vessel is dangerously near, keeping no lookout, and giving no signals, thus contributing to the ensuing collision, she is in fault, and liable for damages.<sup>3</sup>

**5. Tugs Striving for Precedence.**—Where two steam tugs approach a vessel from different directions to tender their services to tow her into port, the established rules are that the tug following the wake of the vessel should come up on her starboard quarter and slack her engine, so as not to pass the vessel, and that the tug coming down in the opposite direction should run round to, either to windward or leeward, so as to head the same way as the vessel.<sup>4</sup> And where a tug is entitled to her position and another approaches, the latter must see to it that a collision is avoided.<sup>5</sup>

**6. Vessels at Anchor.**—A tow boat is liable for the damage resulting from a collision between the boats of her tow and a vessel at anchor in a proper place.<sup>6</sup>

1. *The Quickstep*, 9 Wall. (U. S.) 665; *The Clarita and The Clara*, 23 Wall. (U. S.) 1, 14.

Where a tug towed a vessel into a slip, where it was held by a line fastened to another vessel, and the line parted after the tug had cast off, and the vessel drifted and injured another vessel, the tug is not liable therefor. *The Greenpoint*, 32 Fed. Rep. 799.

2. *Angelo-Australasian Steam Nav. Co. v. Cornell Steamboat Co.*, 32 Fed. Rep. 798.

3. *Phenix Ins. Co. v. The Quaker City and The Isabella*, E. Wilbur, 38 Fed. Rep. 153.

Two tug boats made up parallel tows, and both headed up stream against a strong ebb tide, and the one nearest the shore, upon completion of the tow and while attempting to turn out of the river, struck a canal boat in tow on the starboard side of the other tug.

*Held*, as she took the responsibility of being able to effect her turn, she alone was liable. The failure of the other tug to stop her engines, and allow her tow to drift back with the tide, was an excusable error *in extremis*. *The Osceola*, 33 Fed. Rep. 719.

4. *Sturgis v. Clough*, 21 How. (U. S.) 451.

5. *The R. L. Maybey*, 4 Blatchf. (U. S.) 88.

A tug approaching another tug, which was between two canal boats in a place where she had a right to be, erroneously supposed that the latter tug was about starting with the boats, and, therefore, did not slack her speed, and ran into one of the boats. *Held*, that she alone was in fault. *The James T. Easton*, 27 Fed. Rep. 464.

6. *Orison v. The Syracuse*, 35 Fed. Rep. 367; *The Ogemaw*, 32 Fed. Rep. 919. See *The Cement Rock*, 8 Ben. (U. S.) 443.

**7. Fog Signals.**<sup>1</sup>—While the courts have, in passing upon the duty of tugs in towing other vessels, said, in substance, that the tug and barges were to be considered as one vessel, yet there can be no doubt that when a barge is in tow of a tug or a steamer by a long line, a fog-horn or other signal should be sounded on the barge at regular intervals, in the same manner as if she were moving by the agency of her own sails. On a clear night the lights on the tug and on the barges would notify an approaching vessel that she was in the vicinity of a steamer with tows; but in a fog there must be some means by which the location of the barges can be indicated, and when this precaution is omitted, the craft guilty of such omission is chargeable with negligence and responsible for its consequences.<sup>2</sup>

**IX. PILOT BOATS.**—When a pilot boat is approaching a vessel to put off a pilot, it is the duty of the vessel to wait for the pilot boat, and it is the duty of the pilot boat to keep out of the way of the vessel. So where a collision occurs between the pilot boat and the vessel, while so waiting, the pilot boat is in fault and responsible for the damages which may ensue.<sup>3</sup> The vessel will not be in fault for a collision which occurs while trying to keep away from a pilot boat, even though the latter be trying to hail her for the purpose of offering services; neither is she in fault for not seeing unexpected manœuvres of the pilot boat that are not customary, or for failing to give answer to the pilot's flash-light offering to give services.<sup>4</sup>

**X. FISHING VESSELS.**—The ordinary rules of navigation, designed to prevent collisions, are binding on fishing vessels, while engaged on their fishing grounds.<sup>5</sup>

**XI. VESSELS ANCHORED, MOORED, ETC.**—1. **Generally.**—Vessels in motion are required to keep out of the way of a vessel at anchor, if the latter is without fault, unless it appears that the collision was the result of inevitable accident; the rule being that the vessel in motion must exonerate herself from blame, by showing that it was not in her power to prevent the collision by adopting any practicable precautions.<sup>6</sup> So where a vessel at anchor is col-

1. **Internal Waters.**—"Section 8. All steam vessels (except upon the Red River of the North and rivers whose waters flow into the Gulf of Mexico), when engaged in towing during fog or thick weather, shall sound three distinct blasts of their steam whistles in quick succession, repeating at intervals not exceeding one minute."

2. *The Peshtigo*, 25 Fed. Rep. 488; *The City of Alexandria*, 31 Fed. Rep. 427, 430.

3. *The Leo*, 34 Fed. Rep. 140; *The Alaska*, 33 Fed. Rep. 106.

4. *The Cambusdoon*, 30 Fed. Rep. 704.

5. *The Summit*, 2 Curt. (U. S.) 150.

A fishing vessel is bound to show a light in reasonable time to an approaching vessel. *The Olivia*, Lush. 497; *The Englishman*, 37 L. T., N. S. 412.

6. *The Virginia Erhman v. Curtiss*, 97 U. S. 309; *Boston etc. Steamboat Co. v. Munson*, 117 Mass. 34; *The Batavier*, 40 Eng. L. & Eq. 25; *The Lochlibo*, 3 W. Rob. 310; *Strout v. Foster*, 1 How. (U. S.) 89, 94; *Ure v. Coffman*, 19 How. (U. S.) 56; *The Granite State*, 3 Wall. (U. S.) 310; *The Bridgeport*, 14 Wall. (U. S.) 116, 119; *Amoskeag Mfg. Co., The John Adams*, 1 Cliff.

lided with by a vessel in motion, the latter is *prima facie* in fault, provided the former is anchored in a proper place.<sup>1</sup> To anchor at night in midchannel,<sup>2</sup> or off a coal pier, where vessels are fre-

(U. S.) 404, 413; The Achilles, 13 Phila. (Pa.) 463; The El Dorado, 27 Fed. Rep. 762; The Mary Powell, 31 Fed. Rep. 622.

A ferry boat, knowing the position of an anchored brig, proceeded in a snow squall which obscured the view, so that she came into collision with her. *Held*, that the ferry boat was in fault. The Rockaway, 25 Fed. Rep. 775.

A steamer, although at anchor in a proper place, in the daytime and in fair weather, is bound to avoid a vessel under way subject to special difficulties; for instance, a schooner in a fleet coming out of Hampton Roads with the ebb tide. Wells v. Armstrong, 29 Fed. Rep. 216.

1. The Julia M. Hallock, Sprague (U. S.) 539; The Ogemaw, 32 Fed. Rep. 919; The Brady, 24 Fed. Rep. 300; The George Bell, 3 Hughes (U. S.) 468; The Jeremiah Godfrey, 17 Fed. Rep. 738; The Rockaway, 19 Fed. Rep. 449; Baltimore etc. R. Co. v. Wheeling etc. Transp. Co., 32 Ohio St. 116; The America, 29 Fed. Rep. 304; The Annapolis, 5 L. T., N. S. 326; The George Arkle, 4 L. T., N. S. 290; The Lady Franklin, 2 Low. (U. S.) 220; The Sylph, 4 Blatchf. (U. S.) 24; The Scioto, Davies (U. S.) 359; The City of Augusta, 30 Fed. Rep. 844; The Milwaukee, 2 (U. S.) 509; The Exchange, 10 Blatchf. (U. S.) 168; The Granite State, 3 Wall. (U. S.) 310; Amoskeag etc. Co. v. The John Adams, 1 Cliff. (U. S.) 404; The Echo, 19 Fed. Rep. 453; The Baltic, 2 Ben. (U. S.) 452; The Beaver, 2 Ben. (U. S.) 118; The Helen R. Cooper, 7 Blatchf. (U. S.) 378, aff'g 2 Ben. (U. S.) 67; Mills v. The Nathaniel Holmes, 1 Bond (U. S.) 252; Pierce v. Lang, 1 Low. (U. S.) 65; The Moxey, 1 Abb. Adm. 73; The Maryland, 14 Fed. Rep. 367; Commercial Steamboat Co. v. Dutton, 2 Cliff. (U. S.) 537.

When a vessel in motion comes into collision with one at anchor, the presumption is that the former is in fault, and she can exonerate herself only by showing that it was the fault of the vessel at anchor, or caused by circumstances utterly beyond her control. Bill v. Smith, 39 Conn. 206.

Where a vessel breaks from her moorings, and comes into collision with another vessel, also at anchor, the bur-

den of proof is on the former to show *vis major*, or inevitable accident. The Fremont, 3 Sawy. (U. S.) 571.

The rule that the moving vessel must avoid a collision, does not apply when there is not wind enough to make her mind her helm. Buzzard v. The Petrel, 6 McLean (N. Y.) 491.

2. The Ajace, 14 Phila. (Pa.) 579; The Alabama, 18 Fed. Rep. 831; The Jeremiah Godfrey, 17 Fed. Rep. 738; The City of Milwaukee, 14 Fed. Rep. 365; The Salley, 19 Fed. Rep. 335.

A vessel wrongfully or carelessly interposed in the track of another, so as to render a collision inevitable to the latter, is responsible therefor the same as if the blow was given by her movement directly against the one striking her. The New Jersey, Olc. Adm. 415.

But even if a vessel should anchor in such passageway, without necessity, that will not authorize neglect in any other vessel attempting to pass. Such other vessel is bound to use ordinary care and skill, and if, through want of it, a collision should occur, her owners would be liable to the owners of the anchored vessel for the damages. Knowlton v. Sanford, 32 Me. 148; The Indiana, 1 Abb. Adm. 330.

Two boats, the T and a barge, moored on the opposite sides of a canal, the S with a car float in tow, and in an unfavorable condition of the tide, attempted to pass between the vessels, and collided with the T. *Held*, that the T was also in fault in remaining in her position after the bark moored on the other side, and the damages should be divided. The Margaret J. Sanford, 37 Fed. Rep. 148; The Behera, 14 Phila. (Pa.) 583.

A vessel—*held*, not chargeable with a fault contributing to a collision in anchoring within three hundred feet of the end of a pier contrary to a regulation of the port, especially as it appeared that vessels were in the habit of anchoring where she did. The E. A. Packer, 10 Ben. (U. S.) 520.

A vessel was anchored in the middle of a river 1,900 feet wide. She maintained an anchor light and an anchor watch. There was ample room to pass on either side of her. A steam barge with five boats in tow, instead of keeping off, passed so near that the last

quently passing, is not a proper place.<sup>1</sup> A vessel ought not to be moored and lie in the channel, or entrance to a port, except in cases of necessity; or, if anchored there from necessity, she ought not to remain there longer than the necessity continues. If she does, and a collision takes place with a vessel entering the harbor, she will be considered in fault.<sup>2</sup> A vessel should not be anchored or moored so near to another that the motion of the water, created by passing steamers,<sup>3</sup> the wind, or tides will cause a collision.<sup>4</sup> The vessels must be anchored or moored in the proper

boat struck. The mate of the anchored vessel saw the danger, and might have run out more anchor chain, or ported his helm, but did not. *Held*, that the tow was not in fault, but that damages should be divided between the steam barge and the anchored vessel. *The Ogemaw*, 32 Fed. Rep. 919.

1. *Morten v. Five Canal Boats*, 24 Fed. Rep. 500; *The Lucy D.*, 21 Fed. Rep. 142; *The St. Lawrence*, 19 Fed. Rep. 328; *The Exchange*, 10 Blatchf. (U. S.) 168.

2. *The Scioto, Davies* (U. S.) 359.

Where there is a common and known passageway, in a river for vessels to a wharf, no person has a right, ordinarily, to obstruct such passage by anchoring a vessel upon it, or so near it as to expose other vessels to danger, by compelling them to depart from the passageway. In case of absolute necessity, however, a vessel may lawfully anchor upon such passageway, remaining no longer than the necessity exists. In such case the master must exercise reasonable skill, prudence and care, to give all others their just rights; and whether he performs that duty is a question of fact for the jury. *Knowlton v. Sanford*, 32 Me. 148.

3. *The Greenpoint*, 18 Fed. Rep. 186.

4. *Rogers v. Hurney*, 4 Cliff. (U. S.) 582; *The Lilian M. Vigus*, 22 Fed. Rep. 747; *The Fort Lee*, 31 Fed. Rep. 570; *Meyers v. The American and The Nile*, 38 Fed. Rep. 256; *The Ponca*, 19 Fed. Rep. 223. See *The Charles R. Stone*, 9 Ben. (U. S.) 182; *The Indian v. The Jessie*, 12 L. T., N. S. 586; *The Maggie Armstrong v. The Blue Belle*, 14 L. T., N. S. 340; *The Lidskjalf*, Swa. 117; *The Vivid*, 42 L. J. Adm. 57; 29 L. T., N. S. 375; *Hodkinson v. Fernie*, 2 C. B., N. S. 415; *Vantine v. The Lake*, 2 Wall. Jr. (C. C.) 52; *The John Cottrell*, 34 Fed. Rep. 907; *The Ciampa Amelia*, 41 Fed. Rep. 57; *The Moxey*, 1 Abb. Adm. 73; *The Lincoln*, 1 Low. (U. S.) 46.

The steamboat W was moored outside of another steamboat, the O, alongside of a pier, other steamboats lying astern of them. All were laid up for the winter, the W being securely fastened to the O and the pier. The owner of two barges desiring to take them up into the slip to lie up, and not being able to do so on account of ice, made them fast for the night alongside of the W, being told to moor them there by a harbor-master who was not shown to have any official authority as to the mooring of vessels. At that time it was known that, with a flood tide and an easterly wind, ice was liable to come into the slip with great force. During the night, the tide being flood and the wind easterly, the ice did come in, and carried the barges and the W and the O away from the pier and against those lying astern, and the W was injured by such collision. *Held*, that the injury did not arise from any inevitable accident; that the barges were not properly moored to guard against a danger which was then to be apprehended; that the injury to the W resulted from such improper mooring, and that the barges were liable. *The Energy*, 10 Ben. (U. S.) 158.

The schooner S was towed to a wharf, and berthed on the outside and within two or three feet of the canal boat C, which was unloading. The S was warned by the C to keep off, or both would go aground at low water, and the C be injured; but the S remained where she was, although she could easily have gotten away by employing a tug, if not by her own efforts. When the tide fell the C grounded, and collided with the S, receiving some injury, but finally getting away. On returning to her position, it was found that the S had got several feet closer to the wharf, in consequence of which, at the next low tide, the vessels again collided, the C receiving further injury. The S could easily have moved off at

place,<sup>1</sup> and securely fastened.<sup>2</sup> So due care should be exercised in fastening vessels to their moorings so that they will not unnecessarily interfere with the movements of other boats.<sup>3</sup> Where

high tide before the second collision. *Held*, that she was liable for the damages caused by both collisions. *Call v. The Addie Schlaefer*, 37 Fed. Rep. 382.

Anchoring directly to leeward of another vessel, at a distance of one hundred and twenty-five to one hundred and fifty fathoms, is not of itself negligence. *Julia M. Hallock, Sprague (U. S.)* 539.

1. See *the Jeremiah Godfrey*, 17 Fed. Rep. 738; *The Avon*, 22 Fed. Rep. 905; *Shields v. New York*, 18 Fed. Rep. 748; *Seabrook v. Raft of Railroad cross-ties*, 40 Fed. Rep. 596; *Culbertson v. Southern Belle*, 18 How. (U. S.) 584; *The D. S. Gregory*, 6 Blatchf. (U. S.) 538; *The Margaret J. Sanford*, 30 Fed. Rep. 714; *The Nicholson*, 28 Fed. Rep. 889; *The Canima*, 32 Fed. Rep. 302; *The Halsey*, 28 Fed. Rep. 255.

Where a collision results because the anchored vessel is in an improper place, she is in fault. *Five Canal Boats*, 24 Fed. Rep. 500.

One who has negligently moored his barge to the bank of the Mississippi River cannot recover for damages to it caused by a steamer, whose swell, as she passed in the usual channel, drove the barge ashore. *The Natchez*, 3 Woods (U. S.) 16.

**Anchorage in the middle of a river** about 1,900 feet wide, leaving room on either side for vessels to pass, is not improper. *The Ogemaw*, 32 Fed. Rep. 919.

A pilot having mistaken his course, and not knowing where his boat is, who attempts the dangerous passage of a bridge at night, at the highest rate of speed, and without any look-out, is guilty of negligence. And if, under such circumstances, he collides with a barge moored to a bridge pier, which is out of the usual channel of navigation, and by the collision his own boat is lost, the owners of the boat cannot recover, although the barge was without a light. *Baltimore etc., R. Co. v. Wheeling etc. Transp. Co.*, 32 Ohio St. 116.

When the authorities of a port permit vessels to moor, take in and discharge cargo at a certain buoy, it must be assumed that they sanction the use of the buoy, and treat it as a proper and sufficient mooring-place. *Doward*

*v. Lindsey*; *The William Lindsey*, 5 L. R., P. C. 338. If the vessel is fastened in a place safe and secure, except as rendered otherwise by the negligence of a passing vessel, it is in a proper place, unless fastened in such a manner as to be difficult of removal, in the channel along which vessels were frequently passing. *Foster v. Holly*, 38 Ala. 76.

2. *The Thule*, 3 Woods (U. S.) 670; *The British Empire*, 24 Fed. Rep. 493; *The Wier v. The Padre*, 29 Fed. Rep. 335; *The Titan*, 8 Ben. (U. S.) 7; *The Eloina*, 10 Ben. (U. S.) 458; *The Kolon*, 9 Ben. (U. S.) 197; *The Egyptian*, 1 Moore P. C. C., N. S. 373; *The Louisiana*, 3 Wall. (U. S.) 164; *The Christopher Columbus*, 8 Ben. (U. S.) 239; *The Lion, Sprague (U. S.)* 40.

A vessel, fastened insecurely for a storm, is liable for her consequent collision with another. *The Wier v. The Padre*, 29 Fed. Rep. 355.

Where the anchor of a ship fouled, and it does not appear that the dropping of a second anchor would have been of any avail, the vessel is not liable for the dragging of the anchor against a submarine cable, thereby breaking it. *The Carl Frederick*, 33 Fed. Rep. 589.

A tug, with two heavy car-floats in tow, encountered a squall in the North River. The tug's anchor was insufficient, and the tow drifted against boats moored at a pier. These boats exhibited no lights. *Held*, that the tug alone was in fault for the collision. *Hadden v. The J. H. Rutter*, 35 Fed. Rep. 365.

3. *Price v. The Sontag*, 40 Fed. Rep. 174; *Saulter v. New York etc. S. S. Co.*, 88 N. Car. 123; 43 Am. Rep. 736; *The Quaker City*, 19 Fed. Rep. 141; *The Cornwall*, 8 Ben. (U. S.) 212. See *The Harry*, 15 Fed. Rep. 161; *The Margaret J. Sanford*, 30 Fed. Rep. 714; *The Leo*, 3 Ben. (U. S.) 569.

A canal boat, tied up at a pier, was allowed carelessly to project beyond its end. A vessel, in making a landing, negligently struck her. *Held*, that the damage should be divided, both being in fault. *The Canima*, 17 Fed. Rep. 271.

When there is plenty of room for a vessel to be pulled out from a dock, and she is permitted to strike a vessel the end of which projects slightly over the

a boat is set adrift and collides with another the owner is in fault.<sup>1</sup> But where the fastenings of a vessel are broken by inevitable accident each party must bear his own loss.<sup>2</sup> The fact that a vessel

end of the pier, the former is wholly in fault. *The Martino Cilento*, 22 Fed. Rep. 859. So, a steamboat which, in disregard of warning, on coming into her berth at a pier, backed against a canal boat that had just swung her stern out from the pier, holding on by a line at her bow. *Held*, to be liable for the consequent damages. *The General McCullum*, 8 Ben. (U. S.) 437.

If one ship has given another a foul berth, the owners of the ship giving the foul berth have no right to demand that extraordinary precaution should be taken on board the other ship to avoid a collision. *The Vivid*, 42 L. J., Adm. 57; 29 L. T., N. S. 375.

1. *The Chickasaw*, 38 Fed. Rep. 358. Where a captain allows his sailing vessel to drift with the current in mid-channel of a great navigable thoroughfare in the night, without anchoring his vessel, it is negligence, and no recovery can be had for damages done to such vessel by a propeller accidentally coming in collision with her. 1869, *Parrott v. Knickerbocker Ice Co.*, 2 Sweeney (N. Y.) 93.

A vessel at anchor drifted down on another vessel at anchor, which dropped her starboard anchor after both began to drift. Had the first vessel done the same, no further injury would have resulted, *Held*, that the first vessel, therefore, was liable for injuries resulting from her mistake. *The Mary Fraser*, 26 Fed. Rep. 872.

But where a vessel which had been properly fastened drifted and another was compelled to change her moorings to a more exposed condition where she foundered, *held*, that it was a case of inevitable accident for which the former vessel was not responsible. *The Austria*, 7 Sawy. (U. S.) 434.

2. *The Austria*, 14 Fed. Rep. 298; *A Floating Dock*, 3 Hughes (U. S.) 508; *Doward v. Lindsay*; *The William Lindsay*, 5 L. R., P. C., 338; *The Louisiana*, 3 Wall. (U. S.) 164; *The Avid*, 3 Ben. (U. S.) 434.

Where a vessel, made fast to a wharf by a competent band of stevedores, by fasts which, through long experience, are deemed by them sufficient, through the action of the winds and waves breaks her fastenings and drifts toward a schooner, placing the schooner in

such imminent peril that, in moving to a place of safety, she is capsized and founders, it is a case of inevitable accident. *The Austria*, 14 Fed. Rep. 298.

In an action for damages to plaintiff's wharf, by defendant's schooner being blown against it by a violent gale, plaintiff alleged that the accident might have been avoided if the schooner had been properly fastened to its buoy, or if it had put out to sea when it began to drag towards the wharf, and that the master was negligent in not calling on a steamship nearby to tow the schooner out to sea. The master, mate, and one of the crew of the schooner testified that they did all possible to secure the vessel, and two master mariners testified that they could have done nothing more than was described, and that it would have been impracticable and dangerous to have put out to sea, or for the steamship to have towed the schooner out. *Held*, that a finding for defendants on the ground that the accident was inevitable was warranted. *Stearns v. Hooper*, 78 Cal. 341.

During a very violent gale a brig adrift in the Tyne drove down on a steamer which was lying properly moored to mooring buoys placed thereby the harbor authorities. On the brig striking the steamer, the ring of one of the buoys was carried away, and the steamer got adrift and drove down the river and ultimately came in contact with, and did damage to a bark, whose owner instituted a cause of damage against the steamer in the county court, to recover for the damage done to their vessel by the steamer. At the hearing it was proved that the chain cables of the steamer had been unbent at the time she got adrift, and that no lookout had previously been kept on deck, though it was known that the weather was getting worse. *Held*, that a defence of inevitable accident, set up by the owners of the steamer, was not sustained, and that the steamer was alone to blame for the collision. *The Pladda*, 2 L. R., Adm. Div. 34; 46 L. J., Adm. Div. 61.

**Vessel on Ways.**—Where a vessel, in process of being hauled up on ways for repairs, is so negligently handled, and so insufficiently propped, that she breaks loose and slides into the water, coming into collision with another ves-

"has no business to be where she is," or to go where she goes, is chiefly pertinent as respects her own fault. As respects the other vessel, the question is whether she has any business to be where she is, and whether she contributes to the injury by her fault also.<sup>1</sup> To the inquiry whether a vessel voluntarily moored in an exposed position is or is not in fault because of her exposure, and of her liability to be injured herself, or to injure another vessel by some accident, or mistake, or fault of the latter in approaching her, is a question of practical judgment, to be determined according to all the circumstances of the situation.<sup>2</sup>

**2. Anchor Watch.**—Vessels anchored in the track of other vessels in the night time should keep an anchor watch.<sup>3</sup> He has a right, however, to assume that an approaching vessel is obeying the law; that it has a proper lookout, and is taking the proper precautions to avoid a collision; and hence, when the watch on a vessel at anchor sees another vessel approaching at a distance of about three-quarters of a mile, and sees all her lights clearly and distinctly, he has the right to assume that the lookout on the approaching vessel sees his lights, and will, in due time, adopt the proper manœuvre to pass clear of him.<sup>4</sup> Ordinarily a vessel anchored in the proper place, in the daytime and in fair weather, is not expected or legally required to be on the watch and to stand prepared to take measures to avoid vessels under way and having control of their own motions; but under exceptional circumstances, where a vessel under way is subject to special difficulties or embarrassments in her navigation, some care and precaution on the part of the vessel at anchor may become absolutely prudent and necessary that would not otherwise be obligatory.<sup>5</sup> See

sel, the same maritime rules of law are applicable as in ordinary collision cases. *Baker v. Power*, 14 Fed. Rep. 483.

1. *The Mary Powell*, 31 Fed. Rep. 622.

In case of collision on a river and damage resulting to the vessel of A, where it appears that said vessel was anchored at a place where vessels were prohibited from anchoring, yet if it also appears that the boat belonging to B, which caused the injury, might with ordinary care and attention, have avoided A's vessel and pursued its course, B is answerable to A for the damage done. *Adams v. Wiggins*, 27 Mo. 95.

A steamship, about to make a landing, saw a canal boat, which, while where it ought not to be and while having no one in charge, was not in the way of the steamship, nor in a place where a steamship had a right to go. The steamship, in attempting to make fast to the pier, ran into and sank the canal boat. *Held*, that the steamship was

alone in fault. *The Canima*, 32 Fed. Rep. 302.

2. *The Mary Powell*, 31 Fed. Rep. 622.

3. *The Oscar Townsend*, 17 Fed. Rep. 93; *The Fremont*, 3 Sawy. (U. S.) 571; *The Thomas Lea*, 35 L. T. N. S. 406; *The Worthington*, 19 Fed. Rep. 836; *The Henry Warner*, 29 Fed. Rep. 601; *Buzzard v. The Petril*, 6 McLean (U. S.) 491.

4. *The Avon*, 22 Fed. Rep. 905, 906.

5. *Wells v. Armstrong*, 29 Fed. Rep. 216; *Wells v. Armstrong*, 29 Fed. Rep. 216.

Compare *The Fremont*, 3 Sawy. (U. S.) 571.

A small schooner, having no watch on deck, was lying at anchor inside the Delaware Breakwater on a very dark night, when vessels were constantly arriving for shelter from an approaching storm. Among them was one well manned, which, in proceeding to a proper anchorage, without any fault of either omission or commission on her



**LOOKOUTS, LIGHTS.** So an anchor-watch is not bound to take any active measures to get his vessel out of the way of a vessel under command, approaching, in broad daylight, at the rate of eight knots; nor to hail the approaching vessel, unless he discovers that his vessel is not seen.<sup>1</sup>

**XII. VESSELS AGROUND.**—By the general maritime law those in charge of a vessel aground at night in the fairway of a navigable channel are bound to take proper means to warn others of her position.<sup>2</sup>

**XIII. VESSELS DRIFTING.**—A steamer, with steam up and sails set, is bound to make an effort to avoid a collision with a sailing vessel, which is likely to result from drifting.<sup>3</sup> So when a floating boat follows the course of the current, a steamer approaching must judge of its course, so as to avoid it. This may be done by a proper exercise of skill, which the steamer is bound to use.<sup>4</sup>

**XIV. LOOKOUT—1. Generally.**—All vessels should have a competent lookout stationed in a position to descry approaching vessels at the earliest moment,<sup>5</sup> and the want of an adequate lookout on

part, collided with and sunk the schooner. If a sufficient watch had been on the deck of the latter, the collision might have been avoided. *Held*, that the vessel was not liable. *The Clara*, 102 U. S. 200.

The owners of a vessel moored at a wharf are not bound to keep a watch on board. *Amoskeag etc. Co. v. The John Adams*, 1 Cliff (U. S.) 404.

1. *The Lady Franklin*, 2 Low. (U. S.) 220.

2. *The Industry*, 40 L. J. Adm. 26; 3 L. R., Adm. 303. See *The Elizabeth*, *The Adalia*, 22 L. T., N. S. 74.

In an action for damages by collision, it was shown that the plaintiff's vessel was aground at the mouth of a harbor where no vessel had ever been aground before; that she might have been seen from the defendant's vessel in season for the latter to stand off and avoid the collision. *Held*, that the defendant's not seeing her, and not standing off, but keeping on, and coming into collision with the plaintiff's vessel, did not necessarily make him liable. *Kelsey v. Barney*, 12 N. Y. 425.

3. *Butterfield v. Boyd*, 4 Blatchf. (U. S.) 358.

4. *Pearce v. Page*, 24 How. (U. S.) 228.

5. *The Emily*, Olc. Adm. 132; *The Blossom*, Olc. Adm. 188; *The Germania*, 21 L. T., N. S. 44; *Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 443; *Smyrna etc. Steamboat Co. v. Whilldin*, 4 Harr. 228; *The Indiana*, 1 Abb. Adm. 330; *The Julia David*, 46 L.

J. Adm. Div. 54; *The Thomas Lea*, 35 L. T., N. S. 406; *The Haverton*, 31 Fed. Rep. 563; *Chamberlain v. Ward*, 21 How. (U. S.) 548; *McFarland v. Selby Smelting and Lead Co.*, 17 Fed. Rep. 253; *The Manitoba*, 2 Flip. (U. S.) 241; *The Monticello*, 15 Fed. Rep. 474; *The Roslyn*, 22 Fed. Rep. 687; *The Amboy*, 22 Fed. Rep. 555; *The Edwin H. Webster*, 22 Fed. Rep. 171; *The Geanibanta*, *The Transit*, 1 L. R., Adm. Div. 283; 24 W. R. 1033; *Ward v. The Ogdensburgh*, 5 McLean (U. S.) 622; *The Pavonia*, 23 Blatchf. (U. S.) 403; 26 Fed. Rep. 106; *The State of Texas*, 20 Fed. Rep. 254; *The Luna*, 14 Phila. (Pa.) 495; *McCabe v. Old Dominion S. S. Co.*, 31 Fed. Rep. 234; *Ward v. Armstrong*, 14 Ill. 283; *Netherlands S. S. Co. v. Styles*, 40 Eng. L. & Eq. 19; *Baker v. Lewis*, 33 Pa. St. 301; *St. John v. Paine*, 10 How. (U. S.) 557; *Newton v. Stebbins*, 10 How. (U. S.) 586; *Philadelphia etc. R. Co. v. Kerr*, 33 Md. 331; *The Sturgis v. Boyer*, 24 How. (U. S.) 110; *Whitridge v. Dill*, 23 How. (U. S.) 448; *Hancy v. Baltimore etc. Co.*, 23 How. (U. S.) 287; *The Sciota*, *Davies* (U. S.) 359; *The Twenty-one Friends*, 33 Fed. Rep. 190; *The Goslee v. Shute*, 18 How. (U. S.) 463; *The Racilia*, 25 Fed. Rep. 111; *The Drew*, 25 Fed. Rep. 457; *The Nevada*, 106 U. S. 154; *The Colon*, 8 Ben. (U. S.) 512; *The Esk*, *Liord*, 24 L. T., N. S. 167; *The Pladda*, 2 L. R. Adm. Div. 34; 46 L. J., Adm. Div. 61; *The Raritan*, 32 Fed. Rep. 847; *The Nacoochee*, 24 Blatchf. (U.

board a vessel at sea is a culpable neglect on her part, which will, *prima facie*, render her responsible for injuries received from her in that condition.<sup>1</sup> The duty to keep a lookout is especially incumbent upon a steamer going at a rapid pace in hazy weather, in an ordinary track of vessels trading from one port to another.<sup>2</sup> And it is incumbent upon a steamer backing to keep a lookout well aft,<sup>3</sup> though the rules of navigation do not require vessels to keep a lookout against vessels approaching from the rear and sailing in the same direction.<sup>4</sup> If the ship ahead, however, sees another approaching her from a direction where her lights are not visible, and which vessel she has reason to suppose does not, in

S.) 99; James Adger, 3 Blatchf. (U. S.) 515; The Victor, 1 Brown Adm. 449; The Coleman, 1 Brown Adm. 456; The Wings of the Morning, 5 Blatchf. (U. S.) 15; The Manhasset, 34 Fed. Rep. 408; McCormick v. The Gladys, 35 Fed. Rep. 160; The Gilson, 35 Fed. Rep. 533; Kiernan v. The Leonard Richards, 38 Fed. Rep. 767; The Pennsylvania, 9 Ben. (U. S.) 536; The Cement Rock, 8 Ben. (U. S.) 443; The Manhasset, 34 Fed. Rep. 408. Compare Thomas Martin, 3 Blatchf. (U. S.) 517.

The window of a pilot house on board a steamer was held not to be a proper place for the only lookout. Haney v. Baltimore etc. Co., 23 How. (U. S.) 287; The Ottawa, 3 Wall. (U. S.) 268; Northern Indiana, 3 Blatchf. (U. S.) 92.

The pilot house is not the proper place for the lookout. The Parkersburgh, 5 Blatchf. (U. S.) 247; Hazlette v. Conrad, 1 Dill. (U. S.) 79.

The collision was between a steamer and a barge towed with a hawser by a propeller; the barge was held to be in fault because the propeller's lookout was where he could not see—behind the wheel house—and the propeller with her tow attempted to keep the steamer to starboard in passing, instead of porting her helm as steamers meeting each other should do. New York etc. Transp. Co. v. Philadelphia etc. Nav. Co., 22 How. (U. S.) 461.

It is not fault that the master of a steamboat was not on the hurricane deck, his post of duty, at the time of a collision, when it appears that he was at dinner and the mate was on watch. The Mabel Comeaux, 24 Fed. Rep. 490.

**Ferry Boats.**—A vigilant lookout on ferry boats crossing the East River is required. The America, 10 Blatchf. (U. S.) 155.

1. The Emily, Olc. Adm. 132; The Osseo, 16 Blatchf. (U. S.) 537; The Saratoga, 37 Fed. Rep. 119; The W. J. McCaldin, 35 Fed. Rep. 330; Baker v. Lewis, 33 Pa. St. 301; The Petunia, 8 Ben. (U. S.) 349; The Jeremiah, 10 Ben. (U. S.) 326; The Northern Indiana, 3 Blatchf. (U. S.) 92.

Pilot boats, equally with other vessels, are guilty of gross negligence by running in the night time without a competent lookout stationed forward on the deck. The Blossom, Olc. Adm. 188.

A steamer, in mid ocean, on a dark night, had no lookout on her fore-castle, but had two lookouts on the bridge, one at each end of it. She had her fore trysails set, which obstructed the view ahead from the bridge, and she was going at her utmost speed against a heavy sea. Under the circumstances, the lookouts could not reasonably have been required to remain on the fore-castle. The steamer ran into a sailing vessel and sunk her. *Held*, that, with the speed of the steamer, and the fore-trysail set, the lookout was insufficient, and the steamer was in fault therefor. The Java, 14 Blatchf. (U. S.) 524.

In a collision between two sailing vessels, the one whose duty it was to keep out of the way had no lookout, most of her crew having been disabled by yellow fever. *Held*, that she was not in fault. The Southern Home, 16 Blatchf. (U. S.) 447.

2. The Nevada, 27 L. T., N. S. 720.

3. The Kirkland, 3 Hughes (U. S.) 641. See The Colon, 8 Ben. (U. S.) 512.

In leaving the slip she must keep a lookout astern, and over her side, into the slip, if necessary. The Nevada, 17 Blatchf. (U. S.) 122.

4. Erwin v. Neversink Steamboat Co., 23 Hun (N. Y.) 573; 88 N. Y. 184.

fact, whether keeping a good lookout or not, see her, and is likely to come into collision with her, it is her duty to give some warning to the overtaking ship, not necessarily by exhibiting a light, but by some signal, such as the firing of a gun, the showing a light, or otherwise, which will indicate her whereabouts to the overtaking ship, and call the attention of that ship to the danger of a collision.<sup>1</sup> The precaution of a lookout is not indispensable where he could be of no service,<sup>2</sup> or where the officer of the deck is in full possession of all the information which a lookout could give.<sup>3</sup>

**2. Who Is a Proper Lookout.**—The captain, who attends to the navigation of the vessel, is not a proper lookout, neither is the man at the wheel.<sup>4</sup>

1. The *Anglo-Indian*, 33 L. T. N. S. 233.

2. The *George Murray*, 22 Fed. Rep. 117; *Clark v. The Farragut*, 10 Wall. (U. S.) 334; *Churchill v. The Altentower*, 39 Fed. Rep. 118; *The Elder*, 37 Fed. Rep. 903.

A large steamer overtaking a tug in New York harbor, neglected the rules of navigation applicable to overtaking vessels; probably supposing that the tug would get out of the way, and not noticing that she had two large logs lashed to her sides, so that her movements were impeded. The tug had no lookout, but a lookout would not have enabled her to avoid the collision which occurred. *Held*, that the steamer was responsible. *The Bermuda*, 17 Fed. Rep. 397.

3. The *George Murray*, 22 Fed. Rep. 117.

4. The *Tillie*, 13 Blatchf. (U. S.) 514; *The Blossom*, Olc. Adm. 188; *Whiteridge v. Dill*, 23 How. (U. S.) 448. See *The Milwaukee*, 1 Brown Adm. 313; *The Ottawa*, 3 Wall. (U. S.) 268; *The Hypodame*, 6 Wall. (U. S.) 216; *Northern Indiana*, 3 Blatchf. (U. S.) 92; *The Ottawa*, 3 Wall. (U. S.) 268; *The New York v. Rea*, 18 How. (U. S.) 223; *The City of New York*, 8 Blatchf. (U. S.) 194; *Chamberlain v. Ward*, 21 How. (U. S.) 548; *The Parkersburgh*, 5 Blatchf. (U. S.) 247; *Hazlett v. Conrad*, 1 Dill. (U. S.) 79.

**Sufficiency of, Generally.**—Where a fast and powerful steamer, during a hazy night, had no lookout except the mate and the helmsman, both of whom were in the wheel house, it was held that this was grossly insufficient. *The Ogdensburgh*, 1 Newb. Adm. 139. See *The Parkersburgh*, 5 Blatchf. (U. S.) 247.

The master of a steamboat, standing upon the upper deck some fifteen feet from the water, and about sixty feet from the bow of the boat, is not a sufficient lookout for a steamboat descending the Hudson River, and approaching the city of New York by night. *Steamboat New York v. Rac*, 18 How. (U. S.) 223.

As a general rule, one to whom belongs the responsibility of controlling and directing the conduct of all the affairs on board a vessel is not a proper lookout. *The City of New York*, 8 Blatchf. (U. S.) 194; *The Parkersburgh*, 5 Blatchf. (U. S.) 247.

Where the lookout divided his attention between looking out and reefing sail, is insufficient. *The Twenty-One Friends*, 33 Fed. Rep. 190.

Where the C had two men of experience stationed as lookouts in the "eyes of the ship," there was a sufficient compliance with its duty as to lookouts. *Bradley v. The John Pridgeon, Jr.*, 38 Fed. Rep. 261. See *Philadelphia etc. R. Co. v. Kerr*, 33 Md. 331; *The Germania*, 21 L. T., N. S. 44.

**Captain Acting as Pilot and Lookout.**—

Where the captain of a steamer is acting at the same time as pilot and lookout, the vessel has not a proper lookout, and the owners may be liable for damage caused by such omission. *Bill v. Smith*, 39 Conn. 206.

**Passengers as Lookouts.**—Passengers cannot be regarded as lookouts in any sense known to the maritime law, unless they are specially designated by the master for that purpose. *Amoskeag etc. Co. v. The John Adams*, 1 Cliff. (U. S.) 404.

**Lookout in the Day Time.**—It is necessary that there should be a lookout in the day time. *The New Orleans*, 106

**XV. DEPARTING FROM RULES.**—Where the ordinary rules of navigation are clearly inapplicable, the rule must be modified to meet the exigency of the case and the steamer proceeding according to the rule may, notwithstanding, incur responsibility for a collision.<sup>1</sup> The rules do not compel a vessel to put herself in danger in order to obey them.<sup>2</sup> The consent of one vessel to a violation of the rules by another does not relieve the latter from liability if a collision results;<sup>3</sup> and the fact that a vessel is carrying the mails does not authorize a departure from the rules.<sup>4</sup> Nor does a mere custom of a particular place.<sup>5</sup> To justify a change of the rule, the vessel must show not only that her departure was necessary to avoid immediate danger, but that the course adopted by her was reasonably calculated to avoid that danger.<sup>6</sup> But a very clear case

U. S. 13. See the *Columbia*, 9 Ben. 254.

1. The *Santiago de Cuba*, 14 Phila. (Pa.) 574; The *Santa Claus*, Olc. Adm. 428.

Where two sailing vessels are approaching nearly end on, and one takes a course of safety, thus determining the risk, the other, by taking a course justifiable ordinarily under the sailing rules, but calculated to baffle the efforts of the first to keep out of the way, is in fault if a collision results. The *Elizabeth Jones*, 112 U. S. 514.

The nineteenth article of the English Sailing Rules of 1862, which directs that in "obeying and construing all the other and previous regulations, due regard is to be had to all dangers of navigation, and to any special circumstances existing in any particular case, rendering a departure from such rules necessary, in order to avoid immediate danger," does not prescribe any specific course to be adopted or pursued, since such prescription would necessarily involve on many occasions the destruction of the very ships it was framed to preserve. The *Allan v. The Flora*, 14 L. T., N. S. 860.

2. The *Superior*, 17 Mitch. Mar. Reg. 910; The *Carlton Case*, 10 Ct. of Cl. 485; The *Northern Warrior*, 1 Hask. (U. S.) 314; The *Cornelius C. Vanderbilt*, Abb. Adm. 361.

But it must be proved that a failure to obey the rule was imperative—a mere suggestion that it would have been dangerous is not enough. The *Illinois*, 103 U. S. 208.

3. The *Sammy*, 35 Fed. Rep. 327; The *Greenfaint*, 31 Fed. Rep. 231; The *Dentz*, 29 Fed. Rep. 525; The *Nereus*, 23 Fed. Rep. 448; *Thorp v. The Steamboat Defender*, 1 Bond (U. S.) 397.

The burden of proving that the signals requesting consent to a violation of the rules were understood rests upon the vessel signalling. The *Frostburg*, 25 Fed. Rep. 451; The *Mary Shaw*, 6 Fed. Rep. 918, 923; The *Milwaukee*, Brown Adm. 313; The *Johnson*, 9 Wall. (U. S.) 146, at 156.

4. The *Carroll*, 8 Wall. (U. S.) 302; *Rogers v. The St. Charles*, 19 How. (U. S.) 108; *Haney v. The Louisiana*, Taney's Dec. (U. S.) 602; The *Northern Indiana*, 3 Blatchf. (U. S.) 515; The *James Adger*, 3 Blatchf. (U. S.) 515.

5. The *Friends*, 1 W. Rob. 478; The *Duke of Sussex*, 1 W. Rob. 274; The *Gazelle*, 1 W. Rob. 471; The *A. Demorest*, 25 Fed. Rep. 921; *Wheeler v. The Eastern State*, 2 Curt. (U. S.) 141; The *Hand of Providence*, Swa. 107.

If there is a custom which permits Sound steamers to claim exemption from the operation of art. 16 of the International Regulations when approaching the ferries in the East river on the ebb tide, such custom is opposed to law and cannot prevail. The *Pequot*, 30 Fed. Rep. 839.

6. The *Agra and Elizabeth Jenkins*, L. R., 1 P. C. 501. See The *Spring*, L. R., 1 Adm. & Ecc. 99.

Under 25 and 26 Vict., ch. 63, § 25, the thirteenth rule provides that, if two steamships are meeting end on, the helms of both shall be put to port; the nineteenth rule provides that, in obeying the rules due regard must be had to all dangers of navigation, and to the special circumstances of any particular case, rendering a departure from the rules necessary to avoid immediate danger. In a cause of collision between two vessels meeting end on in a river, the defendants alleged that their helm was

must be made out for a departure from a rule of navigation before a vessel can be pronounced in fault for adhering to it.<sup>1</sup>

**XVI. LOCAL REGULATIONS.**—Independent of statutory provisions the managers of vessels may, as respects themselves, make regulations for the passage of their boats. It is competent for them to waive their rights under the statute and adopt a different mode for their boats to pass each other.<sup>2</sup> So a local usage of navigation, forming a part of the common law of a State, is as valid, in respect of the power and legislation of congress on the subject, as is a statute of the State affecting commerce or navigation.<sup>3</sup> Regulations instituted by the harbor master, under the authority of the statute, are of binding efficacy, and form part of the law of the State.<sup>4</sup> So the corporations of cities and towns on navi-

put a-starboard to avoid a barge. *Held*, that the burden of showing that a departure from the thirteenth rule was necessary lay on the defendants; and, in the absence of evidence to show what became of the barge, they were to blame for the collision. *The Concordia*, L. R., 1 Adm. & Ecc. 93.

1. *The Clement*, 2 Curt. (C. C.) 363.

2. *Moore v. Moss*, 14 Ill. 106, 111; *The Milwaukee*, 1 Brown Adm. 313. See *Malcomson v. General Steam Nav. Co.*, *The Ranger* and *The Cologne*, 4 L. R., P. C. 519; 21 W. R. 273; *The Thomas P. Way*, 30 Fed. Rep. 207; *Hoffman v. Union Ferry Co.*, 68 N. Y. 385.

It being the usage in Chicago harbor for many years for pleasure yachts of less than ten tons to carry a single white light forward of the mast, where it could be seen at any point forward of quarter, the captain of a steamer, familiar with the waters of the harbor and the fact that such yachts carried but one light, is estopped from saying that collision with a yacht was caused by its failure to carry regulation lights. *The Gazelle*, 33 Fed. Rep. 301.

Where well-known usage has sanctioned one course for a steamer ascending, and another for a sail vessel descending a river, the vessel, if required by natural obstructions to navigation to change her course is, after passing them, bound to resume it. Failing to do so, and continuing her course directly into that which an approaching steamer is properly navigating, she is not entitled to recover for a loss occasioned by a collision which the steamer endeavored to prevent by adopting the only means in her power. *The John L. Hasbrouck*, 93 U. S. 405.

The existence of a custom must be

established by the proof in the case in order to justify the failure to comply with the rule. *The Niagara*, 3 Blatchf. (U. S.) 37; *The Washington*, 3 Blatchf. (U. S.) 276.

**Vessel Stemming the Tide.**—The usage is, for vessels having the tide, to keep farther out; those stemming the tide, nearer the shore; and this usage will be considered in questions of collision. *Smyrna etc. Steamboat Co. v. Whillden*, 4 Harr. 228.

3. *Fitch v. Livingston*, 4 Sandf. (N. Y.) 492.

**Hudson River.**—The customs as to the navigation of the North river are in consonance with nautical usages at sea, and the rules regulating such navigation are the same as obtain in regard to sea-going vessels. *The Argus*, Olc. Adm. 304.

It seems that there is no settled usage among those navigating the Hudson river, which requires vessels anchoring over night to take up a position within any particular limits as respects the shore; nor any usage justifying a steamboat, making a night trip, in dispensing, while running in the middle of the river, with any care or precautions to avoid collision, which she would be bound to take if running near the shore. *The Indiana*, 1 Abb. Adm. 330.

**New York Harbor.**—It being the usage, in the harbor of New York, to run steamboats in thick weather, the court refused to hold that both vessels were in fault, so as to justify an apportionment of the damages. *The Sylph*, 4 Blatchf. (U. S.) 24.

4. *Griswold v. Sharpe*, 2 Cal. 17. See *The Grand Republic*, 16 Fed. Rep. 424.

A ferry boat cannot, however, justify under a municipal ordinance which does not purport to regulate the navi-

gable rivers, when authorized by their legislatures, have the right to pass rules and regulations with regard to their landings, and it is the duty of courts of admiralty to respect and uphold them.<sup>1</sup> And where there is a well known rule as to mooring or fastening, it should be followed, and it is immaterial whether it is established by usage or by ordinance.<sup>2</sup> Rules made by a local authority governing the navigation of a river are to be taken as evidence of what it is the duty of vessels to do in the circumstances named therein; and although the mere breach of one or any of them will not be sufficient reason for holding a ship to blame for a collision, yet, if that breach occasions or contributes to the collision, the existence of the rule will afford the best reason for holding the ship violating the rule to be guilty of a breach of duty, and consequently to blame for the collision.<sup>3</sup>

**XVII. DUTIES AFTER COLLISION.**—When a collision takes place which might probably endanger life, it is the duty of the vessel to stay by until the extent of the damage is ascertained,<sup>4</sup> and to render what assistance it may be able to protect life and property.<sup>5</sup>

**XVIII. RULES FIXING LIABILITY FOR COLLISIONS—1. Generally.**—In cases of collisions the prosecuting vessel must not only make it manifest that the loss was occasioned by the fault of those in charge of the colliding vessel,<sup>6</sup> but she must prove that she used all proper precautions and measures to prevent it.<sup>7</sup> She cannot

gation of the river. *E. C. Scranton*, 3 Blatchf. (U. S.) 50.

1. *The Southern Belle*, 1 Newb. Adm. 461; *Harbor Master v. Southernland*, 47 Ala. 511.

**Effect.**—Municipal ordinances concerning vessels are binding only as police regulations. Beyond that they have no force in the admiralty courts. But they may be read, and the court will determine for itself their application to the subject matter. *The Palmetto*, 1 Biss. (U. S.) 140.

2. *Culberton v. Southern Belle*, 18 How. (U. S.) 584; *The Bedford*, 5 Blatchf. (U. S.) 200.

3. *The Raithwaite Hall*, 30 L. T., N. S. 233. See *The Vanderbilt*, 6 Wall. (U. S.) 225.

4. *The Queen of the Orwell*, 11 N. R. 499; *The Germania*, 21 L. T., N. S. 44.

5. *Germania*, 21 L. T., N. S. 44; *The Queen*, 2 L. R., Adm. 354; *The Adriatic*, 33 L. T., N. S. 102.

Although it is the duty of every vessel, whether British or foreign, to render assistance to another which she has injured in collision, the rule will not compel a ship to remain alongside

another so injured so as to run risk of capture by an enemy's fleet. *The Thuringia*, 41 L. J. Adm. 44; 26 L. T., N. S. 446.

6. *The Columbus*, 1 Abb. Adm. 384, 385; *The Haverton*, 31 Fed. Rep. 563; *Steamboat Farmer v. McCraw*, 26 Ala. 189.

7. *The Clara*, 102 U. S. 200; *McCabe v. Old Dominion S. S. Co.*, 31 Fed. Rep. 234, 338; *The Nacoochee*, 28 Fed. Rep. 462; *The Colorado*, 91 U. S. 692; *Karasich v. Hasbrouk*, 28 Wis. 569; *The Boston*, Olc. Adm. 407; *The Haverton*, 31 Fed. Rep. 563; *The New Jersey*, Olc. Adm. 415; *The Neptune*, Olc. Adm. 483; *Ward v. The Ogdensburgh*, 5 McLean (U. S.) 622.

To exonerate a vessel it must be shown that she had taken every reasonable precaution to meet any emergency which might arise, and that she was not guilty of want of ordinary care, caution or maritime skill. *McCabe v. Old Dominion S. S. Co.*, 31 Fed. Rep. 234, 238.

In all cases of collision between a sail vessel and steamer the latter will not be exonerated unless on proof that every precautionary measure, such as

sustain the action merely by convicting the other steamer of negligence or fault in her movements, which conduced to the collision.<sup>1</sup>

**2. Where One Vessel Is in Fault.**—When a collision takes place by the fault of one of the vessels, she is responsible for all the damage.<sup>2</sup> The fact that one boat is in fault will not justify another in the infliction of an injury that can be avoided by the observance of proper skill and care.<sup>3</sup> And, in determining the

slackening the speed, was adopted to avoid the collision. If the steamer conforms to the rules of navigation and the sail vessel does not, still the latter will not be liable unless it appear that such nonconformity, and not the steamer's want of the utmost care, was the sole cause of the accident. *The Fashion*, 1 Newb. Adm. 8.

In *Tuff v. Warman*, 5 C. B., N. S. 573, it is held that mere negligence or want of ordinary care or caution will not, however, disentitle the plaintiff to recover, unless it be such that but therefor, the misfortune could not have happened; nor if the defendant might by the exercise of care on his part have avoided the consequence of the neglect or carelessness of the plaintiff.

1. *The Relief*, Olc. Adm. 104. See *The Martha Brower*, 27 Fed. Rep. 513; *The John S. Smith*, 27 Fed. Rep. 398; *The New Jersey*, Olc. Adm. 415; *The Neptune*, Olc. Adm. 483; *Swift v. Brownell*, 1 Holmes (U. S.) 467; *Tuff v. Warman*, 5 C. B., N. S. 573.

In case of collision the libellants must show due precaution on their part, as well as fault in the respondents. *Fashion v. Ward*, 6 McLean (U. S.) 152; *Griswold v. Sharpe*, 2 Cal. 17.

A vessel out of place is not to be run into with impunity, if she may be avoided by the use of ordinary skill and care. *Cummins v. Spruance*, 4 Harr. (U. S.) 315; *Moore v. Moss*, 14 Ill. 106.

2. *The Scioto*, Davies (U. S.) 359; *McCreedy v. Wells*, 18 How. (U. S.) 89; *Pope v. The R. B. Forbes*, 1 Cliff. (U. S.) 331; *The Carolus*, 2 Curt. (U. S.) 69; *The Greene County Tanner*, 8 Ben. (U. S.) 396; *The Narragansett*, Olc. Adm. 246; *The British America*, 10 Ben. (U. S.) 417; *The Franz Sigel*, 14 Blatchf. (U. S.) 480; *The Woodrup Sims*, 2 Dods. 83; *The Sappho*, 9 Jur. 560; *Reeves v. Ship Constitution*, Gilpin 579; *The Earle Spencer*, 33 L. T., N. S. 235; *Netherlands Steamship Co. v. Styles*, 40 Eng. L. & Eq. 19; *The American Eagle*, 29 Fed. Rep. 302;

*The Manhasset*, 34 Fed. Rep. 408; *The Continental*, 8 Blatchf. (U. S.) 3; *Chase v. Belden*, 117 N. Y. 637; *The City of Chester*, 27 Fed. Rep. 319; *The Robert I. Poulson*, 3 Hughes (U. S.) 494; *The Ellen Tobin*, 8 Ben. (U. S.) 446; *The Haney v. Baltimore etc. Co.*, 23 How. (U. S.) 287; *The Luna*, 14 Phila. (Pa.) 495; *The Osseo*, 8 Ben. (U. S.) 518; *The New Orleans*, 106 U. S. 13; *The Osceola*, 33 Fed. Rep. 719; *The Narragansett*, Olc. Adm. 246; *The Active*, 22 Fed. Rep. 175; *The Abbottsford*, 98 U. S. 440; *The William H. Vanderbilt*, 37 Fed. Rep. 116; *The City of Paris*, 1 Ben. (U. S.) 529; *The E. C. Scranton*, 2 Ben. (U. S.) 25; *Snow v. Hill*, 20 How. (U. S.) 543; *The Ligo*, 2 Hagg. 356; *The Thomas*, 5 Robinson, 345; *Vanderplank v. Miller*, *Moody & Malk*, 169; *Sills v. Brown*, 9 Carr. & Payne 613; *The A. R. Weeks v. The Ephrussi*, 26 Fed. Rep. 654; *The Old Dominion S. S. Co.*, 8 Ben. (U. S.) 221; *The Gevalia and The Vision*, 39 Fed. Rep. 47; *The Tona-wanda*, 11 Phila. (Pa.) 516; *McCreery v. The Jessie Russell*, 38 Fed. Rep. 624; *The Amos C. Barstow*, 8 Ben. (U. S.) 401; *Hunt v. The Mischief*, 32 Fed. Rep. 304.

One vessel brought into immediate jeopardy by another's fault is not liable, even if she has not been manoeuvred with perfect skill and presence of mind. *The Maggie J. Smith v. Walker*, 123 U. S. 349.

3. *The Maria Martin*, 12 Wall. (U. S.) 31. See *Mills v. The Nathaniel Holmes*, 1 Bond (U. S.) 352; *Western Ins. Co. v. The Goody Friends*, 1 Bond (U. S.) 459; *The Haverton*, 31 Fed. Rep. 566.

Some negligence on the part of one in fastening his boats in an exposed position does not excuse gross negligence in another in running into and destroying them. *Bequette v. People's Trans. Co.*, 2 Oreg. 200.

Although the act of fastening a skiff to a snag in the middle of the channel

question of fault with a view to the ascertainment of liability for an injury, the proximate cause of the injury must be regarded. If that proximate cause is found in the improper attempt of the colliding vessel to land, or the inexcusable violence with which it was landed, the respondents are not shielded from liability by proof of negligence or fault on the part of the other vessel which had no connection with the act that produced the injury.<sup>1</sup>

**3. Where Both Are in Fault.**—Where both are in fault the loss is divided.<sup>2</sup> But this rule will not be applied where the fault on

of a harbor where vessels are frequently passing, and in such a manner that it could not be conveniently and expeditiously loosed, is an act of negligence on the part of the owner or person having charge of the skiff, yet if the skiff, being in that situation, is sunk in consequence of the carelessness of a passing vessel, it cannot be said that the fault of so placing the skiff was a proximate cause of the injury, and therefore does not preclude a recovery against the owners of the negligent vessel. *Foster v. Holley*, 38 Ala. 76.

1. *The Maria Martin*, 12 Wall. (U. S.) 31.

2. *The America*, 32 Fed. Rep. 845; *The Columbia*, 23 Blatchf. (U. S.) 268; 25 Fed. Rep. 844; *The Warren*, 23 Blatchf. (U. S.) 282; 25 Fed. Rep. 782; *The Drew*, 22 Fed. Rep. 852; *The Connecticut*, 103 U. S. 710; *The Martello*, 34 Fed. Rep. 71; *McCabe v. Old Dominion S. S. Co.*, 31 Fed. Rep. 234; *Chamberlain v. Ward*, 21 How. (U. S.) 548; *The Haverton*, 31 Fed. Rep. 563; *The Mary Morgan*, 28 Fed. Rep. 333; *The Standard*, 23 Fed. Rep. 207; *Foster v. The Miranda*, 6 McLean (U. S.) 221; *The Howard*, 30 Fed. Rep. 280; *The PAVONIA*, 23 Fed. Rep. 204; *The Roslyn*, 22 Fed. Rep. 689; *The City of Macon*, 20 Fed. Rep. 159; *The Harry*, 15 Fed. Rep. 161; *The N. B. Starbuck*, 29 Fed. Rep. 797; *Williams v. The Whisper*, 37 Fed. Rep. 495; *The Omega*, 5 Hughes (U. S.) 487; *The Captain Miller*, 33 Fed. Rep. 585; *The State of Alabama*, 17 Fed. Rep. 847; *The Wesley A. Grove*, 27 Fed. Rep. 311; *The Seringapatam*, 5 Notes of Cases, 61, 66; 2 W. Rob. 506; *The Sappho*, 9 Jur. 560; *Vaux v. Sheffer*, 8 Moore P. C. 75; *The De Cock*, 5 Month. Law Mag. 303; 2 Law Rep. 311; 22 A. Jur. 464; *The Schooner Catherine v. Dickinson*, 17 How. (U. S.) 170, 177; *Brig James Gray v. The Ship John Fraser*, 21 How. (U. S.) 184, 195; *Rogers v. St'r St. Charles*, 19

*How. (U. S.)* 108; *The Oratava*, 5 Month. Law Mag. 45; *The Rival*, 1 Sprague (U. S.) 128; *The Scioto*, Davies (U. S.) 359; *Lenox v. Winsimmet Co.*, 1 Sprague (U. S.) 160; *Gen. Steam Nav. Co. v. Tonkin*, 4 Moore P. C. 314; *The Monarch*, 1 W. Rob. 21; *The Montreal*, 24 Eng. L. & Eq. 580; *The Victoria*, 3 W. Rob. 49; *Allen v. Mackay*, 1 Sprague (U. S.) 219; *The Nautilus, Ware (U. S.)* 529; *O'Neill v. Sears*, 2 Sprague (U. S.) 52; *The Marcia Tribou*, 2 Sprague (U. S.) 17; *Reeves v. Ship Constitution*, Gilpin (U. S.) 579; *The Seacaucus*, 34 Fed. Rep. 68; *The Scuff*, 32 Fed. Rep. 237; *The Manitoba*, 122 U. S. 97; *The Michael Davitt*, 28 Fed. Rep. 886; *The Stamford*, 27 Fed. Rep. 227; *The City of Atlanta*, 26 Fed. Rep. 456; *The Perkiomen*, 27 Fed. Rep. 573; *Thomas Swann*, 1 Newb. Adm. 158; *Thomas Martin*, 3 Blatchf. (U. S.) 517; *The Hypodame*, 6 Wall. (U. S.) 216; *Phoenix*, 3 Blatchf. (U. S.) 27; *The Favorita*, 1 Ben. (U. S.) 30; *The Hibernia*, 31 L. T., N. S. 805; *The Fulda*, 31 Fed. Rep. 351; *The Sammy*, 35 Fed. Rep. 327; *The Gilson*, 35 Fed. Rep. 333; *The Fanwood*, 28 Fed. Rep. 373; *The Electra*, 1 Ben. (U. S.) 282; *The Havre and The Scotland*, 1 Ben. (U. S.) 295; *The Scioto*, Davies (U. S.) 359; *Brig James Gray v. Ship John Fraser*, 21 How. (U. S.) 184; *Barrett v. Williamson*, 4 McLean (U. S.) 589; *Halderman v. Beckwith*, 4 McLean (U. S.) 286; *The City of Greenville*, 22 Fed. Rep. 347; *The Alberta*, 23 Fed. Rep. 807; *De Lelle v. The Atlanta*, 34 Fed. Rep. 918; *The Mary Patten*, 2 Low. (U. S.) 196; *The Nacoochee*, 28 Fed. Rep. 462; *Milliken v. The C. H. Northam*, 37 Fed. Rep. 238; *The Garden City*, 19 Fed. Rep. 529; *The Armitage Breasley*, 9 Ben. (U. S.) 108; *The Drew*, 25 Fed. Rep. 457; *The State of Alabama*, 17 Fed. Rep. 847; *The Continental*, 14 Wall. (U. S.) 345; *The Uncle Abe*, 18 Fed. Rep. 270; *The Brothers*, 2 Biss.



(U. S.) 104; *The Magenta*, 2 Abb. (U. S.) 495; *The Louisiana*, 2 Ben. (U. S.) 371; *The Pegasus*, 19 Fed. Rep. 46; *Parkersburg*, 5 Blatchf. (U. S.) 247; *The Bay State*, 11 N. Y. Leg. Obs. 297, aff'g 6 N. Y. Leg. Obs. 198; Abb. Adm. 235; *The Rival*, 1 Sprague (U. S.) 128; *Lenox v. Winisimmet Co.*, 1 Sprague (U. S.) 160; *The Marcia Tribou*, 2 Sprague (U. S.) 17; *The North Star*, 106 U. S. 17; *The Sapphire*, 18 Wall. (U. S.) 51; *The Gray Eagle* 9 Wall. (U. S.) 505; *The John Henry*, 3 Ware (U. S.) 264; *The Mary Morgan*, 28 Fed. Rep. 333; *The Mary Ida*, 20 Fed. Rep. 741; *The Monticello*, 15 Fed. Rep. 474; *The Chas. E. Soper*, 19 Fed. Rep. 844; *The David Dows*, 16 Fed. Rep. 154; *Collins v. Nickerson*, 1 Sprague (U. S.) 128; *Peters v. Warren Ins. Co.*, 1 Story (U. S.) 463, 471; *The Standard*, 23 Fed. Rep. 207; *The B. & C.*, 18 Wall. (U. S.) 543; *The Sam Brown*, 29 Wall. (U. S.) 650; *The Maggie Burke*, 20 Wall. (U. S.) 741; *The Jeremiah Godfrey*, 17 Fed. Rep. 738; *Nauntun v. The Oregon*, 1 Pac. L. Mag. 242; *Kirk v. The Osseo*, 19 Fed. Rep. 844; *The S. Shaw*, 6 Fed. Rep. 93; *The Wings of the Morning*, 5 Blatchf. (U. S.) 15; *The Bedford*, 5 Blatchf. (U. S.) 200; *Cohen v. The Mary T. Wilder*, Taney's Dec. (U. S.) 567; *Elliott v. The Volunteer*, 7 Phila. (Pa.) 568; *The Non Pareille*, 33 Fed. Rep. 524; *Vanderbilt v. Reynolds*, 16 Blatchf. (U. S.) 80; *The Farnley*, 5 Hughes (U. S.) 298; *The C. L. Taylor*, 2 Wash. Ter. 93; *The Fred W. Chase*, 31 Fed. Rep. 91; *The S. B. Hume*, 24 Fed. Rep. 296; *The City of Merida*, 24 Fed. Rep. 229; *The S. Anderson*, 27 Fed. Rep. 392; *The Nacoochee*, 22 Fed. Rep. 855; *West Virginia etc. R. Co. v. The Isle of Pines*, 24 Fed. Rep. 498; *The Westernland*, 24 Fed. Rep. 703; *The Lizzie Henderson*, 20 Fed. Rep. 524; *The Helen*, 5 Hughes (U. S.) 116; *Lucas v. Thomas Swann*, 6 McLean (U. S.) 282; *Standard Oil Co. v. The Garden City*, 38 Fed. Rep. 860; *Meigs v. The Northerner*, 1 Wash. Ter. 91; *The City of Paris*, 14 Blatchf. (U. S.) 531; *The Industry*, 27 Fed. Rep. 767; *The Fort Lee*, 31 Fed. Rep. 570; *The Bay State*, 1 Abb. Adm. 235; *The Hattie M. Spraker*, 29 Fed. Rep. 457; *The Plymouth Rock*, 26 Fed. Rep. 40; *The Minnie*, 31 Fed. Rep. 301; *Memphis etc. Packet Co. v. H. C. Yaeger Transp. Co.*, 3 McCrary (U. S.) 259; *Wilson v. Canada Shipping Co.*, 2 L. R., App. Cas. 389; s. c., Nom. *The Lake St. Clair v. The Underwriter*, 36

L. T., N. S. 155; *Williams v. The Whisper*, 37 Fed. Rep. 495; *The Minnie*, 20 Fed. Rep. 543; *The Nereus*, 23 Fed. Rep. 448. *Compare The Martha Brewer*, 27 Fed. Rep. 513; *The Aliwal*, 25 Eng. Law & Eq. 602; *Cummins v. Spruance*, 4 Harr. 315.

If one of the two vessels is a total loss the owners thereof cannot, by virtue of the Limited Liability act, claim a decree for half the damage without first deducting the damage to the other vessel. *The North Star*, 106 U. S. 17.

In an action against two vessels equally in fault, the damages should be divided, any balance not collectible by the libellant against one being collectible against the other. *The Sterling*, 106 U. S. 647.

A fault of one vessel will not excuse any want of care, diligence or skill in another, so as to exempt her from sharing the loss and damage. *The Scioto*, *Davies* (U. S.) 359.

The fact that one of the vessels, colliding through mutual fault, was wholly lost does not prevent recoupment by the other (upon equal division of damages) for half the value of the cargo. *The Hercules*, 20 Fed. Rep. 205.

Where a collision is caused by defective lights on one vessel, and by the want of a lookout on the other and too great speed on her part, both are in fault. *The Titan*, 23 Fed. Rep. 413.

A schooner, going at the rate of seven miles an hour, came into collision with a steamboat going at the rate of fifteen. Had either been going at a more moderate speed, the collision might have been avoided. *Held*, that both were in fault, and that damages should be apportioned. *The Rhode Island*, 17 Fed. Rep. 554.

Where a collision results in part from too high a rate of speed on the steamer's part, and in part from defective lights on the sailing vessel, both are in fault, and the damages should be equally divided. *The Alaska*, 22 Fed. Rep. 548.

In *The David Dows*, 16 Fed. Rep. 154, it is held that the law provides for a division of loss in three cases—where the fault is inscrutable; where there is no fault on either side, and when both parties are guilty of negligence.

**Rule of Common Law.**—The general rule of the common law is, that, if both vessels are to blame, neither can recover damages for injuries caused by the collision; but this rule applies only to faults which operated directly and

one side is flagrant, and on the other so trivial as to leave it in doubt whether it at all contributed to the accident.<sup>1</sup> If the collision occurs by the wilful fault or intentional wrong of both parties, the damages will not be apportioned, but the libel will be dismissed.<sup>2</sup> So if there is reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen.<sup>3</sup> If one has suffered more than the other a decree should be made against the one which suffered least for one-half the difference in their respective losses.<sup>4</sup>

**4. Where Neither Is in Fault.**—If neither be in fault the loss rests where it falls.<sup>5</sup>

immediately to produce the collision. *Steamboat Farmer v. McCraw*, 26 Ala. 189; *Broadwell v. Swigert*, 7 B. Mon. (Ky.) 39; *Rathbun v. Payne*, 19 Wend. (N. Y.) 399; *Barnes v. Cole*, 21 Wend. (N. Y.) 188; *Kelly v. Cunningham*, 1 Cal. 365; *Myers v. Perry*, 1 La. An. 372; *Duggins v. Watson*, 15 Ark. 118; *Dunn v. McComb*, 11 La. An. 325; *Dowell v. The Gen. Steam. Nav. Co.*, 5 Ell. & B. 195; 32 Eng. L. & Eq. 158; *Luxford v. Large*, 5 Car. & P. 421; *Vanderplank v. Miller, Moody & M.* 169; *Lack v. Seward*, 4 Car. & P. 106; *Sills v. Brown*, 9 Car. & P. 601; *Handyside v. Wilson*, 3 Car. & P. 528, 530; per *Best*, C. J., *Vennall v. Garner*, 1 Crompt. & M. 21; 3 Tyrw. 85; *Simpson v. Hand*, 6 Whart. (U. S.) 311; *Clyde Navigation Co. v. Barclay*, 36 L. T., N. S. 379. See also *The Gen. Steam. Nav. Co. v. Mann*, 14 C. B. 127; 26 Eng. L. & Eq. 339, 341; *Union Steamship Co. v. Nottinghams*, 17 Gratt. (Va.) 115; *Baker v. Lewis*, 33 Pa. St. 301; *Digby v. Kenton Iron Co.*, 8 Bush (Ky.) 166; *Halderman v. Beckwith*, 4 McLean (U. S.) 286; *Barrett v. Williamson*, 4 McLean (U. S.) 589; *Lord v. Hazeltine*, 67 Me. 399; *Artic Fire Ins. Co. v. Austin*, 69 N. Y. 470; *Blanchard v. New Jersey Steamboat Co.*, 59 N. Y. 292; *Collinson v. Larkins*, 3 Taunt. (U. S.) 1; *Tuff v. Warman*, 2 C. B., N. S. 740; *The Sisters*, 44 L. J. Adm. 23.

The rule of the common law that contributory negligence prevents a recovery is not applicable in admiralty. *The David Dows*, 16 Fed. Rep. 154.

1. *The M. Dousman*, 1 Newb. Adm. 236; *Ralston v. The State Rights, Crabbe* (U. S.) 22. See *The C. S. Butler, The Baltic*, 30 L. T., N. S., 475; 43 L. J. Adm. 17.

2. *The R. L. Maybey*, 4 Blatchf. (U. S.) 88.

3. *The Grace Girdler*, 7 Wall. (U. S.) 196.

4. *Beatty v. Hanna*, Bk. 30 U. S. L. ed. 1095; *The North Star*, 106 U. S. 17.

5. *The Rebecca Shepherd*, 32 Fed. Rep. 926; *The Sylph*, 4 Blatchf. (U. S.) 24; *Broadwell v. Swigert*, 7 B. Mon. (Ky.) 39; *Myers v. Perry*, 1 La. An. 372; *The Continental*, 14 Wall. (U. S.) 345; *Union S. S. Co. v. New York etc., S. S. Co.*, 24 How. (U. S.) 307, 313; *The Morning Light*, 2 Wall. (U. S.) 550, 561; *The Shannon and The Placida*, 7 Jur. 380; s. c., *nom. The Shannon*, 1 W. Rob. 463; *The Catherine of Dover*, 2 Hagg. Adm. 145, 154; *Jameson v. Drinkald*, 12 J. B. Moore 148; *The Celt*, 3 Hagg. Adm. 328, note; *The Woodrop-Sims*, 2 Dods. 83; *The Thornley*, 7 Jur. 659; *The Ebenezer*, 2 W. Rob. 206; *Fashion v. Wards*, 6 McLean (U. S.) 152; *Duggins v. Watson*, 15 Ark. 118; *Myers v. Perry*, 1 La. An. 372; *The Brig Veruma v. Clark*, 1 Tex. 30; *Cummins v. Spruance*, 4 Harr. (Del.) 315; *Smyrna Steamboat Co. v. Whilldin*, 4 Harr. (Del.) 228; *The Ligo*, 2 Hagg. Adm. 356; *The Moxey, Abb. Adm.* 73; *The Eliza & Abby*, 1 Blatchf. & H. Adm. 435; *Steinback v. Rae*, 14 How. (U. S.) 532; *Reeves v. Ship Constitution, Gilp.* (U. S.) 579; *The Scioto*, 2 Ware (U. S.) 359; *The Itinerant*, 2 W. Rob. 236.

In cases of collision of vessels, occasioned by stress of weather, where neither of the parties is in fault, the owner of the injured ship must bear the loss. *The Brig Veruma v. Clark*, 1 Tex. 30.

Where a collision occurs between two sailing ships in thick and foggy weather, and neither is guilty of negligence in keeping lookout and making proper signals, and neither being able to see or hear the other until immediately before the collision, when they both act promptly, is inevitable acci-

**5. Where Several Are in Fault.**—Where several vessels are all in fault for collision, the damages should be divided between them *pro rata*, subject to the limitation of liability prescribed by the statute.<sup>1</sup>

**6. Negligence Generally.**—The general rule that vessels approaching each other so as to involve a risk of collision are required to exercise such reasonable care to avoid injury as ordinary prudence would suggest, is understood to mean such a degree of care and attention as experience has found reasonable and necessary to prevent injury to others in like cases.<sup>2</sup> It should not be forgotten, however, that these terms are comparative, and always bear a direct relation to the particular circumstances of each case. The increasing probabilities of danger require a corresponding increase of care and vigilance to avoid it. The degree of vigilance which the law exacts, by the requirement of ordinary care, must vary with the probable consequences of negligence, and also with the command of means, to avoid injuring others, possessed by the person on whom the obligation is imposed. Under some circumstances a very high degree of vigilance is demanded by the requirement of ordinary care. Where the consequence of negligence will probably be serious injury to others, and where the means of avoiding the infliction of injury upon others are completely within the party's power, ordinary care requires almost the utmost degree of human vigilance and foresight.<sup>3</sup> A failure to display proper lights,<sup>4</sup>

dent. *The Rebecca Shepherd*, 32 Fed. Rep. 926.

1. *The Doris Eckhoff*, 41 Fed. Rep. 156.

2. *The Philadelphia etc. R. Co. v. Kerr*, 25 Md. 521; *Crary v. Marshall*, 1 E. D. Smith (N. Y.) 530.

3. *Kelsy v. Barney*, 2 Kern. 425; *The Philadelphia etc. R. Co. v. Kerr*, 25 Md. 521.

4. *The Frank P. Lee*, 34 Fed. Rep. 480; *The Nurnberg*, 3 Hughes (U. S.) 505; *The Oliver*, 22 Fed. Rep. 848; *The Excelsior*, 33 Fed. Rep. 554; *Chamberlain v. Ward*, 21 How. (U. S.) 548; *The General Steam Navigation Co. v. Morrison*, 20 Eng. Law & Eq. 267; *The Continental*, 8 Blatchf. (U. S.) 3; *Chase v. Belden*, 117 N. Y. 637; *The Haverton*, 31 Fed. Rep. 563; *The Mary Morgan*, 28 Fed. Rep. 333; *The New Orleans*, 9 Ben. (U. S.) 303; *The John Fenwick*, 3 L. R., Adm. 500; *R. B. Forbes, Sprague* (U. S.) 328; *Dowell v. Steam Nav. Co.*, 38 Eng. L. & Eq. 64; *The City of Chester*, 27 Fed. Rep. 319; *The Robert I. Poulson*, 3 Hughes (U. S.) 494; *The Royal Arch*, 22 Fed. Rep. 457; 22 Blatchf. (U. S.) 209; *The*

*Hercules*, 17 Fed. Rep. 606; *The Pottsville*, 24 Fed. Rep. 655; *Foster v. The Miranda*, 6 McLean (U. S.) 221; *The S. B. Hume*, 24 Fed. Rep. 206; *The Eleanor*, 17 Blatchf. (U. S.) 88; *The Wisconsin*, 23 Fed. Rep. 831; *The Hypodame*, 6 Wall. (U. S.) 216; *The Queen*, 8 Blatchf. (U. S.) 234; *The Mary Lord*, 26 Fed. Rep. 862; *Baker v. The City of New York*, 1 Cliff. (U. S.) 75; *Cohen v. The Mary T. Wilder*, Taney Dec. (U. S.) 567; *Green v. The Adelaide*, Taney Dec. (U. S.) 575.

Noncompliance by a vessel with the provisions of the navigation laws in regard to lights is negligence, which will defeat a recovery by its owners for injuries to it resulting from a collision with another vessel, if the absence of the proper lights in any way contribute to the injury. But where the evidence tends to show that the collision resulted solely from other causes, the question of contributory negligence becomes one of fact. *Whitehall Transp. Co. v. M. J. Steamboat Co.*, 51 N. Y. 369.

When a collision occurs at night, and the lights of one of the ships are not burning at the time when the vessels

or see the lights of another vessel,<sup>1</sup> or mistaking signals,<sup>2</sup> or a failure to have a sufficient lookout,<sup>3</sup> or a helmsman,<sup>4</sup> or slacken speed on approaching another vessel in such a way as to involve a risk of collision,<sup>5</sup> or proceeding at an im-

come in sight, and the court is not satisfied that the want of those lights is occasioned by circumstances over which the crew of the ship had no control, she must, even if the want of the lights did not contribute to the collision, be held to blame under the Merchant Shipping act, 1873, 36 & 37 Vict., ch. 85, § 17. *The Hibernia*, 31 L. T., N. S. 805; 24 W. R. 60.

1. *The Niagara County*, 25 Fed. Rep. 208; *The City of Chester*, 27 Fed. Rep. 319; *The Fanita*, 14 Blatchf. (U. S.) 545; *The Zodiac*, 9 Ben. (U. S.) 171; *The Martha Brower*, 27 Fed. Rep. 513; *The Seacaucus*, 34 Fed. Rep. 68; *The Atlas*, 34 Fed. Rep. 543; *The Englishman*, 37 L. T., N. S. 412; *The Manitoba*, 2 Flip. (U. S.) 241; *The Amboy*, 22 Fed. Rep. 555.

A ferry boat came into collision with a canal boat towed by a tug. The ferry boat did not see the lights of the tug, in dicating that there was a tow, and so started ahead before the tow had got by. *Held*, that the ferry boat was alone in fault. *The Flushing*, 32 Fed. Rep. 334.

Even if the light of one vessel was invisible, the vessel will not on that account be held to have contributed to the collision, where the other vessel has pursued a course which of itself would suffice to produce the collision. *Beal v. Marchais*, *The Bougainville* and *The James C. Stevenson*, 5 L. R., P. C. 316.

2. *The Helena*, 34 Fed. Rep. 425. See *The Santa Claus*, 1 Blatchf. (U. S.) 370; *Seabrook v. Raft of Railroad Cross Ties*, 40 Fed. Rep. 596; *The W. M. Wood*, 31 Fed. Rep. 569; *Nelson v. Leland*, 22 How. (U. S.) 48.

3. *The Julia David*, 46 L. J. Adm. Div. 54; *The Nurnberg*, 3 Hughes (U. S.) 505; *Chamberlain v. Ward*, 21 How. (U. S.) 548; *Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 443; *The Haverton*, 31 Fed. Rep. 563; *McFarland v. Seeby Smelting & Lead Co.*, 17 Fed. Rep. 253; *The Roslyn*, 22 Fed. Rep. 687; *The Amboy*, 22 Fed. Rep. 555; *The Edwin H. Webster*, 22 Fed. Rep. 171; *The Pavonia*, 23 Blatchf. (U. S.) 403; 26 Fed. Rep. 106; *The New*

*Orleans*, 106 U. S. 13; *The W. J. McCaldin*, 35 Fed. Rep. 330; *The Fanita*, 14 Blatchf. (U. S.) 545; *The Zodiac*, 9 Ben. (U. S.) 171; *The Tonawanda*, 11 Phila. (Pa.) 516; *The Nacoochee*, 28 Fed. Rep. 462; *The Raritan*, 32 Fed. Rep. 847; *The Emily*, 1 Blatchf. (U. S.) 236; *Sturgis v. Boyer*, 24 How. (U. S.) 110; *James Adger*, 3 Blatchf. (U. S.) 515; *The Iona*, L. R., 1 P. C. 426; *The Velasquez*, 1 P. C. 494; *The Fort Lee*, 31 Fed. Rep. 570; *The Eleanora*, 17 Blatchf. (U. S.) 88; *The Alabama and the Gamecock*, 1 Ben. (U. S.) 476; *Cianciminos Tow & Transp. Co. v. The Ripple*, 41 Fed. Rep. 63; *The Twenty-One Friends*, 33 Fed. Rep. 190; *The City of New York*, 8 Blatchf. (U. S.) 194; *The Queen*, 8 Blatchf. (U. S.) 234; *The Comet*, 9 Blatchf. (U. S.) 323.

A vessel will not be condemned for a collision, upon the ground of negligence in not keeping a proper lookout, if it clearly appears from the circumstances of the collision that although a proper lookout was not kept, yet he could have been of no service in preventing the collision. *Clark v. The Farragut*, 10 Wall. (U. S.) 334.

A neglect to keep a proper lookout, which does not in any way contribute to a collision, cannot be alleged as a ground on which to recover damages caused by the collision. *Shirley v. The Richmond*, 2 Woods (U. S.) 58.

4. In an action to recover damages for a collision of boats, the fact that the plaintiff's boat was without a helmsman is of no consequence unless the accident was occasioned thereby. *Haley v. Earle*, 30 N. Y. 208.

5. *Hall v. The Buffalo*, 1 Newb. Adm. 115; *The Blenheim*, *The Rona*, *The Ava*, 29 L. T., N. S. 781; *The Columbia*, 27 Fed. Rep. 704; *The Manitoba*, 2 Flip. (U. S.) 241; *The City of Alexandria*, 31 Fed. Rep. 427; *The City of Albany*, 34 Fed. Rep. 812; *The Syracuse*, 9 Wall. (U. S.) 672; *The Aurania*, 29 Fed. Rep. 98; *The Eider*, 37 Fed. Rep. 903; *The Louisiana v. The Isaac Fisher*, 21 How. (U. S.) 1; *The Huntsville*, 8 Blatchf. (U. S.) 228.

proper rate in a fog, or in the dark,<sup>1</sup> or in a channel crowded with ships, are faults that will prevent a recovery or incur liability for a collision when the collision was due to such negligence.<sup>2</sup> Where a vessel is charged for omitting to do something which she ought to have done, there must be clear proof, first, that the thing omitted to be done was clearly within the power of the steamer; secondly, that, if done, it would in all probability have prevented the collision; and, thirdly, that it was an act which would have occurred to any officer of competent skill and experience in com-

1. *McCabe v. Old Dominion S. S. Co.*, 31 Fed. Rep. 234; *The Europa*, 2 Eng. Law & Eq. Rep. 557; *The Britannic*, 39 Fed. Rep. 395; *The Leland*, 19 Fed. Rep. 771; *The St. John*, 29 Fed. Rep. 221; *The Martello*, 34 Fed. Rep. 71; *The S. B. Hume*, 24 Fed. Rep. 296; *The City of Brooklyn*, 1 L. R., Adm. Div. 276; *The Iberia*, 40 Fed. Rep. 893; *The Atter*, 4 L. R., Adm. 203; 22 W. R. 557; *The City of New York*, 8 Blatchf. (U. S.) 194; *The Pennsylvania*, 9 Blatchf. (U. S.) 451; *Morrison v. The Petaluma*, 1 Sawy. (U. S.) 127; *McCready v. Goldsmith*, 18 How. 89; s. c., Abb. Adm. 235; *Newton v. Stebbins*, 10 How. 606; *The Chancellor*, 4 Ben. 164; *Bullock v. Lamar*, 8 Law Rep. 275; *The Blackstone*, 1 Low. 487; *The Monticello v. Mollison*, 17 How. 152; *The Hansa*, 5 Ben. 526; *The Aleppo*, 5 Ben. 560; *The Rose*, 2 W. Rob. 1; 7 Jur. 381; *The Louisiana*, 2 Ben. 375; *The Bristol*, 4 Ben. 397; *The Rhode Island*, 1 Blatchf. 363; *Olcott*, 505; *The Virgil*, 2 W. Rob. 201; *The Iron Duke*, 9 Jur. 476; *The Indiana and Buffalo*, Newb. 122; *The Juliet-Erskine*, 6 Notes of C. 633; *The Magna Charter*, 25 Law T. Rep., N. S. 512; *The Londonderry*, 4 Notes of C., Sup. 31; *The Genesee Chief*, 12 How. 448; *Whitridge v. Dill*, 23 How. 454; *Rogers v. The St. Charles*, 19 How. 108; *The Northern Indiana*, 3 Blatchf. 92; *The Westphalia*, 4 Ben. 404; *The Batavier*, 9 Moore P. C. 287; 40 Eng. L. & E. 19; *The John Adams*, 1 Cliff. 404; *The Pacific*, Newb. 32; *The Great Eastern*, 11 Law T., N. S. 5; *The D. S. Gregory*, 6 Blatchf. 166; 2 Ben. 166; *The Fashion v. Ward*, 6 McLean 176; *The Mattewan*, 4 Ben. 107.

2. *The Germania*, 21 L. T., N. S. 44; *The Earl Spencer*, 33 L. T., N. S. 235; *Netherlands Steamship Co. v. Styles*, 40 Eng. L. & Eq. 19; *The Martello*, 34 Fed. Rep. 71; *The Bay State*, 1 Abb. Adm. 235; *The American Eagle*, 29 Fed. Rep. 302; *Northern Indiana*,

3 Blatchf. (U. S.) 92; *Clark v. The Farragut*, 10 Wall. (U. S.) 334; *The Fannie*, 11 Wall. (U. S.) 238; *Shirley v. The Richmond*, 2 Woods (U. S.) 58; *The Starlight*, 1 Hask. 517; *Law v. Baker*, 26 Fed. Rep. 164; *The Franz Sigel*, 6 Ben. (U. S.) 550; *McCabe v. Old Dominion Co.*, 31 Fed. Rep. 235; *The Titan*, 23 Fed. Rep. 413.

Nine miles an hour is an unreasonable speed in a crowded river. *The Florida*, 4 Blatchf. (U. S.) 470. So are twelve and a half knots without a competent lookout. *The Morning Star*, 4 Biss. (U. S.) 67. Over five miles an hour by a tug in a crowded thoroughfare. *The Little Giant*, 2 Biss. (U. S.) 23.

A schooner sailing in the night in a fog, in a common thoroughfare of approaching steam vessels, and heading on a course crossing their regular tracks, and hearing fog signals from them from various directions, was run into by one of such steamers and sunk. *Held—*

1. That the schooner was in fault for not exhibiting a lighted torch, and that nothing short of an absolute certainty that the torch would have done no good, to be established by proof, would justify an omission to obey the rule requiring it to be so exhibited.

2. That she was in fault also because, while on her port tack, she sounded one blast only of her fog-horn at a time, instead of two; the rule of the supervising inspectors of steam vessels on that subject, though not having the force of law as regards a sailing vessel, still having become binding on the schooner as a usage of the sea.

3. That she was in fault also because she was sailing short-handed in a fog, having only two men on deck, one attending to going about, and acting as a lookout, and the other steering and blowing the fog horn. *The Eleanora*, 17 Blatchf. (U. S.) 88.

mand of the steamer.<sup>1</sup> The fact that the plaintiff's boat was a weak one affords no protection to the defendant, if the collision happened through his carelessness.<sup>2</sup> It is an act of negligence to leave a vessel moored with only a single seven-eighth inch chain in a high and increasing wind,<sup>3</sup> or for a steamer to crowd upon a sailing vessel so as to render a danger probable in her situation,<sup>4</sup> or the omission of a ferryboat to carry a whistle,<sup>5</sup> or an attempt on the part of a vessel to pass to the starboard of another vessel in a narrow channel when the vessels are not approaching head to head.<sup>6</sup> If a steamer wrongfully places herself in the track of another vessel, and in such circumstances as allow the other no chance of avoiding a collision, the former is answerable as if she had run into the other.<sup>7</sup> So where a collision occurs in a river through the inability of one of the boats to make a turn which she takes the risk of being able to effect, she alone will be in fault.<sup>8</sup> When a ship carries a latent instrument dangerous to others, those who have control of it are bound to take all reasonable precautions that it shall not cause damage to others.<sup>9</sup>

(a) PRESUMPTION OF NEGLIGENCE.—The mere fact of a collision between two vessels does not in itself raise a presumption of negligence on the part of either; but the circumstances may be such as, upon proof of the situation of the injured vessel, to raise a presumption of want of reasonable care, caution, and skill on the part of the other.<sup>10</sup>

(b) NONOBSERVANCE OF RULES.—Where a collision results from a neglect of any of the rules the vessel disregarding the rule will, in legal contemplation, be guilty of negligence, and liable for the damages,<sup>11</sup> and the highest diligence must be exercised in

1. *Inman v. Reck, The City of Antwerp and The Friedrich*, 37 L. J. Adm. 25; 2 L. R., P. C. 25.

2. *Inman v. Funk*, 7 B. Mon. (Ky.) 538.

3. *The Lotty*, Olc. Adm. 329.

4. *The William Young*, Olc. Adm. 38.

5. *The Electra*, 1 Ben. (U. S.) 282.

6. *Meigs v. The Northerner*, 1 Wash. Ter. 91.

7. *The Narragansett*, Olc. Adm. 246.

8. *The Osceola*, 33 Fed. Rep. 719. See *The Columbia*, 29 Fed. Rep. 716.

9. *H. M. S. Bellerophon*, 32 L. T., N. S. 412; 44 L. J. Adm. 7.

10. *The Bridgeport*, 7 Blatchf. (U. S.) 361.

11. *Shirley v. The Richmond*, 2 Woods (U. S.) 58; *Niagara*, 3 Blatchf. (U. S.) 37; *Washington*, 3 Blatchf. (U. S.) 276; *The City of New York*, 15 Fed. Rep. 624; *The Philadelphia etc. R. Co. v. Kerr*, 25 Md. 521. See *The Hibernia*, 31 L. T., N. S. 805; *The Franconia*, 25 W. R. 197; 2 L. R.,

Adm. Div. 8; *The Scotia*, 14 Wall. (U. S.) 170; *The Wheatsheaf v. The Intrepide*, 13 L. T., N. S. 612; *The America*, 29 Fed. Rep. 304; *Blanchard v. New Jersey Steamboat Co.*, 59 N. Y. 292.

A neglect of the rule for navigating the Mississippi river, that ascending boats shall run the points, and descending boats the bends, which results in a collision and loss, renders the boat disregarding the rule liable for the damages. *Shirley v. The Richmond*, 2 Woods (U. S.) 58.

A steamboat disregarding the law which requires steamboats navigating the East river to keep in the middle of the stream, cannot recover damages received by collision with a steamboat, which was in the proper track. *Bay State*, 3 Blatchf. (U. S.) 48.

In a cause of collision between a sailing ship and a steamer, although the sailing ship may be found to have been guilty of misconduct, or not to have observed the sailing regulations, yet the steamer

obeying the rules.<sup>1</sup> The omission of a known legal duty is such strong evidence of carelessness and negligence, that, in every case of collision happening under such circumstances, the offending vessel should be held to be altogether in fault unless clear and indisputable evidence establishes the contrary.<sup>2</sup> So where a vessel comes suddenly and without warning into imminent peril of a collision—*e. g.*, where two vessels approaching are concealed from each other by intermediate objects until they are close upon each other—the necessary uncertainty and confusion created by the surprise is to be taken into account in determining whether the management of the respective vessels is proper or blameworthy.<sup>3</sup> A failure, however, on the part of one of the two vessels approaching each other, so as to endanger collision, to comply with the requirements of the statute and the rules of navigation does not excuse the other vessel from adopting reasonable precautions to avoid the collision,<sup>4</sup> and where a collision is caused exclusively

will be held culpable if it appears that it was in her power to have avoided the collision. *Inman v. Reck*, *The City of Antwerp* and *The Friedrich*, 37 L. J. Adm. 25; 2 L. R., P. C. 25.

Under a State statute a vessel whose jibboom is standing contrary to law must be held liable for collision caused by it. *The China*, 7 Wall. 70; *The Carolus*, 2 Curt. 269; *The Julia M. Hallock*, 1 Sprague, 539; *Bussy v. Donaldson*, 4 Dall. 206; *Yates v. Brown*, 8 Pick. 23; *Williamson v. Price*, 4 Mart., N. S. 399; *Dennison v. Seymour*, 9 Wend. 1; *Smith v. Condry*, 1 How. 28; *The Lottery*, Olcott 329; *Smith v. The Creole*, 2 Wall. Jr. 514; *The Rescue*, 2 Sprague 16.

A vessel's failure to comply with statutory regulations for preventing collision, such as the law prescribing lights, is not a bar to a recovery for a collision; at most it only raises a presumption of negligence; the question is for the jury. *Hoffman v. Union Ferry Co.*, 68 N. Y. 385.

In a cause of collision between a steamship and a sailing vessel, occasioned by the fault of the steamship, it was proved that the sailing vessel had failed to comply with the admiralty regulations regarding lights, having either shown no lights as she was bound, or if she had any lights, that the lights could not be seen till the collision was too imminent for prevention: *Held*, that the collision might have been avoided if the sailing vessel had obeyed the admiralty regulations, and that though the omission to exhibit proper lights might be immaterial, where it is clearly shown

that the absence of such lights was not the cause of the collision, and did not conduce to it, yet where it is proved that a vessel has not shown proper lights, the onus lies on such vessel to show that the noncompliance with the regulations was not the cause of the collision, which the sailing vessel failed to do; the general rule being, that a vessel must not only obey the admiralty regulations as regards lights, but must obey them in time to prevent an impending collision. *The Fenham*, 3 L. R., P. C. 212; 23 L. T., N. S. 329.

1. *The Propeller Monticello*, *Molli-son*, 17 How. (U. S.) 153. Each vessel is bound to observe the rules of navigation applicable to their respective positions. *The William Young*, Olc. Adm. 38.

A vessel's officers and crew who have complied with all the rules which the circumstances required them to observe will not be held in fault in the event of a collision. *The Negaunee*, 20 Fed. Rep. 918.

2. *Taylor v. Harwood*, Taney Dec. (U. S.) 437.

3. *The Columbus*, 1 Abb. Adm. 384, 385.

Mistakes committed on the injured vessel in moments of peril and excitement produced by the mismanagement of those in charge of the other vessel, are not of a character to relieve such other vessel causing the collision from payment of full damages. *The Belle*, 1 Ben. (U. S.) 317; *The Nichols*, 7 Wall. (U. S.) 656.

4. *The Sunny Side*, 91 U. S. 208; *The Shannon*, 2 Hagg. Adm. 173; *The*

by the negligence of one of the colliding vessels, and the other violates the rules, the latter will not be deemed in fault, if the infringement of the regulations could not, under the circumstances of the case, have contributed to the collision.<sup>1</sup>

(c) ACTS IN EXTREMIS.—A failure to do an act, only to be adopted in *extremis*, is not negligence.<sup>2</sup> So a vessel which, having performed her own duty, is thrown into immediate danger of collision by the wrongful act of another, is not to be held liable if at that moment she adopts a wrong manœuvre.<sup>3</sup>

(d) NEGLIGENCE IN LAUNCHING VESSELS.—It is the duty of those who launch a vessel to do so with the utmost precaution, and to give such notice as is reasonable and sufficient to prevent injury happening to other vessels from the launch.<sup>4</sup> If there is a custom, they are bound to give the customary notice; if there is no custom, then reasonable notice.<sup>5</sup> What is reasonable and sufficient notice depends upon local circumstances; the size and breadth of the river or waters in which the launch takes place, the amount of shipping, and other like matters.<sup>6</sup> A party launching must prove that such notice was given.<sup>7</sup> And vessels navigating a river are bound to observe reasonable signals of an in-

Lady Anne, 1 Eng. L. & E. 670; The Niagara, 17 Law Rep. 336; The St. John v. The Mary Bannatynem, 18 Law Rep. 528; Moore v. Moss, 14 Ill. 106; Hawkins v. Dutchess S. Co., 2 Wend. 452. But see The Oregon v. Rocca, 18 How. 570; Crockett v. Newton, 18 How. 581; Wheeler v. The Eastern State, 2 Curt. 141; The Sylph, 2 Spinks, Ec. & Adm. 75; St. John v. Payne, 10 How. 557; Haney v. Baltimore S. P. Co., 23 How. 562; The Ann Caroline, 2 Wall. 538; Foster v. The Miranda, Newb. 227; 6 McLean 221; The Santa Claus, Olcott 423; The Vanderbilt, Abb. Adm. 361; Allen v. Mackay, 1 Sprague 219; The Hope 1 W. Rob. 154; The Friends, 1 W. Rob. 478.

The fault of a sail vessel in not following the public regulations and rules of navigation as to lights, keeping her course, etc., will not excuse a steam vessel in case of collision unless the latter adopts every reasonable precaution in her power to avoid a collision. The Scotia, 14 Wall. (U. S.) 170.

1. The Englishman, 37 L. T., N. S. 412. See Drew v. Chesapeake, 2 Doug. 33.

2. The Galileo, 28 Fed. Rep. 469.

When the captain of a steamer, upon a vessel being reported lying ahead, immediately gave orders to stop and reverse, but was unable to stop the way of his ship in time to prevent a collision, he is not proved to have been guilty of

negligence because he did not take the further precaution of immediately dropping his anchor. Tyne Steam Shipping Company v. Smith, The C. M. Palmer and the Larnax, 21 W. R. 702; 29 L. T., N. S. 120. See Hodgkinson v. Fernie, 40 Eng. Law & Eq. 306.

**Injudicious Order.**—At the moment a collision is apprehended to be inevitable, an injudicious order, given in the excitement of the moment, is not to be considered the only cause, even if a fault, should the antecedent negligence and conduct of the one party have placed the other in a situation where there was no time for judicious action. The Pacific & The Fashion, 1 Newb. Adm. 8.

3. The Carroll, 8 Wall. (U. S.) 302; The Nov, 30 L. T., N. S. 576.

4. The Glengary, 30 L. T., N. S. 341; The Vianna, Swab. 405; The Andalusian, 2 L. R., Adm. Div. 231; 46 L. J. Adm. Div. 77.

5. The Vianna, Swab. 405.

6. The Glengary, 30 L. T., N. S. 341.

The mere hoisting of a flag is not enough to exempt from responsibility a vessel which, on being launched in a crowded harbor, struck a vessel then passing, the officers and crew of which were ignorant of the intention to launch. Malster v. Humphreys, 5 Hughes (U. S.) 180.

7. The Vianna, Swab. 405; The Glengary, 30 L. T., N. S. 341.



tended launch.<sup>1</sup> When, in launching a vessel in a river, the usual precautions taken in that river have been taken, and the usual general notice that the launch was about to take place has been given, the persons having charge of the launch have performed all they are required to do by law, and no specific notice of the exact moment of the launch is required.<sup>2</sup>

7. **Inevitable Accident.**<sup>3</sup>—Where no negligence or fault can be imputed to either vessel, it will be considered as inevitable accident, though not caused by storm or *vis major*.<sup>4</sup> or, in other words, it is only when the disaster happens from natural causes, without negligence or fault on either side, and both parties have endeavored, by every means in their power, with due care and caution, and with a proper display of nautical skill, to avoid injury.<sup>5</sup>

1. The Vianna, Swab. 405.

A tug- steamer, when being launched in the river Tyne, ran stern foremost into the starboard side of a steamer passing down the river, and negligently being at that place. *Held*, that, notwithstanding the steamer's negligence, the tug might, by ordinary care, such as giving a signal before launching, have avoided the consequences of such negligence, and, therefore, both being to blame, half the damage only was payable by the tug. The United States, 12 L. T., N. S. 33.

2. The Glengary, 3 L. T., N. S. 341; 43 L. J. Adm. 37.

3. See ACCIDENT, 1 Am. & Eng. Encyc. of Law 82.

4. The Pacific and The Fashion, 1 Newb. Adm. 8; The Morning Light, 2 Wall. (U. S.) 550-561; The Java, 14 Wall. (U. S.) 189.

5. Sampson v. United States, 12 Ct. of Cl. 480. See The Louisiana, 3 Wall. (U. S.) 164; Union etc. S. S. Co. v. New York etc. S. S. Co., 24 How. (U. S.) 307; The Uhla, 19 L. T., N. S. 89; The Pladda, 2 L. R., Adm. Div. 34; The Secret, 26 L. T., N. S. 670. See The Almo, The Amelia, 29 L. T., N. S. 118; Doward v. Lindsay, The William Lindsay, 5 L. R., P. C. 338; 29 L. T., N. S. 355.

Where a floating dock, which was properly moored to resist any storm of wind or sea ever known in the locality, was lifted from its moorings by a violent storm, which caused the water in the harbor to rise to a height greatly beyond that ever known before, and drifted against a schooner and damaged her. *Held*, that this was an inevitable accident, and that each party must bear his own loss. A Floating-Dock, 3 Hughes (U. S.) 508.

A collision resulting from the darkness of the night, and without the fault of either party, is an "inevitable accident." The Morning Light, 2 Wall. (U. S.) 550.

A steamer proceeding slowly through a fog ran into a schooner at anchor. *Held*, a case of inevitable accident for which the steamer should not be held liable. Van Dyke v. The Bridgeport, 35 Fed. Rep. 159.

Two schooners came into collision in the fog off Cape Cod. Neither could hear the other's signals. When the collision was imminent both acted promptly. *Held*, that the collision should be deemed due to an inevitable accident, and this, even though possibly if one of the schooners had ported instead of attempting to go astern, the accident might not have happened. The Rebecca Shepherd, 32 Fed. Rep. 926.

A schooner ran foul of a ship, whereby the latter became unmanageable. Her anchor was let go, when she swung round upon and came in collision with a brig lying at anchor. *Held*, that the collision was inevitable, those on board the ship having done what they could to avoid it. The Hibernia, 4 Jur., N. S. 1244.

Two sailing vessels approaching stern on in such a manner as that, under the sailing rules, each would be bound to port, being in a dense fog, only sighted each other at a distance of about two hundred yards. The defendant's vessel, having been close hauled on the port tack, was then preparing to go about, and had eased off her head sheets. Both vessels immediately ported, but came into collision. Only one minute elapsed between the time of sighting and the collision. The plaintiff's petition alleged that the defendant's vessel

Where the collision is the result of an inevitable accident, arising out of one of the perils of navigation, and, in judgment of law, is not attributable to the fault of either party, the settled rule in admiralty is that each vessel must bear her own loss.<sup>1</sup> The defence of inevitable accident can never be sustained where the disaster was caused by negligence. Unless both parties have endeavored by all means in their power to prevent the collision, the defence of inevitable accident is inapplicable.<sup>2</sup> The defence, to succeed, must be supported by proof that everything was done which could and ought to have been done to avoid the collision; and this, though the vessel is in some degree disabled, and so less manageable than she would otherwise have been.<sup>3</sup>

**8. Injury to Freight.**—For an injury done to freight by a collision, the owner of it must share the fate of the vessel on board of which his goods are shipped, and cannot recover, unless upon the facts proved her owners would be entitled to recover.<sup>4</sup>

**XIX. DAMAGES—1. Generally.**—Ships and vessels are held liable for damage occasioned by collision, either on account of the culpable neglect or complicity, direct or indirect, of their owners,<sup>5</sup> or on

neglected to port, and it was stated, in answer to a question by the judge of the admiralty court, that the head sheets of the defendant's vessel were not again hauled aft. On this evidence that vessel was held to blame by the admiralty court, on the ground that she had not executed all the proper manœuvres which she might have executed after sighting the other vessel. *Held*, that the collision was the result of an inevitable accident, the defendant's vessel having done all that could be effected by ordinary care, caution or maritime skill in the short space of time that elapsed; and that the plaintiff, if he meant to rely upon the fact that the head sheets had not been again hauled back, ought to have alleged that fact in his petition as the cause of the collision; the allegation of neglect to port not sufficiently indicating the nature of such omission. *The Marpesia*, 4 L. R., P. C. 212; 8 Moore P. C. C., N. S. 468.

Where a casualty occurs which might have been prevented by the use of known and proper precautions against the danger, it is not an inevitable accident. *Ladd v. Foster*, 31 Fed. Rep. 827.

So a collision between two steam canal boats going in opposite directions on a starlight night, at a speed of less than three miles an hour, cannot be attributed to inevitable accident. *The Thomas Carroll*, 23 Fed. Rep. 912.

The term cannot be applied where a

steam vessel is running through a dense fog at three knots an hour, after her officers have seen, before the fog settled, a fleet of schooners ahead, and have heard their fog-horns, and the steam vessel collides with one of the schooners; nor where two schooners appear at the same moment, through a fog, lying becalmed, the one on the port and the other on the starboard bow of a steam vessel under steerageway, and there is room for the steamer to be carried between them with a proper display of nautical skill, but she collides with one. *Sampson v. United States*, 12 Ct. of Cl. 480.

1. *The Brooklyn*, 4 Blatchf. (U. S.) 365; *Evans v. The John F. Warner*, 4 West. L. Month. 93; *Pharo v. Smith*, 7 Leg. Int. 381; *Beane v. The Mayurka*, 2 Curt. (U. S.) 72; *The Fashion v. Ward*, 6 McLean (U. S.) 152; *Newb. Adm. 8*; *The Nautilus*, 1 Ware (U. S.) 529; *The Moxey*, Abb. Adm. 73; *The North America*, 2 N. Y. Leg. Obs. 67; *The Eliza & Abby*, Blatchf. & H. 435; *The Morning Light*, 2 Wall. (U. S.) 550; *Steinback v. Rae*, 14 How. (U. S.) 532; *The Moxey*, 1 Abb. Adm. 73.

2. *The Clavita and The Clara*, 23 Wall. (U. S.) 1; *The Nacoochee*, 24 Blatchf. (U. S.) 99; 28 Fed. Rep. 462.

3. *The Calcutta*, 12 L. T., N. S. 768; *The Secret*, 26 L. T., N. S. 670.

4. *Duggins v. Watson*, 15 Ark. 118.

5. *The Continental*, 14 Wall. (U. S.)

account of the negligence, unskilfulness or carelessness of those employed in their control and navigation.<sup>1</sup> When employed in navigation ships and vessels should be kept seaworthy and be well manned and equipped for the voyage, and in cases where they are not seaworthy, or not well manned or equipped, and a collision ensues between such a vessel and one without fault in that respect, the owners of the vessel not seaworthy, or not well manned and equipped cannot escape responsibility, if it appears that the unseaworthiness of the vessel, or the want of a competent master, or of a sufficient crew, or of suitable tackle, sails, or other motive power as the case may be, caused or contributed to the disaster, and as the owners of the vessel appoint the master and employ the crew they are also held responsible for their conduct in the control and navigation of the vessel.<sup>2</sup> Although a vessel is

1. The Continental, 14 Wall. (U. S.) 345; Martino v. Boggs, 1 La. An. 74; Cook v. Parham, 24 Ala. 21; Seccombe v. Wood, 2 M. & Rob. 290.

If the steamer at the time of the collision is in the possession and control of the master as owner *pro hac vice* sailing her on shares, the action cannot be maintained against her owners, but the action must be brought against the master. *Somes v. White*, 65 Me. 542. See *Sparks v. Kate French*, 5 Metc. (Ky.) 533.

The master of the vessel on board at the time is responsible for the wrongful act of the vessel, although it was consequential to the neglect or misfeasance of a licensed pilot in securing her improperly to a wharf. *The Lotty, Olc.* Adm. 329.

**Charterers.**—One of several owners, who sails a vessel on shares, under an arrangement between himself and the owners, whereby he in effect has become the charterer, hiring his own crew, paying and victualling them, paying half the port charges, retaining half the net freight after the port charges are taken out, and paying the other half to the general owners, is to be considered the owner *pro hac vice*, and, as such, is liable personally for a tortious collision with another vessel. *Thorpe v. Hammond*, 12 Wall. (U. S.) 408.

In *England* a ship chartered by her owners so that the whole control and management of the ship and crew are vested in the charterers, still remains liable in a proceeding *in rem* of damage done to another ship by the negligence of her crew, although they are the charterer's servants. *The Lymington*,

32 L. T., N. S. 69; 23 W. R. 421. See *Fenton v. Dublin Steam Packet Company*, 1 P. & D. 103.

**Insurers.**—If the vessel is insured the insurers will not be liable. *Mathews v. The Howard Ins. Co.*, 11 N. Y. 9; *The Thetis*, 2 L. R., Adm. 365.

In case of a total loss of a cargo by collision, a libel may be brought by the insurer against the colliding vessel, after notice and proof of the loss and demand of payment, though no payment has been made. *The Manistee*, 5 Biss. (U. S.) 381.

**Contractor.**—A ship is liable for the act of a contractor in sole charge of the ship. *The Ruby Queen*, Lush. 266.

**Dockmaster.**—where a master and crew are bound by statute to obey the directions of a harbor-master in going into dock, and a collision is occasioned by the ship being conducted according to the harbor-master's directions, the ship is not liable. *The Bilbao*, Lush. 149. See *The Cynthia*, 36 L. T., N. S. 184.

2. *The Washington*, 3 Blatchf. (U. S.) 276; *Cook v. Parham*, 24 Ala. 21; *The Continental*, 14 Wall. (U. S.) 345; *Fletcher v. Braddick*, 2 N. R. 182; *Martin v. Temperly*, 4 Q. B. 298; *The Gerard Stuyvesant*, 8 Ben. (U. S.) 183.

*Compare Bowcher v. Noidstrom*, 1 Taunt. 568; *Nicholson v. Mouncey*, 15 East 384; *Huggett v. Montgomery*, 2 N. R. 446; *Rose v. Miles*, 4 M. & S. 101; *Hodgkinson v. Fernie*, 2 C. B., N. S. 415.

Owners of vessels are bound to provide skilful officers, as well as a full complement of men and officers. *Washingtonton*, 3 Blatchf. (U. S.) 276.

When the master of a ship takes all such precautions as a man of ordinary

obliged to employ a pilot or to pay pilot fees, the presence of a pilot on the vessel does not relieve the owner from liability for damage caused by a collision.<sup>1</sup> So where there is joint blame in the master and crew and the pilot, the owners are not exempted from liability for damage by reason of having a licensed pilot on board.<sup>2</sup> When a collision between two vessels is caused by the fault of the one only, she is liable for the immediate damage to the other vessel, and also for damages resulting from reasonable and proper efforts of her master and crew to save her from the condition in which she has been left by the act of the wrongdoer, as well as for any other consequential damages fairly attributable to that act. But, if it is proved that a subsequent stranding of the injured vessel was caused by the negligence of those in charge of her, when they could, by the use of ordinary nautical skill, have avoided it, the vessel originally in fault is responsible for the immediate effect of the collision only, and for no part of the damages by the stranding.<sup>3</sup>

**2. Where the Vessel Is Only Impaired.**—The general rule of damages applicable to collisions which are not wilful is, that the owner of the injured vessel is to receive a remuneration which will place him in the situation in which he would have been but for the collision.<sup>4</sup> Thus the measure of damages is the loss necessarily in-

prudence and skill, exercising reasonable foresight, would use to avert danger, his owners are not held responsible because he may have omitted some possible precaution which the event suggests that he might have resorted to. *Doward v. Lindsay, The William Lindsay*, 5 L. R., P. C. 338.

1. *Cook v. Curtis*, 58 N. H. 507; *The Borussia, Swa.* 94; *The Belgic*, 36 L. T., N. S. 929. See *Martin v. Farnsworth*, 41 How. (N. Y.) Pr. 59; *The Carolus*, 2 *Curtis* (U. S.) 69; *The E. M. Norton*, 15 Fed. Rep. 686; *Smith v. Condry*, 1 How. (U. S.) 28; *The China*, 7 Wall. (U. S.) 53; *Smith v. The Creole*, 2 Wall. Jr. (C. C.) 485. *Compare Griswold v. Sharpe*, 2 Cal. 17.

In a collision, where the court, assisted by trinity masters, decided that both vessels were to blame, but that with respect to one of them the blame was to be attributed to the pilot, who had been taken on board under a local (Liverpool) pilot act, it was held, that such vessel was not to contribute to the loss; and with respect to costs, that each party must pay his own costs. *The Montreal*, 24 Eng. L. & Eq. 580.

2. *Netherlands Steamship Co. v. Styles*, 40 Eng. L. & Eq. 19.

3. *Grand Trunk R. Co. v. Griffin*, 21 Fed. Rep. 733; *Myers v. Perry*, 1 La. An. 372; *The Narragansett*, 1 Blatchf. (U. S.) 211; *The Baltimore*, 8 Wall. (U. S.) 377; *The Countess of Durham*, 9 Monthly Law Mag. (Notes of Cases) 279; *The Pensher, Swa.* 211; *The Linda, Swa.* 306; *The Flying Fish, Brown & L.* 436; s. c., 3 Moore P. C., N. S. 77; *Cummins v. Spruance*, 4 Harr. 315; *The Union*, 2 Biss. (U. S.) 18; *Mould v. The New York*, 40 Fed. Rep. 900; *The City of Lincoln*, 15 Probate D. V. 15.

A boat was run into through the carelessness of a tug. The boat was towed away for repairs and broke her moorings, sustaining further damage. Held, that this latter damage was too remote to be charged to the tug. *The Reba*, 22 Fed. Rep. 546.

In *Cummins v. Spruance*, 4 Harr. 315, it is held, that the measure of damages for collision is the injury sustained, or cost of repairs. The loss of profits by the voyage is too remote and consequential.

4. *The Rhode Island*, 1 Abb. Adm. 100; *The New Jersey*, Olc. Adm. 444; *The Blossom*, Olc. Adm. 188; *Fitch v. Livingston*, 4 Sandf. Sup. Ct. 492; *The Fannie Tuthill*, 17 Fed. Rep. 87; *The Thuringia*, 26 L. T., N. S. 446; 41 L. I.

curred in repairing a vessel and also for its use during the repairs.<sup>1</sup> And in estimating the cost of repairs the expense of raising and clearing out the injured vessel,<sup>2</sup> the expenses and delay of taking the injured vessel from the place of collision to her port of destination, and thence to the most suitable place for repair,<sup>3</sup> charges

Adm. 44; *The Georgiana v. The Anglican*, 21 W. R. 280.

In a libel for collision, where the vessel injured has been repaired, the expense of restoring her to a condition as good as she was in before the injury, is the true measure of damages. The evidence of experts as to their opinion of the nature and extent of the injury is not admissible in such cases, though it may be where a vessel has been run down and abandoned. *Schooner Catharine v. Dickinson*, 17 How. (U. S.) 170.

Where, on a libel for a collision, it appeared there had been no examination and estimate in advance by competent persons, and repairs had been made, altering the injured sloop from a poop-decked to a flush-decked vessel, and at a cost exceeding her value—*held*, that the libellant could only recover the value of his vessel at the time of the accident, with the cost of five days' pumping, necessary to ascertain the extent of her injuries and the cost of repair, and with the damage to his personal property on board at the time. *A Scow*, 8 Ben. (U. S.) 181.

Where an injury by a collision can be repaired at a trifling expense by bolts and braces, this expense, and not that of a new beam, is measure of damages. *The J. T. Easton*, 24 Fed. Rep. 95.

When the wrongdoer takes the injured vessel into his possession to repair the injury he has done, he will be required to show that the boat, when returned, was in substantially as good condition as before the accident. Where, in such case, the boat, when returned, appears to have been repaired in an imperfect manner, and the owner had refused to accept the repairs as satisfactory, the wrongdoer will be held liable for all the additional work necessarily done upon the boat, to put her in such good condition. *The Uncle Abe*, 9 Ben. (U. S.) 502.

Where, in a collision case, a commissioner allowed, as damages, \$800 for the difference between the value of the libellant's vessel after the same was repaired and the value before the injury,

the court, on all the facts, disallowed any damages, holding that she was, after being repaired, in as good condition as before the injury. *The Isaac Newton*, 4 Blatchf. (U. S.) 21.

1. *Missouri R. Packet Co. v. Hannibal etc. R. Co.*, 1 McCrary (U. S.) 281; *Halderman v. Beckwith*, 4 McLean (U. S.) 286; *Barrett v. Williamson*, 13 How. (U. S.) 101; *The Narragansett*, 1 Blatchf. (U. S.) 211, 217; *The Rhode Island*, Olc. Adm. 505; *The Mary Eveline*, 14 Blatchf. (U. S.) 497; *Myers v. Perry*, 1 La. An. 372; *The Seabrook v. Raft of Railroad Cross-ties*, 40 Fed. Rep. 506; *The Fannie Tuthill*, 17 Fed. Rep. 87; *The Granite State*, 3 Wall. (U. S.) 310; *The Cambridge*, 2 Low. (U. S.) 21; *The Mary Steele*, 2 Low. (U. S.) 370.

The colliding vessel cannot diminish the allowance of her market value by proving her actual worth to be less because of her age, imperfect build, or the state of her timbers. *The New Jersey*, Olc. Adm. 444.

The expense of the repairs where they were made affords the measure of recovery, the amount being less than the estimate made at the place of the injury. *The City of Chester*, 34 Fed. Rep. 429.

Where, in a collision case, it appeared that several of the bills for repairs to the injured vessel were exaggerated, with the knowledge and connivance of the master, if not by his procurement, with a view to impose upon the underwriters, and the district court reduced the items to the lowest estimate, it was held, that such reduction was proper. *The Sampson*, 4 Blatchf. (U. S.) 28.

**When both are in fault** no allowance will be made for losses arising from the detention during repairs. *Meigs v. The Northerner*, 1 Wash. Ter. 91.

2. *Vantine v. The Lake*, 2 Wall. Jr. (C. C.) 52; *Fitch v. Livingston*, 4 Sandf. Sup. Ct. 492. See *The Mary Eveline*, 14 Blatchf. (U. S.) 497; *The America*, 11 Blatchf. (U. S.) 485; *Williamson v. Barrett*, 13 How. (U. S.) 101, 110; *The Nebraska*, 3 Ben. (U. S.) 261.

3. *Halderman v. Beckwith*, 4 Mc-

for wharfage while repairing,<sup>1</sup> and wages of the crew necessarily kept on the injured vessel while she is repairing,<sup>2</sup> and the cost of surveying the injuries done by collision, and of superintending the repairs, when necessary to the economical prosecution of the work, are to be taken into account.<sup>3</sup> If the repairs are made not at once, but at different times, voyages intervening, this circumstance should be considered in measuring the damages, and a reasonable deduction made from their cost.<sup>4</sup> In the absence of direct evidence of the amount of the loss of the use of the vessel during the time consumed in making repairs, interest upon the value of the vessel for the time occupied in making such repairs may be awarded as a fair compensation in this respect.<sup>5</sup> So interest on the sum paid for the repairs of the injured vessel is to be added.<sup>6</sup> And also interest on the sum allowed for demurrage.<sup>7</sup> But insurance does not enter into the amount for which the owner of the vessel is liable.<sup>8</sup> The amount paid for salvage service is

Lean (U. S.) 286; Barrett v. Williamson, 4 McLean (U. S.) 589; Fitch v. Livingston, 4 Sandf. Sup. Ct. 492; The Morning Star, 4 Biss. (U. S.) 62; The Benjamin F. Hunt, Jr., 34 Fed. Rep. 816; The Fannie Tuthill, 17 Fed. Rep. 87.

A vessel was injured in a collision caused by the fault of another and was unable to continue her navigation. *Held*, that the expense of a tug to tow her through dangerous navigation to the home port was a proper item of damages; and unless the master in taking her to the home port, instead of going into an immediate port for temporary repairs, acted dishonestly, his action will be respected. The Benjamin F. Hunt, Jr., 34 Fed. Rep. 816.

A vessel having her jibboom carried away and one of her fore chain plates broken in a collision while weighing anchor is justified in putting back for repairs, and is entitled to damages for the detention, where the other vessel was in fault. Wells v. Armstrong, 29 Fed. Rep. 216.

But expenses from the port of departure to the place of collision and of return to the port of repairs will not be allowed in damages. Memphis & St. Louis Packet Co. v. The H. C. Yeeger, 2 McCrary (U. S.) 165.

In a collision cause, in which a steamer and a sailing vessel were both found to be in fault, and the steamer, after the collision had towed the schooner into port, *held*, an allowance might be made for towage, as part of the damage suffered by the steamer, but not for salvage. The Mary Patten, 2 Low. (U. S.) 196.

1. Vantine v. The Lake, 2 Wall. Jr. (C. C.) 52; The James A. Dumont, 34 Fed. Rep. 428; The Fannie Tuthill, 17 Fed. Rep. 87.

2. New Haven Steamboat Co. v. Mayor etc., 36 Fed. Rep. 716; The Naragansett, 1 Blatchf. (U. S.) 211, 217. See Fitch v. Livingston, 4 Sandf. Sup. Ct. 492; The Linda Flor, Swa. 309. Hoffman v. Union Ferry Co., 68 N. Y. 385.

**Personal Effects of Seamen.**—If a vessel is lost by a collision to which the fault of both contributed, the seamen of the lost vessel may recover half the value of their lost personal effects; the master, however, can recover nothing. The City of New York, 25 Fed. Rep. 149.

3. New Haven Steamboat Co. v. Mayor etc., 36 Fed. Rep. 716.

A superintendence on behalf of the libellant and a separate superintendence in the interests of the insurer are unnecessary, and the charge for but one will be allowed. New Haven Steamboat Co. v. Mayor etc., 36 Fed. Rep. 716.

4. The Henry M. Clark, 22 Fed. Rep. 752.

5. The Rhode Island, 2 Abb. Adm. 100. See Atchison v. Steamboat Dr. Franklin, 14 Mo. 63; Fitch v. Livingston, 4 Sandf. (N. Y.) 492; The Alexandria, 10 Ben. (U. S.) 101; The Mary Eveline, 14 Blatchf. (U. S.) 497; The Manitoba, 122 U. S. 97.

6. The Baltic, 3 Ben. (U. S.) 195.

7. The Alexandria, 10 Ben. (U. S.) 101.

8. The City of Norwich, 118 U. S.

chargeable,<sup>1</sup> and so is a reasonable sum for the care and custody of cargo,<sup>2</sup> or loss of freight, but this should be net freight after deducting the expenses of the voyage, not gross freight.<sup>3</sup> Damage suffered by the disabled vessel, in the course of reasonable and proper efforts to save her, is a consequence of the condition in which she is left by the wrongdoer, and is therefore properly chargeable.<sup>4</sup> So actual expenses incurred by the surviving ship in the rescue, support, and return to land of the other's crew is a damage to be shared by both, where both were in fault.<sup>5</sup>

(a) DEMURRAGE.<sup>6</sup>—When the vessel is employed at the time of the collision, or when it appears that she would have been beneficially employed during the period of her detention, it is entirely clear that actual loss has attended the interruption of her engagements.<sup>7</sup> Demurrage is, therefore, a proper subject for the allowances of such damages.<sup>8</sup> The amount of damages is to be resolved by ascertaining the market value of the use of the vessel, or her probable net earnings during the period of her detention, by the best evidence attainable. One way of ascertaining this is by ascertaining what she was earning at the time, or immediately before and after the collision.<sup>9</sup>

468; *The Scotland*, 118 U. S. 507; *The Peshtigo*, 2 Flip. (U. S.) 466.

Where two steamboats collided and were adjudged to pay each one half the damage, and one of the boats received insurance money—*held*, that it was not to be deducted from the share which the other boat was adjudged to pay, even though the underwriters voluntarily released her from all claim for her fault. *Cannon v. The Potomac*, 3 Woods (U. S.) 158.

1. *The Cepheus*, 24 Fed. Rep. 507; *The Narragansett*, 1 Blatchf. (U. S.) 211, 215; *The Abbie C. Stubbs*, 28 Fed. Rep. 719; *The Cambridge*, 2 Low. (U. S.) 21.

The owners of the injured vessel will be allowed salvage expenses and other charges necessarily paid by them in rescuing the vessel and cargo from perils they were placed in by the collision, and it will not be limited to a *quantum meruit* for mere work and labor. *The Narragansett*, Olc. Adm. 246.

2. *The Alexandria*, 10 Ben. (U. S.) 101.

3. *The Heroine*, 1 Ben. (U. S.) 226; *The Abbe C. Stubbs*, 28 Fed. Rep. 719; *The Benares*, 1 Eng. Law & Eq. 637; *The Utopia*, 16 Fed. Rep. 507; *The Star of India*, 35 L. T., N. S. 407; 25 W. R. 377.

Reasonable efforts to secure fresh cargo are required of a vessel, which,

in consequence of a collision, has lost freight, before she can recover dead freight as an item of her damage. *The C. P. Raymond*, 28 Fed. Rep. 765.

4. *The Narragansett*, 1 Blatchf. (U. S.) 211. See *Seabrook v. Raft of Railroad Cross Ties*, 40 Fed. Rep. 596.

5. *Leonard v. Whitwell*, 19 Fed. Rep. 547.

6. See DEMURRAGE, 5 Am. & Eng. Encyc. of Law 548.

7. *The Clarence*, 3 W. Rob. 283; *Williamson v. Barrett*, 13 How. (U. S.) 101; *The Rhode Island*, 2 Blatchf. (U. S.) 113, 114; *The Cayuga*, 7 Blatchf. (U. S.) 385.

8. *Cannon v. The Potomac*, 3 Woods (U. S.) 158; *The Cayuga*, 7 Blatchf. (U. S.) 385; *The Baltic*, 3 Ben. (U. S.) 195; *The Thomas Kiley*, 3 Ben. (U. S.) 228; *Coffin v. The Osceola*, 34 Fed. Rep. 921; *Memphis etc. Packet Co. v. H. C. Yaeger Transp. Co.*, 3 McCrary (U. S.) 259; *Swift v. Brownell*, 1 Holmes (U. S.) 467; *The Stromless*, 1 Low. (U. S.) 153; *The City of Buenos Ayres*, 25 L. T., N. S. 672.

Where a vessel damaged by collision becomes locked by ice while awaiting her turn at the dry dock, the colliding vessel is not liable for the time lost thereby. *The Mina A. Read*, 30 Fed. Rep. 287.

9. *The Margaret J. Sanford*, 37 Fed. Rep. 148.

An exaggerated claim for demurrage

(b) CHANGE OF OWNERSHIP cannot affect the liability of a ship that has injured another in a collision.<sup>1</sup> So where the purchasers of a steamer assume any liability for damages that may have resulted from a collision with another boat, the owners of the latter may avail themselves of the assumption, and recover from the purchasers damages for the injury sustained.<sup>2</sup>

(c) PROOF OF DAMAGES.—The libellant is bound to prove not only the injuries sustained, but also the amount of money necessary to repair such injuries; and an estimate including repairs not proved to have been made necessary by the accident cannot be taken as proof of the amount of damages.<sup>3</sup>

3. Where the Vessel Is a Total Loss.—Where a vessel is sunk by a wrongful collision, under circumstances rendering it improbable that she can be raised and repaired at any advantage, a decree may pass that her whole value be paid as damages, and that the title of the libellants to her be remitted to the claimants of the colliding vessel.<sup>4</sup> And in determining the amount of the loss her

while a vessel injured by a collision is undergoing repairs will not be allowed. For a seventy ton schooner, six years old—*held* that \$15 per day was unreasonable; that \$5 per day was an ample allowance. *The Excelsior*, 17 Fed. Rep. 924.

For a canal boat worth \$1,350—*held* that, under similar circumstances, an allowance of \$3 per day was enough, \$8 per day being claimed. *The Venus*, 17 Fed. Rep. 925.

1. *The Bold Buccleugh*, 2 Eng. Law & Eq. Rep. 536; *Dean v. Richards*, *The Europa*, 2 Moore P. C. C., N. S. 1; *The Charles Amelia*, 2 L. R., Adm. 330.

A prize while in charge of a prize-master and crew, while on her way to the port for adjudication, through her own fault came into collision and sunk another vessel. No claim having been presented, she was duly condemned as a prize and sold and the proceeds paid into the registry. The owners of the sunken vessel and cargo intervened. *Held*, that they were entitled to have their damages assessed and paid out of the proceeds of the vessel before distribution to the captors. (*NELSON*, J., dissenting.) *The Siren*, 7 Wall. (U. S.) 152.

2. *Myers v. Perry*, 1 La. An. 372.

3. *The Tiger Lily*, 14 Fed. Rep. 591.

4. *The Falcon*, 19 Wall. (U. S.) 75; *The Shady Side*, 17 Blatchf. (U. S.) 132; *The Peshtigo*, 2 Flip. (U. S.) 466; *The Ontario*, 2 Low. (U. S.) 40. See *The Cambridge*, 2 Low. (U. S.) 21.

A canal boat lying at a pier in New

York was struck by a steamship and sunk in thirty feet of water. It being impossible to ascertain the amount of her injury as she lay, her master contracted for \$500 to have her raised, which was done. On putting her upon the ways, she was found, after examination and survey, to be not worth repairing, whereupon she was sold at auction for \$100. *Held*, that her owner might recover as damages her value as a total loss, deducting the sum for which she was sold, and, in addition, the cost of raising her and putting her on the ways to be examined. *The Nebraska*, 3 Ben. (U. S.) 261.

In raising a canal boat which had been sunk by a collision, her bow end, to the extent of about one third her length, was broken off, and she was then towed to some flats, where she lay between two and three months, and was then sold at auction for \$18, there being nothing to show that she did not bring all she was supposed to be worth. Her owners were allowed to recover her value as for a total loss. *Deems v. Albany & Canal Line*, 14 Blatchf. (U. S.) 474.

One whose vessel is sunk by a collision in shallow water, cannot abandon her and recover of the vessel in fault as for a total loss, if she can be raised and repaired for less money. And if he delays in raising her he cannot claim an increased expense arising out of the delay. *The Thomas P. Way*, 28 Fed. Rep. 526.

Damages allowed for injuries to a vessel by a collision cannot ordinarily



market price or value at the time of sinking will be the criterion.<sup>1</sup> In ascertaining the value of a vessel sunk in collision when the market was stagnant, and there were no actual sales to furnish a criterion, her cost, with deductions for deterioration, may be resorted to.<sup>2</sup> Compensation will be allowed for the profits which would have been realized upon an existing charter of the vessel, because the charter is itself thereby lost; but this rule does not apply to profits on a personal contract, in which any other fit vessel might be used.<sup>3</sup>

4. **Exemplary damages** may be given for a wilful collision.<sup>4</sup> If exemplary damages are claimed, evidence may be given of acts prior to the injuries complained of, but must be confined to such acts.<sup>5</sup>

5. **Damnum Absque Injuria.**—In case of a collision by mere accident, without fault or negligence of either party, it is *damnum absque injuria*, and neither party can recover.<sup>6</sup>

6. **Limitation of Liability.**—See SHIPPING.

7. **Personal Injuries.**—The limitation of liability, under the act of congress<sup>7</sup> applies to claims by the personal representatives of persons lost on the trip.<sup>8</sup> To recover damages for personal injuries the collision must be the proximate cause of such injuries,<sup>9</sup> and in such cases only the actual damage from physical injury, or

exceed her value at the time of collision, *i. e.*, as for a total loss, with cost of raising, to determine her condition, or to remove her as an obstruction, where that is necessary. To recover more where the vessel has been repaired instead of being abandoned, special circumstances must be shown, proving that the excess accrued notwithstanding the exercise of good faith and ordinary prudence in repairing. *The Venus*, 17 Fed. Rep. 925.

1. *The New Jersey*, Olc. Adm. 444; *The Laura Lee*, 24 Fed. Rep. 483. See *The North Star*, 15 Blatchf. (U. S.) 532; *The Utopia*, 16 Fed. Rep. 507; *The George Bell*, 5 Hughes. (U. S.) 172; *Swift v. Brownell*, 1 Holmes (U. S.) 467.

In assessing damages on total loss by collision, though the cost of construction is competent evidence where no market value is ascertainable, the whole cost should not be given as damage where the vessel could be duplicated for a less sum, and the cost testified to, includes various changes and improvements. *The City of Alexandria*, 40 Fed. Rep. 697.

2. *Leonard v. Whitwill*, 19 Fed. Rep. 547.

In estimating the value of a Mississippi river steamboat, the rule that a

depreciation of twenty per cent. results each year, affords the rule of value ordinarily. *The Laura Lee*, 24 Fed. Rep. 483.

3. *The City of Alexandria*, 40 Fed. Rep. 697.

4. *Smyrna etc. Co. v. Whilldin*, 4 Harr. 228.

Greater damages may be given than the amount of actual injury, if the collision was the result of motive and design. *Ralston v. The State Rights*, Crabbe (U. S.) 22.

5. *Ralston v. The State Rights*, Crabbe (U. S.) 22.

6. *Smyrna etc. Steamboat Co. v. Whilldin*, 4 Harr. 228.

7. Rev. Stat., §§ 4283-5.

8. *The Alpena*, 10 Biss. (U. S.) 436.

9. *The Union*, 2 Biss. (U. S.) 18.

When a steamer through its own fault collided with a skiff in which were the libellant and his son, whereby the son was drowned and the libellant so seriously injured as to confine him to his bed for seven weeks, and render him unfit for labor until the date of the decree and partially disable him for life, and the skiff was broken, the court allowed as damages the necessary cost of repairs to the skiff with compensation for the loss of its use while undergoing repairs, the cost of the cure of libellant,

consequent loss of employment should be allowed. If the collision occurs by the fault of both vessels, and both are before the court, the damages must be apportioned between them; and the seamen on board one vessel can recover only half their damages against the other, because they are disabled by their relation to their own ship and her owners from any recovery against the latter, directly or indirectly.<sup>1</sup>

**8. Loss of or Damage to Cargo.**—Where the owners of a ship or vessel damaged by a collision are carriers of cargo, they may recover for the loss or injury in the suit for the collision.<sup>2</sup> If totally lost, they may recover its full value.<sup>3</sup> The value to be estimated from the value at the port of shipment including expenses of transportation to the place of collision, lading of the cargo, etc., and interest at 6 per cent. per annum,<sup>4</sup> the value of the cargo at the market price at the home port of the injured vessel at the time it would ordinarily have arrived there,<sup>5</sup> its value at the time and place of shipment without including loss of profits which would have been realized by completing the voyage.<sup>6</sup> Where the damages are recovered for the loss of cargo they may properly include an allowance in the nature of freight after the voyage, as far as performed,<sup>7</sup> and which the vessel was earning at the time, deducting expenses<sup>8</sup> or the amount of freight paid to a substituted vessel.<sup>9</sup> The owners of the colliding vessel will not be liable for the loss of goods by a collision unless they are to blame.<sup>10</sup>

also a sum of money as compensation for his sufferings, also a sum equal to the amount of such wages as the libellant with the aid of his son could have earned up to the time of the decree, and compensation for his permanent partial disability. The latter was arrived at by the present allowance of a sum equal to the amount of such income as the ordinary labor of libellant would produce for one-third of the period of his expectation of life according to the mortality tables. *Miller v. The W. G. Hewes*, 1 Woods (U. S.) 363.

The limit of £30 in the Merchant Shipping act, § 510, as the amount of damages payable by the owner of a vessel which has wrongfully caused the death of any of the crew of another vessel, to the family of each seaman, applies only to damages assessed by the board of trade, and not to damages in a suit under § 514 of the act. *Glaholm v. Barker, L. R.*, 2 Eq. 598; *Same v. Same, L. R.*, 1 Ch. 223.

1. *The Queen*, 40 Fed. Rep. 694.

2. *The Commander-in-chief*, 1 Wall. (U. S.) 43; *The Commerce*, 1 Black.

574.

3. *The Russia*, 3 Ben. 479; *The Com-*

*mander-in-chief*, 11 Wall. (U. S.) 43; *The Narragansett*, Olc. 225.

4. *Desty's Ship & Adm.*, § 401; *The Monticello v. Mollison*, 17 How. 152; *The Glaucus*, 1 Low. 371; *The Aleppo*, 7 Ben. 125; *The Anna Maria*, 2 Wheat. 327.

5. *Swift v. Brownell*, 1 Holmes 467; *The Joshua*, Abb. Adm. 215.

6. *Desty's Ship & Adm.*, § 401; *Mary J. Vaughan*, 2 Ben. 47; *Smith v. Condry*, 17 Pet. (U. S.) 20.

7. *The Glaucus*, 1 Low. 366; *The Ann Carolina*, 2 Wall. (U. S.) 538; *The Baltimore*, 8 Wall. (U. S.) 385; *The Rebecca*, Blatchf. & H. 347; *The New Jersey*, Olc. 444; *The Cayuga*, 14 Wall. (U. S.) 278; *The Heroline*, 1 Ben. 226; *Williamson v. Barrett*, 13 How. 101; *Egbert v. Baltimore etc. Co.*, 2 Ben. 225; *Jones v. Whyte*, 2 Jur. 303; *The Canada*, Lush. 586; *Yates v. Whyte*, 4 Bing. N. C. 272; *The Eolides*, 3 Hagg. Adm. 367; *The Rhode Island*, Abb. Adm. 104.

8. *Williamson v. Barrett*, 13 How. 101.

9. *The Yorkshireman*, 2 Hagg. Adm.

30.

10. *Desty's Ship & Adm.*, § 401; *Croe-*

**9. Weak Vessels.**—Where a weak vessel is in a situation to expect some encounters with other vessels, and is responsible for the position assumed by her, she is bound to give notice to others approaching her of any condition rendering her liable to be seriously injured by ordinary contacts; and in default of notice, in such cases, only half damages are given.<sup>1</sup>

**10. Lien for Damages.**—Damage creates a lien on the ship causing the collision,<sup>2</sup> which it carries with it into whosoever hands it may come.<sup>3</sup> So a lien on a vessel for damages by collision takes precedence of all other liens arising prior thereto, including seamen's wages.<sup>4</sup> It is not divested by the removal of the vessel into another jurisdiction,<sup>5</sup> or by sale of vessel.<sup>6</sup> It is inchoate and must be perfected by subsequent proceedings,<sup>7</sup> but it lasts long enough to give the party a reasonable opportunity to enforce it.<sup>8</sup> There is no maritime lien upon the cargo for damages by collision, except to the extent of freight due, though the cargo belonged to the owner of the vessel in fault.<sup>9</sup>

**11. Laches.**—No arbitrary or fixed period of time in delaying the assertion of a maritime lien has been or will be established as an inflexible rule, but the delay which will defeat such a suit must, in every case, depend on the peculiar equitable circumstances of that case. Admiralty denies the privilege of enforcing the lien which has been suffered to lie dormant, without excuse, until the rights of innocent third persons would be prejudiced if it should be recognized.<sup>10</sup>

by *v. Fitch*, 12 Conn. 410; *Williamson v. Grant*, 1 Conn. 487; *The New Jersey*, Olc. 448.

1. *The Syracuse*, 18 Fed. Rep. 328; *The Niagara*, 20 Fed. Rep. 152; *The Reba*, 22 Fed. Rep. 546; *The Chas. R. Stone*, 9 Ben. (U. S.) 182; *The N. B. Starbuck*, 29 Fed. Rep. 797; *The Howard*, 30 Fed. Rep. 280.

2. *Harmer v. Bell*, 7 Moore P. C. C. 267; *The America*, 6 Law Rep., N. S. 264; 8. c., 2 West. L. M. 279; *The Rock Island Bridge Co.*, 6 Wall. 213; *Edwards v. The R. F. Stockton*, *Crabbe* 589; *The Bold Buccleugh*, 3 W. Rob. 220; 2 Eng. L. & Eq. 536. But see *The Volant*, 1 W. Rob. 383; *The Europa*, Brown & L. 87; 2 Eng. L. & Eq. 557.

3. *The Avon*, 1 Brown Adm. 170; *The China*, 7 Wall. 68; *Edwards v. The R. F. Stockton*, *Crabbe* 580; *The America*, 16 Law Rep. 264; *The Amalia*, Brown & L. 151; *The Bold Buccleugh*, 3 W. Rob. 220; *The Alabama*, 1 Ben. 476. And see *The Zollverein*, Swa. 96; *The Gazelle*, 2 W. Rob. 279; *Schuyler v. The Corsica*, 37 How. Pr. 262.

**Freight.**—As to a lien on the freight,

see *The Roeliff*, 38 L. J. Adm. 56; *The Orpheus*, 3 L. R., Adm. 308.

4. *Rusk v. The Freestone*, 2 Bond (U. S.) 234.

5. *The Avon*, 1 Brown Adm. 170. And see *The Zollverein*, Swa. 96.

6. *The Genesee Chief*, 12 How. 443; *The Avon*, 1 Brown Adm. 180; *The Zollverein*, Swa. 96. It follows proceeds on sale of wreck. *Flaherty v. Doane*, 1 Low. 151; *The Clara*, 1 Swab. 1.

7. *Edwards v. The R. F. Stockton*, *Crabbe* 580; *The Bold Buccleugh*, 3 W. Rob. 220; *The China*, 7 Wall. 68; *The America*, 16 Law Rep. 264.

8. *The Europa*, Brown & L. 89. Four years' intervening sale defeats the lien. *The D. M. French*, 1 Low. 43. Twenty months deemed sufficient. *The Admiral*, 18 Law Rep. 91.

9. *The Bristol*, 29 Fed. Rep. 867; *Place v. Norwich etc. L. Co.*, 118 (U. S.) 468. See LIMITATION OF LIABILITY under SHIPPING.

10. *Smith v. Sturgis*, 3 Ben. (U. S.) 330; *The Columbia*, 13 Blatchf. (U. S.) 521; *Harmer v. Bell*, 22 Eng. L. & Eq. 62. See *The Leo*, 8 Ben. (U. S.) 506.

**XX PLEADINGS—1. Generally.**—The pleadings should state the cause of the collision as accurately and distinctly as possible, leaving nothing to inference.<sup>1</sup> A mere general allegation that "she was so carelessly, negligently, unskillfully and recklessly navigated that," etc., is not sufficient.<sup>2</sup> The pleadings should be so framed as to assist not only the party in his statement of the case, but also the court in investigating the truth between the litigants: the defendant in a collision cause cannot rely on a simple negative, but must state the circumstances relating to the collision.<sup>3</sup>

**2. Jurisdiction.**—The admiralty jurisdiction of the courts of the United States extends to cases of collision occurring in a harbor, sound, or navigable river, within a State.<sup>4</sup> But the law of the seas—the law maritime according to the law of nations—furnishes the rule by which to determine the extent of liability for collisions occurring upon the high seas and not the United States courts of admiralty when none of the owners of either vessel are residents of the United States.<sup>5</sup>

**3. Consolidation of Claims.**—Where a party has received injuries from the collision of two vessels, each of which was in fault, they may both be proceeded against in one libel, and the damages apportioned between them equally. At the same time the right may be reserved to the party injured to collect from either party the full amount of damages, in case the other is unable to pay.<sup>6</sup> If one only is found in fault, a decree may be rendered against that one.<sup>7</sup> But if each boat is charged with a distinct and sep-

See *Dean v. Richards*, *The Europa*, 2 Moore P. C. C., N. S. 1, *The China*, 7 Wall. 68; *The America*, 16 Law Rep. 264; *Edwards v. The R. F. Stockton*, Crabbe 580. A libel filed four years after the collision deemed too late. *The D. M. French*, 1 Low. 43. See *ante*, § 84.

Where a libel to recover damages was filed eleven months after the boat had been sunk, and during the interval the steamer had passed into possession of one without notice of the collision, libellants are not guilty of laches, as the crew of the sunken vessel, their most important witnesses, had perished with her. *The Alaska*, 33 Fed. Rep. 107.

1. *The Lady Anne*, 1 Eng. L. & Eq. 670. See *The East Lothian*, 14 Moore P. C. C.; 1 Lush. 241; *The Alhambra*, 33 Fed. Rep. 73.

The pleadings should be confined to the merits of the collision. *The George Arkle*, Lush. 222.

2. *The H. P. Baldwin*, 2 Abb. (U. S.) 257; *The Marpesia*, 4 L. R., P. C. 212; 26 L. T., N. S. 333. Compare *George v. Watts*, 30 L. T., N. S. 60.

It seems that the established rule, which requires a plaintiff in a cause of

damage to state with reasonable certainty the instances of neglect on which he intends to rely, and if he relies on a breach of a statutory rule of navigation, that he should specifically plead that the act done or not done was in violation of that particular rule, does not apply to a case where one vessel is under way and the other incapable of moving. *The Secret*, 26 L. T., N. S. 670.

A plaintiff whose vessel has been run down at anchor, may charge negligence generally, and the burden of proof, the collision proved, is thrown upon the defendant to establish his defence. *The Bothnia*, Lush. 52.

3. *The Why Not*, 2 L. R., Adm. 265; 38 L. J., Adm. 26.

4. *St. John v. Paine*, 10 How. (U. S.) 557; *Newton v. Stebbins*, 10 How. (U. S.) 586. Compare *The St'r. New York v. Rue*, 18 How. (U. S.) 223.

5. *Thommasen v. Whitwell*, 9 Ben. (U. S.) 458. Compare *The British America*, 9 Ben. (U. S.) 516.

6. *The Washington*, 9 Wall. (U. S.) 513; *Atkinson v. The R. B. Hamilton*, 1 Bond (U. S.) 536.

7. *The E. C. Scranton*, 2 Ben. (U. S.)

arate act of collision, without any allegation of privity between them, or concert or unity of purpose, they cannot be joined in the same libel.<sup>1</sup> Seamen and passengers sustaining injuries by collision may be made colibellants with the owners of the vessel, even after an interlocutory decree, no sufficient reason to the contrary appearing.<sup>2</sup> Where several actions are brought against a ship in respect of one collision by different plaintiffs, and several bail bonds given, and the actions are consolidated by order of the court, and the damage pronounced for in the usual course, the court has the power to open the order of consolidation and dis sever the actions, but will not do so unless due cause is shown.<sup>3</sup>

**4. Cross Claims.**—Where there is a cross action, and both come on to be heard together by consent of proctors, the court decides in the cross action according to the facts pleaded and proved in the original action.<sup>4</sup>

**5. Replying.**—A plaintiff may plead new matter in reply, if it is really matter of reply, and not properly a part of the case set up in his behalf.<sup>5</sup> Where the evidence has been taken before an examiner of the court, the plaintiff's counsel is entitled to reply.<sup>6</sup>

**6. Justification.**—It is not a sufficient defence in a libel for collision to set up that a sound boat would not have sustained any damage,<sup>7</sup> or that the owners have already paid the libellants for the damage done by the collision,<sup>8</sup> or that the owners of the injured steamboat have been satisfied by the insurers for the damage.<sup>9</sup> So public convenience, or contract with a department of the government, will not justify an excessive rate of speed.<sup>10</sup> The mere fact that a pilot was on board assisting in the management of the ship and occasionally giving orders at the time would not defeat a recovery against the steamer.<sup>11</sup>

**XXI. EVIDENCE—1. Generally.**—In cases of collision the burden of proof is on the libellant.<sup>12</sup> The burden of proof is on the plaintiff, not only to show negligence on the part of the defendant, but ordinary care on his own part.<sup>13</sup> So where one of the

1. *Atkinson v. The R. B. Hamilton*, 1 Bond (U. S.) 536.
2. *The Queen*, 40 Fed. Rep. 694.
3. *The William Hutt*, Lush. 25.
4. *The Vortigern*, Swa. 518.
5. *The Bothina*, Lush. 52.
6. *The Njukan*, 14 W. R. 973.
7. *The Sam Gaty*, 5 Biss. (U. S.) 190; *Amoskeag Mfg. Co. v. The John Adams*, 1 Cliff. (U. S.) 404.
8. *The Propeller Monticello v. Molli-son*, 17 How. (U. S.) 152.
9. *The Yeager*, 4 Wood (U. S.) 18; 20 Fed. Rep. 653.
10. *James Adger*, 3 Blatchf. (U. S.) 515.
11. *Pope v. The R. T. Forbes*, 1 Cliff. (U. S.) 331.
12. *The Wolverton*, 13 Fed. Rep. 44; *The Ralph M. Hayward*, 12 Fed. Rep. 794, 795; *The Ligo*, 2 Hagg. Adm. 356; *The Edwin H. Webster*, 18 Fed. Rep. 724. See *The Breeze*, 6 Ben. (U. S.) 14.
13. *Drew v. Chesapeake*, 2 Doug. (Mich.) 33; *Morgan v. Sim*, 11 Moore P. C. C. 30; *The Haverton*, 31 Fed. Rep. 563. See *Schenck v. The Fremont*, 1 Bond (U. S.) 57; *Elliott v. The James Nelson*, 1 Pittsb. (Pa.) 6; *Randolph v. The United States*, Newb. 497; *The Relief*, Olc. Adm. 104; *The New Jersey*, Olc. Adm. 415; *The Maresia*, L. R., 4 P. C. 212; *The Sea Nymph*, Lush. 23; *Hall v. Little*, 2 Flap. (U. S.) 153; *Mellon v. Smith*, 2 E. D. Smith (N. Y.) 462. See *The Negaunee*, 20 Fed. Rep. 918.

To sustain an action for damages

vessels neglects an ordinary and proper measure of precaution,<sup>1</sup> or departs from the rule, the burden is on her to show that the collision was not owing to that neglect, or that such a departure was necessary.<sup>2</sup> If the defendants plead inevitable accident alone, the plaintiff must show a *prima facie* case of negligence against the defendants, and the plaintiffs must, therefore, begin.<sup>3</sup> A plaintiff is only entitled to recover *secundum allegata et probata*.<sup>4</sup> Therefore, a party suing cannot recover in full if he fails to prove the case set up in his pleading and evidence, although no fault is proved against his vessel, and fault is established against the other vessel.<sup>5</sup> So in an action for injuries caused by a collision, the

occasioned by collision between two steamboats, it must be shown that the plaintiff was using ordinary care. *Halderman v. Beckwith*, 4 McLean (U. S.) 286; *Barrett v. Williamson*, 4 McLean (U. S.) 589.

Where a collision is caused by the negligence of two vessels, proof that the disaster could have been prevented by one of them is not sufficient to exculpate the other. The entire damage may be recovered from one vessel, though both be in fault, if one only is saved. *The Troy*, 28 Fed. Rep. 861.

1. *The Lion*, Sprague (U. S.) 40; *The Anglo Norman*, *The Jane E. Williams*, 1 Newb. Adm. 492; *The Great Republic*, 23 Wall. (U. S.) 20.

2. *The LaFayette*, 20 Fed. Rep. 319; *The Pennland*, 23 Fed. Rep. 555; *The Alaska*, 22 Fed. Rep. 548; *The Curtis Park*, 19 Fed. Rep. 797; *The Elizabeth Jones*, 112 U. S., 514; *The Elizabeth Jenkins*, L. R., 1 P. C. App. 501; *The Miranda*, 1 Newb. Adm. 227; *The Concordia*, 1 L. R., Adm. 93.

Where there has been a breach of the rules, and a collision ensues, the *prima facie* presumption is that it was occasioned thereby. *The Palestine*, 13 W. R. 111.

It is incumbent upon the vessel claiming the protection of the rule and a departure from the statutory requirement to show—

1. That a proposition to depart from the statute was made by her by means of the signals prescribed by rule 1, and in due season for the other vessel to receive the proposition and act upon it with safety.

2. That the other vessel heard and understood the proposition thus made.

3. That the other vessel accepted the proposition. *The Milwaukee*, 1 Brown Adm. 313.

4. *The Abraham*, 28 L. T., N. S. 775; *The Benmore*, 4 L. R., Adm. 132; 43 L.

J., Adm. 5; overruling *The Thomas Lea*, 38 L. J. Adm. 37; 20 L. T., N. S. 1017. See also *The Otter*, 22 W. R. 557. Compare *The Marpesia*, 4 L. R., P. C. 212.

Where, in case of a collision at sea at night, the defence of inevitable accident is raised, and the main issue is, whether the weather was such that the lights of one vessel could be seen in time to enable the other to keep out of the way—*held*, that the burden is upon libellants to show, not only that their lights were burning, but also that the weather was such that they could be seen a sufficient distance to avoid the collision. *The Florence P. Hall*, 14 Fed. Rep. 408.

4. *The Ann*, Lush. 55; 13 Moore P. C. C. 198; *The Dispatch*, Lush. 98; 14 Moore P. C. C. 83; *The Haswell*, B. & L., 247; *Fashion v. Ward*, 6 McLean (U. S.) 195; *Malton v. Nesbit*, 1 C. & P. 70.

An allegation in a petition that the vessel proceeded against in a collision cause was "considerably further out to the north side of the river than" the other vessel, and improperly ported, and so brought about a collision, is sufficiently proved to entitle the owners of the vessel making the allegation to recover, by showing that the vessel proceeded against was further over to the south side of the river than the other, and improperly ported. The word "considerably" need not be proved to the full extent. *Malcomson v. General Steam Navigation Company*; *The Ranger and The Cologne*, 4 L. R., P. C. C. 519; 9 Moore P. C. C., N. S. 352.

**Application of the Rule.**—The rule that a party seeking redress for an injury can only recover *secundum allegata et probata*, applies only to cases where the averments alleged are material to the issue raised. *The Alice*, *The Rosita*, 2 L. R., P. C. 214.

5. *The North America*, 12 Moore P.

plaintiff is not restricted, in the recovery of damages, to the amount named in his bill of particulars and affidavit, but may, on the trial, prove a greater value, and recover according to his proof, if the amount do not exceed the amount laid in his declaration.<sup>1</sup>

**2. Gist of the Action.**—The gist of the action for collision is negligence, misconduct, or want of nautical skill.<sup>2</sup> And the libellant must show the alleged negligence by a fair preponderance of the evidence; otherwise the libel must be dismissed.<sup>3</sup>

**3. What Admissible.**—The court will admit a log book on production by the officer in whose custody such logs are kept, without requiring the evidence of the person who made the entries.<sup>4</sup> So the books containing the entries made by the coast guard, and sent to the coast guard office, are admissible to prove the state of wind and weather at the time of the collision, without calling the person who made the entries.<sup>5</sup> Where a vessel has been sunk by a collision, it is competent, as bearing upon the question of damages, to prove that the vessel could not be raised, or that it would cost more to do so than the value of the wreck when raised.<sup>6</sup> Evidence of an order, as to the lights, given twelve hours before the collision, is admissible, but not of conversations with respect to them.<sup>7</sup> So evidence that the defendant's boat was racing at the time of the accident is not irrelevant.<sup>8</sup> Where the collision is caused by error induced by excitement from the imminence of the peril, evidence cannot be admitted when the peril itself was brought about by the negligence, etc., of those in charge of the same vessel.<sup>9</sup>

**4. Credibility of Testimony.**—Where the account given on behalf of one of the vessels is consistent and credible, while that given on behalf of the other is inconsistent and irreconcilable with the undoubted course of each, the account given by the former should be taken as true in fixing the liability.<sup>10</sup> Witnesses upon a vessel

C. C. 331; Swa. (U.S.) 358; *The Ancon*, 6 Sawy. (U. S.) 118.

1. *The Steamboat Clipper v. Logan*, 18 Ohio 375.

2. *Cummins v. Spruance*, 4 Harr. 315.

3. *The Joseph W. Gould*, 19 Fed. Rep. 785, 787. See *Butterfield v. Boyd*, 4 Blatchf. (U. S.) 356; *Middlesex Quarry Co. v. The Albert Mason*, 2 Fed. Rep. 321; *The Edwin H. Webster*, 18 Fed. Rep. 724.

4. *The Maria Das Dorias, B. & L.* 27. See *The Newport*, 36 Fed. Rep. 910.

**Erasure Immaterial.**—The log-book of one of the ships produced contained an erasure as to the wind at the time of the collision, but the alteration was rather adverse to the case on behalf of the ship. *Held*, that the erasure was

immaterial. *The Constitution*, 10 Jur., N. S. 831.

5. *The Catherina Maria*, 1 L. R., Adm. 53.

6. *Blanchard v. New Jersey Steamboat Co.*, 59 N. Y. 292.

7. *The Aleppo*, 35 L. J. Adm. 9; 14 L. T., N. S. 228.

8. *Myers v. Perry*, 1 La. An. 372.

9. *The Dexter*, 23 Wall. (U. S.) 69.

Evidence that the pilot, "after the accident, admitted the collision was caused by his neglect, and, within twenty-four hours afterwards, committed suicide by poison," was inadmissible. *Bigley v. Williams*, 80 Pa. St. 107.

10. *The Alhambra*, 25 Fed. Rep. 846; *The S. C. Tryon*, 5 Hughes (U. S.) 161.

A libel to recover damages resulting from a collision will be dismissed where

in motion, looking at another also in motion, cannot determine by the eye, unaided otherwise, with reliable exactness, either her course, distance or speed.<sup>1</sup> The courts attach greater weight to the testimony of witnesses to facts which occurred within their own knowledge, on board their own vessel, than to any opinions or judgments formed by those upon one vessel respecting the management of the other.<sup>2</sup> So loose declarations or admissions extracted from or freely made by portions of a crew directly after a wreck from collision, will have but slight weight in invalidating their deliberate testimony to the facts.<sup>3</sup>

**5. Witnesses.**—In a cause of collision the crew of the vessel proceeded against are competent witnesses, notwithstanding they may be sharers in the profits and losses of the vessel, and do not deny their interest in the suit.<sup>4</sup> Witnesses should, as far as possible, be examined *viva voce* before the court, not upon written in-

the testimony is irreconcilably conflicting, and the probabilities are against the libellant's case. *The Levensons*, 5 Hughes (U. S.) 351; *The Grand Isle*, 34 Fed. Rep. 767.

Where the testimony is conflicting and irreconcilable, the conclusion of the district judge, who saw and heard the witnesses, will be accepted by the circuit court. *Downes v. The Excelsior*, 40 Fed. Rep. 271; *The Hypodame*, 6 Wall. (U. S.) 216.

So where the evidence shows that defendant's vessel displayed unusual lights, which misled the pilot on plaintiff's boat, and the testimony on either side regarding the occurrences immediately before the collision is in direct conflict upon material matters, the verdict of the jury, whose determination rested upon a consideration of the conduct of the vessels at and before the collision, will not be disturbed. *Chase v. Belden*, 117 N. Y. 637.

1. *The Narragansett*, Olc. Adm. 246.

2. *The Governor*, 1 Abb. Adm. 108; *The Osceola*, Olc. Adm. 450. See *The Santa Claus*, Olc. Adm. 428; *The Nessmore*, 41 Fed. Rep. 437.

On a question as to the strength and direction of the wind arising, on the trial of a libel for collision, brought in behalf of a sailing vessel against a steamboat, the testimony of those on board the former, whose movements depend upon the wind, is entitled to more weight than that of those on board the latter, whose movements are independent of it. *Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 443.

So the estimate or judgment of witnesses, formed in the night time,

and expressed orally, or exhibited on charts or diagrams, on a vessel in motion, are of slight weight in determining the relative position and bearing of another vessel, also under motion. *The Argus*, Olc. Adm. 304.

Where competent officers are in their places attentive to their duties, and navigating their vessel in accordance with what can be seen, their testimony that a light was not perceived, which must have been seen if properly burning, is entitled to superior credit, if not outweighed by other circumstances. *The Westfield*, 38 Fed. Rep. 366.

3. *The New Jersey*, Olc. Adm. 415; *The Nessmore*, 41 Fed. Rep. 437.

The settlement by a tug for damages to her tow caused by a collision is a strong practical admission of her own liability, either in whole or in part, therefor. *The Hattie M. Spraker*, 29 Fed. Rep. 457.

4. *The Osceola*, Olc. Adm. 450; *The Hudson*, Olc. Adm. 396; *The Catherine of Dover*, 2 Hagg. 145; *McNally v. The L. P. Dayton*, 30 U. S. 669. See *Gillingham v. Charleston Towboat & Transp. Co.*, 40 Fed. Rep. 649. Compare *The Midlothian*, 15 Jur. 806; 5 Eng. L. & Eq. 556; *The Foyle*, Lush. 10.

The receiver of wrecks has no power under §§ 448, 449 of 17 and 18 Vict., ch. 104, to examine into the question which ship caused the damage to the other by a collision, and in an action for the collision the captain's statement by him taken was held to be inadmissible to show that the damage to the plaintiff's ship was on her starboard bow. *Northard v. Pepper*, 17 C. B., N. S.



terrogatories before an officer of the court prior to the hearing.<sup>1</sup>

**6. Identity Must be Established.**—If the libellant fails to establish the identity of the vessel in fault, the libel must be dismissed.<sup>2</sup>

**XXII. DECREE.**—In collision causes, the court will look at all the allegations of both parties, upon which fault depends, consider which are true, and, not allowing either party to contradict, by proof, what he has alleged, will extract the true case from the entire record and decree accordingly.<sup>3</sup> And in doing this the court will look chiefly to the facts in proof, and will pay but slight attention to the opinions and hypotheses of witnesses, especially those of each ship's company, in respect to the acts of the other.<sup>4</sup> Where there is too much doubt of any substantial damage to warrant a decree, the suit should be dismissed.<sup>5</sup> So the court will refuse to award damages for swearing falsely.<sup>6</sup>

**XXIII. COSTS.**—The vessel in fault should bear the costs.<sup>7</sup> If both vessels were in fault each should pay its own costs,<sup>8</sup> or the costs should be divided,<sup>9</sup> or refused to either.<sup>10</sup> So, where both are in fault, the vessel most in fault bears all the costs,<sup>11</sup> but if a vessel, not in fault, fails to render assistance after the collision, she will be liable for the costs.<sup>12</sup> If neither was to blame, each should bear its own costs.<sup>13</sup> Where damages occur by inevitable accident no costs are allowed,<sup>14</sup> but the power to award

1. A certified copy of an examination taken before a receiver of wrecks cannot be used to discredit the captain in the witness box; the original only can be admitted. *The Emperor, The Zephyr*, 12 W. R. 890.

2. *The Annex No. 3*, 35 Fed. Rep. 560.

A steamer at a pier was run into at night, and at about that time a ferry boat struck something in the neighborhood. *Held*, that the identity of the ferry boat, not being proved, the evidence being conflicting and unsatisfactory, the steamer's libel against the ferry boat must be dismissed. *The Annex No. 3*, 27 Fed. Rep. 516.

3. *The Clement*, 2 Curt. (U. S.) 363; See *Peterson v. Wayne*, 37 Fed. Rep. 808; *The Alfred*, 2 Eng. L. & Eq. 541.

4. *The Narragansett*, Olc. Adm. 246. See *The Isaac Newton*, 4 Blatchf. (U. S.) 21; *Sills v. Brown*, 9 C. & P. 601; *Fenwick v. Bell*, 1 C. & K. 312.

5. *The S. O. Pierce*, 40 Fed. Rep. 767.

6. *The Sylvan Grove*, 29 Fed. Rep. 336.

7. *The Favorita*, 8 Blatchf. (U. S.) 539.

8. *Desty's Ship & Adm.*, § 406; *The De Cock*, 5 Month. Law Mag. 303; *Hay v. Le Neve*, 2 Shaw Scotch App. 395;

*The Monarch*, 1 W. Rob. 21; *Foster v. The Miranda*, Newb. 227; 6 McLean 221; *The Washington*, 5 Jur. 1067; 2 Mar. L. C. 23; *The Columbus*, Abb. Adm. 390; *The Baltimore*, 8 Wall. (U. S.) 388.

9. *Lenox v. Winisimmet Co.*, 1 Sprague 160.

10. *The Favorita*, 8 Blatchf. (U. S.) 539.

11. *Desty's Ship & Adm.*, § 406; *The Columbus*, Abb. Adm. 390; *The Rival*, 1 Sprague 130; *The Celt*, 3 Hagg. Adm. 321; *The Monarch*, 1 W. Rob. 21; *Reeves v. The Constitution*, Gilp. 579; *The Debock*, 5 Mon. Law Mag. 303; *The Scioto*, 2 Ware (Dav.) 359.

12. *The Celt*, 3 Hagg. Adm. 321.

Where a vessel deserted the injured vessel without cause, costs were awarded as a punishment. *The Caledonia*, Spinks 23; *The St. Lawrence*, 7 Notes of C. 556; *The Atlas*, 4 Ben. 33; *The Celt*, 3 Hagg. Adm. 321.

Where the crew of the vessel not in fault were guilty of gross violence, costs were denied. *The Cataline*, 2 Spinks 23.

13. *The Columbus*, Abb. Adm. 384; *The Shannon and Placidia*, 7 Jur. 380.

14. *The Ebenezer*, 2 W. Rob. 206; *The Itinerant*, 8 Jur. 132; 2 W. Rob. 236; *The Margaret*, 1 L. T., N. S. 340.

costs in such cases is in the discretion of the court.<sup>1</sup> The party who fails in any suit, except under peculiar circumstances, should pay the whole of the costs.<sup>2</sup> So where a libel is dismissed the respondent is entitled to the cost.<sup>3</sup> If the action is brought without cause, the party bringing it should pay his own costs.<sup>4</sup> So the costs and expenses paid in defending a suit for services and keeping a vessel afloat are not recoverable where both vessels were in fault.<sup>5</sup> Nothing can be taxed as costs for services of attorney or counsel, except the costs and the fees therein described and enumerated by the statute.<sup>6</sup>

**NAVY YARD.**—See note 7.

**NEAP TIDES.**—Those tides which happen between the full and the change of the moon, twice in every twenty-four hours.<sup>8</sup>

**NEAR; NEAREST.**—(See also AT, 1 Am. & Eng. Encyc. of Law 890; NEXT).—Near is a relative term, and its precise meaning depends upon circumstances.<sup>9</sup>

1. The London, Brown & L. 82; The Rival, 1 Sprague 130; De Vaux v. Salvador, 11 Ad. & E. 420; The Sapphire, 18 Wall. (U. S.) 51.

2. The Christina, 8 Jur. 321.

3. The Catherine of Dover, 2 Hagg. Adm. 145. Compare The George, 2 W. Rob. 386; 9 Jur. 670; The Scioto, 2 Ware (Dav.) 359.

4. The Thornley, 7 Jur. 659.

5. Desty's Ship. & Adm., § 406; The Favorita, 4 Ben. 132.

6. The Baltimore, 8 Wall. (U. S.) 377; Flanders v. Tweed, 15 Wall. (U. S.) 453; Oelrichs v. Spain, 15 Wall. (U. S.) 230.

7. **Navy Yard.**—Includes the waters contiguous to and necessary to the operations of the navy yard. The waters necessary to float the vessels stationed at the yard are, like the yard itself, within the exclusive jurisdiction of the United States. *Ex parte Tatem*, 1 Hughes (U. S.) 588.

8. *Teschemacher v. Thompson*, 18 Cal. 21.

9. *Bouv. L. Dict.*; *Tyne Keelmen v. Davison*, 16 C. B., N. S. 616; *Fall River Iron Works Co. v. Old Colony etc. R. Co.*, 5 Allen (Mass.) 227; *American Dock and Imp. Co. v. Trustees of Public Schools*, 39 N. J. Eq. 435; *Kirkbride v. Lafayette Co.*, 108 U. S. 211; *Barrett v. Schuyler Co. Court*, 44 Mo. 197. See also *Shepherd v. Baltimore etc. R. Co.*, 130 U. S. 426; s. c., 38 Am. & Eng. R. Cas. 437; *Boston etc. R. Co. v. Midland R. Co.*, 1 Gray (Mass.) 367; *Fassett v. Roxbury*, 55 Vt. 554.

**Near** (as used in Tenn. law of 1869,

prohibiting liquor selling on election days, "near an election ground") includes a locality a mile and a quarter off. *Manis v. State*, 3 Heisk. (Tenn.) 315.

In or near, in the grant of a market. See *Attorney General v. Horner*, 14 Q. B. D. 245; s. c., 11 App. Cas. 66. In his judgment in that case, BRETT, M. R., is reported (54 L. J. Q. B. 230) to have said: "A distinction was attempted to be drawn between the words 'next' and 'near;' but I can see none."

But see *Rex v. Hervey*, 1 W. Bl. 20, where it was held that, the word "near" in a penal case must be construed strictly, and is not equivalent to the word "next."

**A Question of Fact.**—Where plaintiffs were to run for defendant his staves "at and near T," at a specified price, *held*, that whether a point a mile and a half from there was "near T," within the meaning of the contract, was a question of fact for the jury, and could not be decided by the court as matter of law. *Shaw v. Davis*, 7 Mich. 318.

The words "near town lines," under the Illinois statute, which provides for the erection of bridges over streams near county or town lines, were held to give the highway commissioner, of the town or towns electing to build such a bridge, power to determine its site, within a mile or any other reasonable distance from the town line. *Inseley v. Shepard*, 31 Fed. Rep. 869.

**"Near the House of K."**—A declaration, in an action to recover damages of a town for a defect in a highway, which

alleges the defendant's failure to keep it in repair "near the house of K," is not so clear, that, upon the defendant failing to deny in his answer his liability to repair that spot, an admission of such liability is inferred. *Kellogg v. Northampton*, 4 Gray (Mass.) 65.

**"Near the Sea Shore."**—In a patent, the words, "near the sea shore," must have been used in the sense of "along the sea shore." *Keyser v. Coe*, 9 Blatchf. (U. S.) 35.

**"At or Near."**—"A statute fixing a terminus of a railroad at or near a place, was held to be satisfied in one case by a location 2,475 feet from the place. *Fall River Iron Works Co. v. Old Colony etc. R. Co.*, 5 Allen (Mass.) 221. And in another by a location a mile and a half away. *Parke's Appeal*, 64 Pa. St. 137." *Lewis on Em. Dom.*, § 247.

Meaning of words at or near. "See *Mason v. Brooklyn City etc. R. Co.*, 35 Barb. (N. Y.) 373; *Mohawk Bridge Co. v. Utica etc. R. Co.*, 6 Paige (N. Y.) 554; *State v. Hudson Tunnel R. Co.*, 38 N. J. L. 548; *Central R. Co. v. Pennsylvania R.*, 31 N. J. Eq. 475." *Lewis on Em. Dom.*, § 257n.

**As Near as May be.**—"In § 914, Rev. Stat. U. S., which provides for the conformity of the practice of federal courts, in common lawsuits, to that of the State courts, means "not as near as may be possible, or as near as may be practicable." *Indianapolis etc. R. Co. v. Horst*, 93 U. S. 291; *Beardsley v. Littell*, 14 Blatchf. (U. S.) 105; *Emma Silver Min. Co. v. Park*, 14 Blatchf. (U. S.) 415.

**Near the Creek, in a Deed.**—A deed describing a line as running to a stump "near the creek, and thence up the creek," etc., is to be construed as including all the land to low water mark of the creek. The court said: "Though the words 'near the creek,' strictly speaking, imply the existence of space betwixt the object immediately expressed, and the object of reference beyond it, they indicate, in popular meaning, no more than the whereabouts." *Klingensmith v. Ground*, 5 Watts (Pa.) 458.

**"Near to."**—Where an owner is entitled to a remedy when his property, "near to" a street in which a railroad track or structure has been placed, is damaged thereby, it was held, that the property was "near to" the street, if the injury to it is the direct and necessary result of the occupancy of the street by the track, etc. *Shepherd v. Baltimore etc. R. Co.*, 130 U. S. 426.

**"Near a Dwelling House."**—Where a passenger can only be put off a train near a dwelling house, the question whether or not a dwelling house is "near," within the meaning of the statute, should be submitted to the jury; and the court refused to say as a matter of law that a dwelling house 25 or 30 rods distant upon another highway was, within the contemplation of the statute, a near dwelling house in a dark night, its vicinity being unknown to the passenger. *Loomis v. Jewett*, 35 Hun (N. Y.) 313.

**"Near St. Louis."**—A deed conveyed all the interest of the grantor in his father's estate "near St. Louis;" held, that it might be shown that the father possessed land nearer St. Louis, and more appropriately within the description of the deed of the son, than that sought to be comprised within it. *Menkens v. Blumenthal*, 27 Mo. 198. See *Campbell v. Smith*, 19 Ves. 400. *Gates v. Madison Co. Mut. Ins.*, 5 N. Y. 469; s. c., 2 N. Y. 43.

**"Three Nearest Towns."**—In the clause of a Massachusetts statute (Gen. Stat., ch. 43, § 28), which provides that the jurors, who are to assess the damages for the taking of land for a public use, shall be returned from the "three nearest towns," the word "nearest" refers to the situation of the towns relatively to each other, and not relatively to the tract of land to be viewed. *Reed v. Hanover etc. R. Co.*, 105 Mass. 304; *Wyman v. Lexington etc. R. Co.*, 13 Met (Mass.) 316; *Meacham v. Fitchburg R. Co.*, 4 Cush. (Mass.) 291.

**Nearest Courthouse.**—Where there was a provision that "the cause shall be removed to some adjoining county, the courthouse of which is nearest the courthouse of the county in which the suit is pending," it was held, that "the nearest courthouse," in the meaning of the statute, is not necessarily the one nearest by geometrical measurement, but may be the one most convenient of access, and nearest by the usual traveled route. *Shaw v. Cade*, 54 Tex. 307.

**Nearest Magistrate.**—Condition precedent to recovery for loss by fire, under the terms of a policy, was the production of "the certificate under seal of the magistrate or notary public living nearest the place of fire," as to the amount of loss, etc.; the production of the certificate of such magistrate, which stated some of the facts required, and that he was not competent to state others, and also the certificate of another

**NEAT CATTLE.**—See note 1.

**NECESSARIES.**<sup>2</sup>—See also EXEMPTIONS, 7 Am. & Eng. Encyc.

magistrate who did not live as near as the first, but whose office was nearer, stating all the facts required, is a sufficient compliance with the condition. *Agricultural Ins. Co. v. Bemiller*, 70 Md. 400.

"We are asked to go into a nice calculation of distances, and settle the point on the law of *mensuration*. *De minimis*, etc., is a sufficient answer to this objection. The spirit of the condition required no such mathematical precision from the assured. Its object is completely secured by the proximity of the certifying magistrate." *Turley v. North American F. Ins. Co.*, 25 Wend. (N. Y.) 374.

**Nearest Male Cousin.**—In a devise to the "nearest and most deserving male cousin," held, that the word *nearest* meant "nearest in blood, or coming next, or most closely related, or pointing at the eldest by way of eminence." *Power v. Quealy*, 2 L. R. I. 227, 234; affirmed in 4 L. R. I. 20, where CHRISTIAN, L. J., remarked: "Now, 'nearest,' in such a collocation as this, has, I think, a legal meaning attached to it by authority. Its meaning is not, I think, nearness to the estate, according to the order of descent, as it was put in the argument, but nearness in blood to the testator; and amongst a class of persons all equally the nearest of kin in that state of the description, as three brothers are, it means simply the nearest in the order of birth."

**Nearest Practicable Point.**—A railway company obligated itself to locate depot at the nearest practicable point. It was held, that the road was only bound to locate its depot at the nearest point at which it could be done at a reasonable and ordinary cost. *Wooters v. International etc. R. Co.*, 54 Tex. 300.

**Near Thereto as She May Safely Get.**—These words must receive a reasonable, not a literal application. Per POLLOCK, B., in *Nielsen v. Wait*, 14 Q. B. D. 522; affirmed 16 Q. B. D. 67. See Capper v. Wallace, 49 L. J. Q. B. 350; 6 Q. B. D. 163; Pyman v. Dreyfus, 24 Q. B. D. 152; 49 L. J. Q. B. 13.

"It appears from *Parker v. Winlow*, 27 L. J. Q. B. 49; 7 E. & B. 942; *Bastifell v. Lloyd* 31 L. J. Ex. 413; 1 H. & C. 388, and *Dahl v. Nelson* 12 Ch. D. 568; 6 App. Cas. 38, that

when the charter party provides that a ship shall go to a harbor named, or 'as near thereto as she can safely get,' the primary object is to get to the place named, and the alternative condition does not arise unless the cause which prevents the immediate arrival of the ship at the place named, is such that it cannot be got rid of by the shipowner by reasonable means and within a reasonable time, having regard to the nature and object of the voyage; and further, that if the cause of detention be the arrival of the vessel during the low tides, her having to wait for the tides to increase is one of the ordinary incidents of navigation, and the shipowner must submit to the delay so occasioned." Per NORTH, J., in *Horsley v. Price*, 11 Q. B. D. 244. See *Schillizzi v. Derry*, 4 E. & B. 873; *Shield v. Wilkins*, 5 Ex. 305; *The Alhambra*, 6 P. D. 68, *Castel v. Trechman*, 1 Cab. & El. 276.

1. An indictment is uncertain which charges a theft of "three head of neat stock or beeves." All neat stock are not beeves. *Castello v. State*, 36 Tex. 324.

In the Texas statute, "If any person shall steal any 'neat' cattle, sheep, goat or hog, he shall be, etc.," the amendment omits the word "neat" in the article. The obvious purpose of the legislature was to leave the word "cattle" in the act, with its popular and well understood acceptation. The word, originally, certainly had a more extensive and comprehensive meaning than it now has in the United States. It has still a more extended signification in English parlance; and to give the term the restricted meaning which it only possesses in general American phraseology, the Englishman still uses some qualifying adjective, such as black or neat cattle. The popular signification of the word in this country, however, is well understood, without particularity of definition. *Hubatter v. State*, 32 Tex. 483.

2. (As used in the provision of the bankrupt law, excepting from the assignment such articles and necessities or the bankrupt as the assignee shall set apart.) Includes money. When an allowance in money is appropriate and necessary, it may be made. *Re Hay*, 2 Low. (U. S.) 180.

of Law 130; HUSBAND AND WIFE, vol. 9, p. 789; INFANTS, vol. 10, p. 613; INSANITY, vol. 11, p. 134; MARITIME LIENS, vol. 14, p. 410; POOR AND POOR LAWS.

**NECESSARILY.**—"In a necessary manner; by necessity; unavoidably; indispensably."<sup>1</sup>

**NECESSARY.**—(See EXECUTIONS, 7 Am. & Eng. Encyc. of Law 151; HUSBAND AND WIFE, vol. 9, p. 789; INFANTS, vol. 10, p. 613; TAXATION).—The word necessary has great flexibility of meaning. It is used to express mere convenience, or that which is indispensable to the accomplishment of a purpose.<sup>2</sup>

1. Webster's Dict. followed by the court in *Summers v. Farney*, 123 Ind. 560.

A cause is necessarily on the calendar (N. Y. Code of Pro., § 307, subd. 8) when it is regularly or properly there. *Sipperly v. Warner*, 9 How. Pr. (N. Y.) 332.

"Necessarily Expended."—"The import of the words 'necessarily expended' is sufficiently evident when we consider the purpose for which they were inserted, and the nature of the subject to which they are applied. They relate not to the necessity of payment as between the officer and the person to whom it is made—which would, perhaps, be satisfied by nothing short of the power of legal compulsion—but to the necessity of the expenditures, having reference to what is due to the public and the law, in the efficient and faithful discharge of official duty." *People v. Supervisors*, 32 N. Y. 473.

2. *St. Louis etc. R. Co. v. Illinois Inst. for Blind*, 43 Ill. 307; *Montague v. Richardson*, 24 Conn. 347; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316; *Easter v. Allen*, 8 Allen (Mass.) 7; *New Jersey R. etc. Co. v. Hancock*, 35 N. J. L. 545; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315.

The interpretation of this word in *McCullough v. Maryland*, 4 Wheat. 316, is too lax. It should be confined more strictly to its etymological meaning. Nothing can be said to be necessary to the accomplishment of an object which can be dispensed with without abandoning the object itself. *Leisse v. St. Louis etc. R. Co.*, 2 Mo. App. 105.

In an act exempting from taxation "all colleges, with the grounds annexed and necessary for the enjoyment of the same," the word "necessary" "as used in jurisprudence, imports, not an absolute, but a reasonable necessity." *North-*

*ampton Co. v. Lafayette College*, 45 Leg. Int. (Pa.) 246. See also *Smart v. Morton*, 5 El. & B. 47; s. c., 85 E. C. L. 47; *Stoughton v. Lynch*, 1 Johns. Ch. (N. Y.) 467; *Swanston v. Twickenham*, 11 Ch. D. 838. The word necessary is an adjective possessing degrees. A thing or purpose may be necessary, more necessary, indispensably necessary. *Cotton v. Commissioners*, 6 Fla. 629.

Where it is lawful to inflict pain on an animal, if it is reasonably "necessary," the latter word includes "adequate and reasonable object." "That without which an animal cannot attain its full development, or be fitted for its ordinary use, may fairly come within the term 'necessary.'" *Ford v. Wiley*, 58 L. J. R. M. C. 145, 149; s. c., 61 L. T. N. S. 74.

In deciding where it was "necessary" for two steamers to stop and reverse, it was held, that if a steamship is approaching another in a dense fog, without the means of ascertaining, except by fog signals, the course which the other was pursuing, unless there were indications to convey to a seaman of reasonable skill that they were in such a position as to pass well clear of each other, it was there "necessary" to stop and reverse, or be liable for the consequences. *The Lebanon v. The Ceto*, 62 L. T., N. S. 1.

A toll house was held exempt from taxation as "necessary" to the operation of the turnpike. The court, quoting from the opinion in *State v. Hancock*, 35 N. J. L. 537, said: "The word 'necessary,' in this connection, does not mean 'indispensable.' It embraces all things suitable and proper for carrying into execution the powers granted." *Detroit etc. R. Co. v. Detroit* (Mich. 1890), 46 N. W. Rep. 12, 14.

**Necessary Alterations.**—A written provision in an insurance policy author-

izing "necessary alterations and repairs," held, not to authorize a material enlargement of the building, as by an addition 12 feet wide and 200 feet long. *Frost's Detroit Lumber etc. Works v. Millers' etc. Ins. Co.*, 37 Minn. 300. See also *FIRE INSURANCE*, 7 Am. & Eng. Encyc. of Law 1002.

**Necessary, as Used in Statute.**—Where a statute declares that the urban local authorities shall be empowered, "if upon the report of the surveyor it appears necessary," to carry water mains "into, through, or under any lands situate within their district," the word "necessary" must be construed as meaning "necessary for the efficient discharge of the duty in the way most for the benefit of the public." And further, that the person to determine the necessity was the surveyor. *Lewis v. Weston-Super-Mall Local Board*, L. R., 40 Ch. Div. 55.

A statute (2 Rev. Laws 445, § 267), declared to be a public act, authorized the corporation of the city of New York to make by-laws "for regulating, or, if they find it necessary, preventing the interment of the dead" within the city. "This necessity is not absolute. It is nearly synonymous with expediency, or what is necessary for the public good." *Stuyvesant v. Mayor etc. of New York*, 7 Cow. (N. Y.) 606.

An Illinois statute provides that every railroad corporation shall construct farm crossings "when and where the same may become necessary for the use of the proprietors of the lands adjoining such railroad." The word "necessary" was held to be equivalent to "reasonably convenient." *Chalcraft v. Louisville etc. R. Co.*, 113 Ill. 88.

In a provision in an Indiana statute that "auditors and their deputies are authorized to administer oaths necessary in the performance of their duties," "the word 'necessary' in connection with the performance of the duties of auditors, as used in the section, we think, must be regarded as relating to matters filed with, or business transacted before, the auditor, in which an oath is required, and in reference to which some duty is enjoined upon the auditor. The oath in such a case is a necessity, without which the auditor cannot perform the duty required of him, and he is, therefore, authorized to administer it, as necessary in the performance of his duties." *Wheat v. Ragsdale*, 27 Ind. 199. See also *Garrett v. Higgins*, 27 Ind. 162; *Curry v. Miller*, 42 Ind. 320.

Under § 69 of the charter of Jersey City, power is given to the board of public works "to purchase or construct . . . such other buildings as may be necessary for the purposes of this act." "A building necessary for the purposes of the act is one convenient and proper for such purposes, a building reasonably required or needed for carrying into effect the provisions of the act." *Gregory v. Mayor etc. of Jersey City*, 36 N. J. L. 169.

The word "necessary," as used in the phrase "any other work necessary for the construction, use, or enjoyment of said railroad," comprises within its fair and legitimate import "all such means as are suitable and to accomplish the end which the legislature had in view at the time of the enactment of the charter. *State v. Hancock*, 35 N. J. L. 537; *Crawford v. Longstreet*, 43 N. J. L. 328.

**In Exemption Laws.**—Where "necessary household furniture" is exempt by statute from execution, the word "necessary" is always given a liberal construction. It is never treated as synonymous with "indispensable." It embraces all those articles which enable the family to live conveniently and decently, according to the custom of the country in which they reside. "We think the word 'necessary' was not intended to denote those articles of furniture only which are indispensable to the bare subsistence of the persons for whose benefit the law was designed—the debtor and his family. According to such a limited construction, it would exclude many things which universal usage and the common understanding of that word in reference to this subject have pronounced to be necessary articles of household furniture; and would, indeed, protest merely those rude contrivances which are used only in a savage state. The word was obviously used in a larger sense; it was intended to embrace those things which are requisite in order to enable the debtor not merely to live, but to live in a convenient and comfortable manner." *Montague v. Richardson*, 24 Conn. 338; s. c., 63 Am. Dec. 173; *Davlin v. Stone*, 4 Cush. (Mass.) 359. Nevertheless it cannot be extended by taking into consideration the debtor's present or past station in life, and the mode of living to which he and his family have been accustomed. Articles which are unusually valuable, so as properly to be regarded as ornaments, cannot be ex-

empt under a statute exempting "household furniture necessary for supporting life." "The law intends that the debtor, when withholding money from his creditor for furniture, shall supply each class of his necessities, and secure his comfort and convenience by expending money in a reasonably economical manner, looking solely to utility." *Hitchcock v. Holmes*, 43 Conn. 528; *Freem. on Exec.* (2nd ed.), § 231.

In those States where the exemption is confined by statute to *necessary* wearing apparel, the word "necessary" "is not to be understood in its most rigid sense implying something indispensable, but as equivalent to convenient and comfortable. It would, therefore, include such articles of dress or clothing as might properly be considered among the necessities, in contradistinction, to the luxuries of life. Whether an article attached is a necessary or a luxury may, under some circumstances, be a question for the jury, depending upon the situation of the debtor and the character and uses, and, perhaps, the cost of the article." *Towns v. Pratt*, 33 N. H. 349; s. c., 66 Am. Dec. 726. "The wearing apparel, 'necessary for immediate use,' must be such an amount of clothing as is necessary to meet the varying climate and the customary habits and ordinary necessities of the mass of the people. The clothing worn by the individual, while about his daily toil, might be all that was necessary for the time, but be wholly insufficient when the labor ceased; and the clothing suitable and proper for days of labor might not be such as the common sentiment of the community would deem necessary for use on days set apart for religious assembling and worship. *Peverly v. Sayles*, 10 N. H. 356; *Freeman on Exec.* (2nd ed.), § 232.

Grounds adjoining a college used for the president's house, etc., are exempt from taxation as "necessary" for the enjoyment, etc. "The word 'necessary,' as used in jurisprudence, imports not an absolute but a reasonable necessity." *Northampton Co. v. Lafayette College*, 45 Leg. Int. (Pa.) 246.

"Necessary" as used in the R. I. act for laying out highways (*Digest of 1844*, p. 319) is to be taken in the sense of "reasonably necessary." "It was never, however, understood that the term "necessary," in this act, implied, or was intended to imply, an absolute necessity;

for, in that sense, no new way, in modern days, at least, could become necessary." *Hazard v. Middletown*, 12 R. I. 227; *Hunter v. Newport*, 5 R. I. 328.

The power given by § 96, Poor House act, 1875, enabling justices to order the doing of works "necessary" for the abatement of a nuisance, does not extend "to whatever the local sanitary authority thinks necessary." Per *STEPHEN, J.*, in *Ex parte Whitchurch*, 6 Q. B. D. 545. See also *Ex parte Saunders*, 11 Q. B. D. 191; *R. v. Llewellyn*, 13 Q. B. D. 681; *Whitaker v. Derby*, 55 L. J. M. C. 8; *R. v. Wheatley*, 16 Q. B. D. 34.

"Expenses (if any) necessary to maintain hereditaments in a state to command such rent," in definition of annual value in § 1, 6 & 7 W. IV, ch. 96, include drainage works for a farm. *Reg. v. Gainsborough*, 4 L. R., 7 Q. B. 64.

Where a party has a contractual right to demand such things as he may "think necessary"—*e. g.*, to ask for further proof or information—this does not enable him to act capriciously, it only embraces such things as he may reasonably require. *Braunstein v. Accidental Ins.*, 1 B. & S. 782.

**Necessary Repairs.**—The question, which arose in *Truscott v. Diamond Rock Co.*, 20 Ch. D. 251, was whether a covenant "to do necessary repairs" was the equivalent of a covenant to repair. It was decided in the affirmative. "Necessary," in the phrase "necessary repairs," neither adds to nor takes away from the meaning. Per *JESSEL, M. R.*

It is well settled that a mortgagee in possession is not bound to expend money on the mortgaged premises, further than to keep them in "necessary repairs;" this language has been construed strictly, and such allowance put on the ground of absolute necessity for the protection of the estate; for such expenditure when incurred he will receive allowance. *Clark v. Smith*, 1 N. J. Eq. 121.

**Necessary Appendages.**—See *APPENDAGE*, 1 Am. & Eng. Encyc. of Law 630.

**Necessary Charges.**—Wherefor towns authorized by Mass. Gen. Stat., ch. 18, § 10, to raise money, were held not to include expenses of a committee directed by a vote of the town to petition the legislature for the annexation of the town to another town. *Minot v. West Roxbury*, 112 Mass. 1; *Coolidge v. Brookline*, 114 Mass. 592. But see *Connolly v. Beverley*, 151 Mass. 437, construing the subsequent act of

1889, ch. 380. See also *Stetson v. Kempton*, 13 Mass. 278; *Friend v. Gilbert*, 108 Mass. 411; *Hood v. Mayor etc. of Lynn*, 1 Allen (Mass.) 105; *Babbitt v. Savoy*, 3 Cush. (Mass.) 530; *Fuller v. Groton*, 11 Gray (Mass.) 340; *Hadsell v. Hancock*, 3 Gray (Mass.) 530; *Bancroft v. Lynnfield*, 18 Pick. (Mass.) 566; *Willard v. Newport*, 12 Pick. (Mass.) 231; *Hardy v. Waltham*, 3 Met. (Mass.) 163; *French v. Quincy*, 3 Allen (Mass.) 9; *Spaulding v. Lowell*, 23 Pick. (Mass.) 71.

"All Necessary Apparatus."—See APPARATUS, 1 Am. & Eng. Encyc. of Law 615 n.

In the articles of a corporation the executive committee were authorized "to do all acts necessary for the prosperity of the society in the intervals of the meeting of the board." This does not authorize it to buy real estate. *Tracy v. Guthrie Co. Agricultural Soc.*, 57 Iowa 29.

"All Necessary Expenses and Charges."—The expression in a collateral note, that the holder is to be reimbursed "all necessary expenses and charges" arising from the sale of the collateral, means those incident to its sale. *De Coursey v. Johnston*, 20 Pittsb. L. J., N. S. (Pa.) 407.

"Necessary for the Construction or Operation" of a Railroad.—Property is to be regarded as "necessary" for the operation of the road if it is such as the company, in the reasonable exercise of its discretion, thought it best to procure for the most profitable use of the road to itself and the most beneficial use of it to the public, even though the road could have been operated without it. *Buck v. Seymour*, 46 Conn. 156.

"Necessary and Convenient."—A private act of parliament, for enclosing the waste lands of a manor, reserved to the lord and his assigns all "convenient and necessary ways." "We are all of opinion that, upon the construction of the words, 'convenient and necessary,' which occur in one part of the section, and the words, 'necessary or convenient,' which occur in another part, the true question is not whether the road has been made in the direction, or in the manner least injurious to the owner of an allotment; or in that direction, or by that mode which a strict and rigid necessity would point out; much less whether it has been made in that direction or by that mode, which, upon a view of the work when accomplished, and when a better judgment may pos-

sibly be formed than could have been formed before, may be thought by persons possessing the highest degree of skill and experience to be the best that could have been devised; but whether the direction chosen has been such as a person of reasonable and ordinary skill and experience would have selected beforehand, and whether the mode adopted has been such as a prudent and rational person would have adopted if he had been making the road over his own land, and not over the land of another." *Abson v. Fenton*, 1 B. & C. 201.

"Necessary Help."—When warden of prison is entrusted with authority to employ "all necessary help," he may employ a physician. *State v. Hobart*, 13 Nev. 420.

"All necessary incidental powers" occurring in a bank charter—the court, says: "The term is used to mean that kind of necessity which custom and usage impose on that particular branch of business called banking." *Curtis v. Leavitt*, 15 N. Y. 168.

"Necessary Occasions."—A fund applicable to the "repairs, ornaments and other necessary occasions" of a parish church may be applied (probably under either of the words "repairs" or "ornaments," and certainly under "necessary occasions") in the building of a spire to the church, although the church has not previously had a spire. *Re Palatine Estate Charity*, 39 Ch. D. 54.

Necessary Acts.—Under a provision that a railroad "may do all other acts necessary for making, maintaining, altering, or repairing and using the railway," an act is not "necessary" merely because it would be economical to the company. *Reg. v. Wycombe R. Co.*, L. R., 2 Q. B. 310; *Fenwick v. East Lond. R. Co.*, L. R., 20 Eq. 544; *Pugh v. Golden Valley R. Co.*, 12 Ch. D. 274. See also *Greenwich v. Easton*, etc. R. Co., 24 N. J. Eq. 217.

A necessary easement is one necessary for the enjoyment of the property as it stood at the time when such property was acquired under the title in virtue of which the easement is claimed. *Pyer v. Carter*, 1 H. & N. 916; commented on in *Morland v. Cook*, L. R., 6 Eq. 252, dissented from in *Wheeldon v. Burrows*, 12 Ch. D. 31; and approved in *Watts v. Kelson*, 6 Ch. 166. See *Gale on Easements* (5th ed.) 131; *Elph. 189, 190*. See also EASEMENTS, 6 Am. & Eng. Encyc. of Law 139.



**"Necessary and Useful for Public or Private Purposes."**—As used in the Pennsylvania Lateral Railroad act of 1832, § 1, in the clause, "necessary and useful for public or private purposes," it refers not to an absolute but a reasonable necessity. *Hays v. Briggs*, 3 Pittsb. (Pa.) 504.

**"Necessary Land for Making a Railway."**—An exception, in a contract for sale of an estate, of "necessary land for making a railway," renders the contract void for uncertainty. *Pearce v. Watts*, 44 L. J. Ch. 492; L. R., 20 Eq. 492.

Where the right exists to get the minerals under land, and for that purpose has been granted the right to construct "necessary" or "convenient" ways, the test of the proper exercise of such right is "whether the direction chosen has been such as a person of reasonable and ordinary skill and experience would have selected beforehand, and whether the mode adopted has been such as a prudent and rational person would have adopted if he had been making the road upon his own land and not upon the land of another." *Abson v. Fenton*, 1 B. & C. 196; 15 Morr. Min. Rep. 215.

**"Necessary outgoings,"** deductible from the annual value of a succession (§ 22, 16 & 17 V., ch. 51), mean "permanent charges made on the occupier of the property—such as repairs, poor rates, highway, sewer and county rates, drainage rates and the like;" but income tax or commission to agent is not included. *Re Elwes*, 28 L. J. Ex. 46; 3 H. & N. 719; *Re Cowley*, L. R., 1 Ex. 288.

**Necessary Disbursements.**—Means actual expenses. *Wolf v. McGavock*, 24 Wis. 54. See also *DeWitt v. Swift*, 3 How. Pr. (N. Y.) 282.

**"Necessary and proper,"** occurring in art. 1, § 8, ch. 8, of U. S. Constitution, empowering congress to make laws "necessary and proper" for carrying its express provisions into effect, are thus construed by C. J. MARSHALL: "It would be incorrect, and would lead to endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said, with respect to each, that it was not necessary, because the end might be attained by other means. Congress must possess the choice of means, and must be empowered to use any means which are, in fact, conducive

to the exercise of a power granted by the constitution." *United States v. Fisher*, 2 Cranch (U. S.) 358; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 413; *Martin v. Hunter*, 1 Wheat. (U. S.) 304; *Juilliard v. Greenman*, 110 U. S. 440; *Thayer v. Hedges*, 23 Ind. 146; *Wayman v. Southard*, 10 Wheat. (U. S.) 1; *Harris Am. Const. Law* 106. And see *Legal Tender Case*, 12 Wall. (U. S.) 457; *Harris Am. Const. Law* 103-108.

"It must be taken then as finally settled, so far as judicial decisions can settle anything, that the words 'all laws necessary and proper for carrying into execution' powers expressly granted or vested, have, in the constitution, a sense equivalent to that of the words, laws, not absolutely necessary, indeed, but appropriate, plainly adopted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the constitution; laws really calculated to effect objects entrusted to the government. CHASE, CH. J., in *Hepburn v. Guswold*, 8 Wall. (U. S.) 603. See also *CONSTITUTIONAL LAW*, 3 Am. & Eng. Encyc. of Law 701.

**"Works Necessary and Convenient for Traffic."**—By "works necessary and convenient for traffic," in a deed, is meant, not those without which the passenger and goods traffic cannot be carried on, but those which are reasonably necessary for passenger and goods traffic as carried on on a railway of the kind of the grantee, and as from time to time required. *Harris v. London etc. R. Co.*, 60 L. T., N. S. 392.

**"Necessary Expense to Command Rent."**—Under a local act for the embanking and draining a district consisting of several parishes, an annual rate was imposed on the district, and lands occupied by the respondent were rated at a certain proportion yearly. The rate by the act was expressly made a landlord's tax, and the respondent's landlord had accordingly always paid the amount. The whole rate under the act was necessary for and was spent each year in maintaining the drainage works. Without such drainage works, the land occupied by the respondent would have been under water at certain seasons, and the annual value would have been considerably diminished. *Held*, that in assessing the respondent to the poor rate, a deduction was to be allowed under 6 & 7 Will. IV, ch. 96, § 1, in respect of the drainage rate, as an expense necessary to main-

**NECESSITY.**<sup>1</sup>—See also EMINENT DOMAIN, 6 Am. & Eng. Encyc. of Law 509; MARITIME LIENS, vol. 14, p. 410; MILITARY LAW, vol. 15, p. 390; PRIVATE WAYS; SUNDAY LAWS; WAYS.

**NEED.**<sup>2</sup>—See also WANT.

**NE EXEAT** (Writ of).

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tain the land in a state to command the rent. Reg. v. Gainsborough Union, 7 Q. B. 64.

**"Necessary Implication."**—"Necessary implication," in construing a will, means so strong a probability of intention that an intention contrary to that imputed cannot be supposed. *Wilkinson v. Adam*, 1 Ves. & B. 466. See also *People v. Draper*, 15 N. Y. 558; *State v. Union Bank*, 9 Yerg. (Tenn.) 164.

1. **"In Case of Fire or Other Great Necessity."**—Where a city is to be furnished with water free of charge in case of "fire or other great necessity," no charge can be made for supplying the city with water for the purposes of flushing sewers, watering the streets, and irrigating the parks, etc. *Spring Valley Water Works v. San Francisco*, 52 Cal. 111.

**Dishorning cattle is not a "necessity,"** so as to avail as a defence upon a charge of cruelty to animals. *Ford v. Wiley*, L. R., 23 Q. B. D. 210.

2. **"Most in Need."**—A devise to the testator's brothers A and B, to dispose of the same "among our brothers and sisters and their children, as they shall judge to be most in need of the same," is not void for uncertainty. *Bull v. Bull*, 8 Conn. 47; s. c., 20 Am. Dec. 86. *Contra*, *Fontaine v. Thompson*, 80 Va. 229.

**Need Not.**—This phrase does not mean "must not;" and, therefore, though by subd. 2, § 1, M. W. P. act, 1882, a husband "need not" be joined in actions by or against his wife, yet he may be joined, especially so where the wife is a defend-

ant in an action of tort. *Seroka v. Katzenburg*, 17 Q. B. D. 177; 54 L. T. 649; 34 W. R. 542. See *Mustr.*

**"Need and Require" in a Will.**—Testator gave a fund to his executors in trust for the use and benefit of his daughter for life, the interest to be paid to her as she may "need or require." The daughter was weakminded. *Held*, that it is as if he had said, "as she may need or her necessities require." *Corlies v. Allen*, 36 N. J. Eq. 100.

**Need Such Aid.**—A devise to trustees, in trust for such of testators' children or descendants as may need such aid, is invalid, being too remote. *Kent v. Dunham*, 142 Mass. 216.

**"Needful" in Statute.**—By a Wisconsin statute the school boards are clothed with the power to make needful rules and regulations for the government of the schools, that is, "such as will best advance the pupils in their studies, tend to their education and mental improvement, and promote their interest and welfare." A rule that the pupils shall carry wood for the use of the school-house, not promoting these ends, is not "needful." *State v. Board of Education*, 63 Wis. 237.

**Needlessly in statute**, forbidding the needless killing or mutilating of any animal. "Needless cannot be reasonably construed as characterizing an act which might, by care, be avoided. It simply means an act done without any useful motive, in a spirit of wanton cruelty for the mere pleasure of destruction. *Grise v. State*, 37 Ark. 460.

**"Needlessly Torture or Mutilate."**—Trapping a trespassing and depredating

**I. HISTORY OF THE WRIT.**—The writ of *ne exeat regno* was, in early times, in England, a high prerogative writ, issuing, for political purposes only,<sup>1</sup> to forbid, as its name implies, the departure of a subject from the realm. The date of its introduction is very obscure.<sup>2</sup> The common law, as evidenced by Magna Charta, allows untrammelled liberty of locomotion to the subject, permitting him to depart from the kingdom for business or for pleasure without any licence from the crown.<sup>3</sup> Relying upon this, some writers contend that the writ was introduced between the reigns of John and Edward I. However, the opinions of Lord Coke, Fitzherbert and Justice Story, that the writ was a part of the prerogative at common law, seem to be the better. While it was undoubtedly true that every man might leave the kingdom at his pleasure without permission of the crown, the king, being entitled to his military services, might forbid his departure without infringement of this general right.<sup>4</sup> The exact date at which the writ was first applied as an aid to chancery in the administration of remedial justice is also unknown; but the first application seems to have occurred in the reign of Queen Elizabeth.<sup>5</sup> And in the reign of James I, this use of the writ had become so common as to be the subject of one of Lord Chancellor Bacon's ordinances.<sup>6</sup> In several of the United States the writ has been abolished, either in direct terms or by judicial construction, being considered as contrary to the spirit of American governments.<sup>7</sup> In the States where it is still in use it is

dog is not "needlessly torturing or mutilating," within a statute against cruelty to animals. *Hodge v. State*, 11 Lea (Tenn.) 528; s. c., 47 Am. Rep. 307.

In a **WILL**.—"As she may need" was held to be equivalent of "as she may desire" where the bequest was "the interest to be drawn and used by her as she may need." *Gillen v. Kimball*, 34 Ohio St. 363.

1. *Jackson v. Petrie*, 10 Ves. 164; Beames on *Ne Exeat* 1; 1 Bl. Com. 162, 319; Story Eq. Jur., § 1467; *Flack v. Holm*, 1 Jacob & Walk. 403; *Ex parte Bruner*, 3 P. Wms. 312.

2. Story Eq. Jur., § 1465.

3. Beames on *Ne Exeat* 1, 3.

4. 2 Fitz. Nat. Brev. 85; Beames on *Ne Exeat* 85; Co. Ins. 54; Com. Dig. Chan. 4 b; Story Eq. Jur., § 1466.

5. Beames on *Ne Exeat* 16; Story Eq. Jur., § 1467.

6. Writs of *ne exeat regno* are properly to be granted according to the suggestion of the writ, in respect of attempts prejudicial to the King and State, in which case the Lord Chancellor will grant them, upon prayer of any of the principal secretaries, without cause

showing, or upon such information as his lordship shall think of weight; but, otherwise also, there may be according to the practice of long time used, in case of interlopers in trade, great bankrupts in whose estates many subjects are interested, or other cases that concern multitudes of the king's subjects; also in case of duels and divers others. Beames Ord. in Chan., p. 39, ord. 40, 89; Beames on *Ne Exeat* 16, 17.

7. In *Vermont*, *Pennsylvania*, *Mississippi*, *Kentucky* and *Louisiana*, any restraint on emigration is forbidden by the constitution. In *Arkansas* the writ is abolished.

In *Cable v. Alvord*, 27 Ohio St. 654, the court concludes that the writ is abolished in all civil actions. In *Ex parte Harker*, 49 Cal. 465, the court declares that the writ is not included among the proceedings by which a person can be arrested in a civil action. While in *New York* the act to abolish imprisonment for debt was held not to have deprived the court of chancery of the power to issue a writ of *ne exeat* in cases of equitable cognizance where such writ would have been allowed previous

treated as a writ of right,<sup>1</sup> and is governed by the same principles in general that apply to the writ as used in England.<sup>2</sup>

**II. DEFINITION OF THE MODERN WRIT OF NE EXEAT.**—*Ne exeat*, as now understood, is a writ issuing out of a court of equity, on the petition of a complainant having a clear equitable demand, to prevent the departure of a defendant who has sequestered his property and is about to leave the country.<sup>3</sup> It is a writ to obtain equitable bail.<sup>4</sup> It may be questioned whether its functions may not have become practically obsolete in view of the general abolition of imprisonment for debt and the growth of the writ of attachment as allowed under the codes, wherein legal and equitable remedies and procedure are assimilated, and under the enlarged procedure of courts of equity in those jurisdictions where the functions of courts of law and of equity are still distinct.

**III. WHEN GRANTED.**—The writ being governed altogether by custom it is almost impossible to lay down fixed principles by which it is governed. This much, however, may be said:—

**1. Generally.**—The writ has been granted only in cases of equitable demands,<sup>5</sup>

to the passage of that act. *Brown v. Haff*, 5 Paige (N. Y.) 235; s. c., 28 Am. Dec. 425; *Ashworth v. Wrigley*, 1 Paige (N. Y.) 301. The code of Civil Proc., § 548, abolished the writ and stated that no arrests should be made in civil actions or special proceedings except as prescribed by statute. *Boucicault v. Boucicault*, 59 How. Pr. (N. Y.) 134; *Collins v. Collins*, 80 N. Y. 24. Whether the writ was abolished by the old code—*quære*. *Collins v. Collins*, 80 N. Y. 24.

**1. Sherman v. Sherman**, 3 Bro. (C. C.) 370; *Gleason v. Bisby*, 1 Clarke (N. Y.) 551; *Gilbert v. Colt*, 1 Hopk. (N. Y.) 499; *Mitchell v. Bunch*, 2 Paige (N. Y.) 606; s. c., 22 Am. Dec. 669; *Porter v. Spencer*, 2 Johns. Ch. (N. Y.) 169; *Rice v. Hale*, 5 Cush. (Mass.) 242. Though originally a prerogative writ, it is now resorted to merely for the purpose of obtaining equitable bail. *Cable v. Alvord*, 27 Ohio St. 666; *Cox v. Scott*, 5 Har. & J. (Md.) 384; 2 Story Eq., § 1469.

**2. Rice v. Hale**, 5 Cush. (Mass.) 238; *Brown v. Haff*, 5 Paige (N. Y.) 235; s. c., 28 Am. Dec. 425; *Denton v. Denton*, 1 Johns. Ch. (N. Y.) 441.

**3. Dick v. Swinton**, 1 Ves. V. 372; *Stewart v. Graham*, 19 Ves. V. 312; *Grant v. Grant*, 3 Russell Ch. 598; *Cox v. Scott*, 5 Har. & J. (Md.) 384; *Mitchell v. Bunch*, 2 Paige (N. Y.) 606; s. c., 22 Am. Dec. 669; *Smedberg v. Mark*, 6 Johns. Ch. (N. Y.) 138; *Cable v. Al-*

*vord*, 27 Ohio St. 666; *Adams v. Whitcomb*, 46 Vt. 708; *Johnson v. Clendenin*, 5 Gill & J. (Md.) 463.

*Ne exeat* is a process to hold the custody of the defendant's body until he shall give bail to abide the decree of the court. *Cable v. Alvord*, 27 Ohio St. 666; *Gresham v. Peterson*, 25 Ark. 377.

A person cannot be prevented from going beyond the State limits by an injunction, but only by a writ of *ne exeat*. *Bleyer v. Blum*, 70 Ga. 558.

**Not Imprisonment for Debt.**—Arrest and restraint of liberty upon a writ of *ne exeat*, held not "imprisonment for debt," within the meaning of a constitutional prohibition on the subject. 1868, *Dean v. Smith*, 23 Wis. 483; s. c., 99 Am. Dec. 198.

**4. Mitchell v. Bunch**, 2 Paige (N. Y.) 606; s. c., 22 Am. Dec. 669; *Story Eq. Jur.*, § 1470.

The practice of a court of equity, whereby a justice thereof, independent of any statutory authority, may in vacation by a *capias* arrest a person intending to leave the State in order to evade a decree, or attach his property to secure an enforcement of an anticipated final decree, is analogous in principle and application to that under the writ *ne exeat regno*, as recognized and administered by the English law. 1870, *Samuel v. Wiley*, 50 N. H. 353.

**5. Cox v. Raber**, 6 Ves. Jr. 783; *Crosby v. Marriott*, 2 Dock. 609; *Hannahan v. Nicholls*, 17 Ga. 77; 2 Story

where the equity was clear,<sup>1</sup> the demands certain and not contingent,<sup>2</sup> actually payable and not future,<sup>3</sup> of a pecuniary nature and not in the form of unliquidated damages,<sup>4</sup> and the party was about to leave the country to avoid payment.<sup>5</sup> The

Eq. Jur., § 1470; *Smedberg v. Mark*, 6 Johns. Ch. (N. Y.) 138; *Porter v. Spencer*, 2 Johns. Ch. (N. Y.) 169; *Brown v. Haff*, 5 Paige (N. Y.) 235; s. c., 28 Am. Dec. 425; *Cox v. Scott*, 5 Har. & J. (Md.) 384; *Palmer v. Van Doren*, 2 Edw. Ch. (N. Y.) 425; *Rhodes v. Cousins*, 6 Rand. (Va.) 188; s. c., 18 Am. Dec. 715; *Lucas v. Hickman*, 2 Stew. (Ala.) 11; s. c., 19 Am. Dec. 44; *Rice v. Hale*, 5 Cush. (Mass.) 241; *Graham v. Stucken*, 4 Blatchf. (U. S.) 50.

As in case of a *capias ad respondendum*, a *ne exeat* should not issue unless the petition sets forth facts raising a strong presumption of fraud. *Malcolm v. Andrews*, 68 Ill. 101.

1. *Woodward v. Schatzell*, 3 Johns. Ch. (N. Y.) 412; 1 N. Y. Ch. L.

To sustain the writ sufficient equity must appear on the face of the bill; mere apprehension that the defendant will misapply funds in his hands or abuse his trust is not sufficient.

2. *Sherman v. Sherman*, 3 Bro. (C. C.) 370; 1 Turn. & Russ. 322; *Rico v. Guatree*, 3 Atk. 509; *Whitehouse v. Partridge*, 3 Swanst. 377, 378; *Morris v. McNeal*, 2 Russ. 604; *Porter v. Spencer*, 2 Johns. Ch. (N. Y.) 169; *Graham v. Stucken*, 4 Blatchf. (U. S.) 50; *Mattocks v. Tremaine*, 3 Johns. Ch. (N. Y.) 75; *MacDonough v. Gaynor*, 18 N. J. Eq. 249.

The court will not grant a *ne exeat* in behalf of a surety, to enable him to hold his principal to bail, in order to compel payment of a forfeiture or penalty under the law of a foreign state, before it is legally ascertained that either principal or surety will be compelled to pay such penalty. *Gibbs v. Mennard*, 6 Paige (N. Y.) 258; *Gibbs v. Mermaud*, 2 Edw. Ch. (N. Y.) 482.

3. *Seymour v. Hazard*, 1 Johns. Ch. (N. Y.) 1. The debt for which this writ will issue must be certain in its nature, and actually payable and not contingent. 2 Story Eq. Jur., § 1474; *Whitehouse v. Partridge*, 3 Swanst. 365-377; *Sherman v. Sherman*, 3 Bro. (C. C.) 370; *Gibbs v. Mermaud*, 2 Edw. Ch. (N. Y.) 482.

There must be a debt existing at the time and so far mature that present payment or performance can rightfully be demanded. *Gleason v. Bisby*, 1

*Clarke* (N. Y.) 551; *Rhodes v. Cousins*, 6 Rand. (Va.) 188; s. c., 18 Am. Dec. 715; *Cox v. Scott*, 5 Har. & J. (Md.) 384; *De Rivafinoli v. Corsetti*, 4 Paige (N. Y.) 264; s. c., 25 Am. Dec. 532; *Cable v. Alvord*, 27 Ohio St. 666; *Rico v. Guatree*, 3 Atk. 509; *Whitehouse v. Partridge*, 3 Swanst. 377, 378; *Morris v. McNeil*, 2 Russ. 604; *Porter v. Spencer*, 2 Johns. Ch. (N. Y.) 169; *Malcolm v. Andrews*, 68 Ill. 101; *Forrest v. Forrest*, 10 Barb. (N. Y.) 46; s. c., 5 How. Pr. (N. Y.) 125; *Hunter v. Nelson*, 5 Blackf. (Ind.) 263; *MacDonough v. Gaynor*, 18 N. J. Eq. 249; *Palmer v. Van Doren*, 2 Edw. Ch. (N. Y.) 425; *Edwards v. Massey*, 1 Hawks (N. Car.) 359; *Samuel v. Wiley*, 50 N. H. 353.

4. *Blaydes v. Calvert*, 2 Jac. & Walk. 211; *Gibbs v. Mermaud*, 2 Edw. Ch. (N. Y.) 482; *Cowdin v. Cram*, 3 Edw. Ch. (N. Y.) 231; *De Rivafinoli v. Corsetti*, 4 Paige (N. Y.) 264; s. c., 25 Am. Dec. 532; *Etches v. Lance*, 7 Bes. 417; *Cox v. Ravie*, 6 Ves. 283; *Graham v. Stucken*, 4 Blatchf. (U. S.) 50; *Beames on Ne Exeat*, 36-57, 53-55; *Smedberg v. Mark*, 6 Johns. Ch. (N. Y.) 138; *Story Eq. Jur.*, § 1475.

5. *Graham v. Stucken*, 4 Blatchf. (U. S.) 50; *Mattocks v. Tremaine*, 3 Johns. Ch. (N. Y.) 75; *Mitchell v. Bunch*, 2 Paige (N. Y.) 606; s. c., 22 Am. Dec. 669.

Proof that the maker of a note is about to leave the State and take away his property is ground for a *ne exeat*, although the surety is solvent and accessible. Under 2 Ind. Rev. Stat., p. 275, § 668, all the parties jointly liable as defendants, or interested as plaintiffs, need not be joined in the proceeding. 1877, *Fitzgerald v. Gray*, 59 Ind. 254.

To become entitled to the writ of *ne exeat* a party must show that the defendant is removing or about to remove himself or his property. *Orme v. McPherson*, 36 Ga. 571; *Ramsay v. Joyce*, 1 McMull. Ch. (S. Car.) 236.

A *ne exeat* was held properly issued against a defendant in a suit to compel the settlement of a partnership account, where it appeared by the verified complaint and other affidavits that he had converted all his property into

writ will, in no case, be granted on a mere legal claim,<sup>1</sup> but, if equity has concurrent jurisdiction, it has been held not an objection to its issue that the complainants might have resorted to a court of law.<sup>2</sup> For instance, the writ has been granted upon a bill to enforce payment of the amount due upon a lost bond,<sup>3</sup> and again upon a vendor's bill for specific performance;<sup>4</sup> but in this latter

money or notes and threatened to leave the State. 1868, *Dean v. Smith*, 23 Wis. 483; s. c., 99 Am. Dec. 108.

1. *Ex parte* Bunker, 3 P. Wms. 312; *Atkinson v. Leonard*, 3 Bro. (C. C.) 218; *Parker v. Appleton*, 3 Bro. (C. C.) 427; *De Carriere v. De Callone*, 4 Ves. Jr. 577; *Jackson v. Petrie*, 10 Ves. Jr. 164; *King v. Smith*, 1 Dick. 82; *Brocker v. Hamilton*, 1 Dick. 154; *Ex parte* Duncombe, 2 Dick. 503; *Seymour v. Hazard*, 1 Johns. Ch. (N. Y.) 1; *De Rivafinoli v. Corsetti*, 4 Paige (N. Y.) 264; s. c., 25 Am. Dec. 532; *Edwards v. Massy*, 1 Hawks (N. Car.) 359; 2 Story Eq. Jur., § 1740; *Smedberg v. Mark*, 6 Johns. Ch. (N. Y.) 138; *Cox v. Scott*, 5 Har. & J. (Md.) 384; *Palmer v. Van Doren*, 2 Edw. Ch. (N. Y.) 425; *Rhodes v. Cousins*, 6 Rand. (Va.) 188; s. c., 18 Am. Dec. 715; *Lucas v. Hickman*, 2 Stew. (Ala.) 11; s. c., 19 Am. Dec. 44; *Rice v. Hale*, 5 Cush. (Mass.) 241; *Forrest v. Forrest*, 10 Barb. (N. Y.) 46; s. c., 5 How. Pr. (N. Y.) 125; *Beames on Ne Exeat*, p. 30; *Stewart v. Graham*, 19 Ves. 314; *Orme v. McPherson*, 36 Ga. 571; *Ramsey v. Joyce*, 1 McMull. Ch. (S. Car.) 236; *Hunter v. Nelson*, 5 Blackf. (Ind.) 263; *MacDonough v. Gaynor*, 18 N. J. Eq. 249; *Bonesteel v. Bonesteel*, 28 Wis. 245; *Gresham v. Peterson*, 25 Ark. 377; *Victor Scale Co. v. Shurtleff*, 81 Ill. 313.

The writ of *ne exeat* will not be issued on account of a claim on which the defendant may be arrested and held to bail at law. *Hannahan v. Nichols*, 17 Ga. 77; *Nixon v. Richardson*, 4 Desaus. (S. Car.) 108.

Under Georgia act of 1857 the surety has a perfect remedy by bailing his principal, and, therefore, cannot resort to the equitable remedy by *ne exeat*. *Ross v. Hawkins*, 29 Ga. 261.

**Illinois.**—The revised statute of Illinois provides that it shall not be necessary for the applicant for the writ of *ne exeat* to show a strictly equitable claim. Rev. Stat. Ill., p. 1716, ch. 97, § 7.

**Against an Executor.**—A *ne exeat* will not be granted against an executor,

sued at law as such, on a demand purely legal as a bill of exchange endorsed by the testator, there being no charge or affidavit that assets have come to the hands of the defendant. *Smedberg v. Mark*, 6 Johns. Ch. (N. Y.) 138.

2. *Hannay v. M'Intire*, 11 Ves. 54; *Jones v. Alphain*, 16 Ves. 370; *Jones v. Sampson*, 8 Ves. 593; *Grant v. Grant*, 3 Russ. 598; *Porter v. Spencer*, 2 Johns. Ch. (N. Y.) 169; *Atkinson v. Leonard*, 3 Bro. (C. C.) 218; *Johnson v. Clendenin*, 5 Gill & J. (Md.) 463.

In Alabama, a *ne exeat* will be granted—1st, where the defendant is about to remove beyond the jurisdiction of the court, and the demand against him is exclusively of an equitable nature, whether a sum certain be due or not; 2nd, where the courts of law and equity have concurrent jurisdiction if the defendant is about to remove, and has not been held to bail in an action at law; 3rd, where such courts have concurrent jurisdiction, and no action has been commenced at law, but suit has been instituted in equity, and the party is about to remove from the State; and 4th, where, from the extreme necessity of the case, and to prevent a failure of justice, it becomes necessary. *Lucas v. Hickman*, 2 Stew. (Ala.) 111; s. c., 19 Am. Dec. 44. See also *Baker v. Rowan*, 2 Stew. & P. (Ala.) 361.

An allegation of nonresidence alone is insufficient to give the chancellor jurisdiction to grant a *ne exeat*, and to render a decree *in personam* for an alleged debt, for which the remedy is exclusively legal. *McGinley v. Brooks*, 1 B. Mon. (Ky.) 129.

Where a defendant, who had been sued at law and held to bail, was about to depart from the State with his bail, who had sold his property, a writ of *ne exeat* was granted, from the necessity of the case, to prevent a failure of justice. *Porter v. Spencer*, 2 Johns. Ch. (N. Y.) 169.

3. *Atkinson v. Leonard*, 3 Bro. (C. C.) 218.

4. *Boehm v. Wood*, T. & R. 332-334; *Raynes v. Wyse*, 2 Mer. 472; *Dan.*

case not unless there has been a decree, or the court could clearly see that there must be a specific performance.<sup>1</sup>

2. **Alimony.**—As a means for enforcing the collection of alimony, the writ of *ne exeat* is becoming of slight importance by reason of statutes affording other remedies.<sup>2</sup> The writ has been issued, however, in American as in English courts for this purpose.<sup>3</sup> Where alimony has been decreed the court has issued the writ upon the necessary affidavit,<sup>4</sup> but only for the sum actually due and in arrears and the costs,<sup>5</sup> and the writ will never be granted until a decree has been made.<sup>6</sup>

3. **Account.**—In account, as in other cases of concurrent juris-

Ch. Practice (Perk. ed.), vol. 3, ch. 40, § 1, p. 1,804.

A demand against the vendor for specific performance, not being a money demand, is not a case for *ne exeat*. The claim for specific performance must be a demand for money, or the writ will not be granted. *Cowdin v. Crom*, 3 Edw. Ch. (N. Y.) 231.

To entitle plaintiff to a *ne exeat* against defendant, in a suit for specific performance, he must show affirmatively that he had a clear and unencumbered title to the land at the time of commencing the suit. *Brown v. Haff*, 5 Paige (N. Y.) 235; s. c., 28 Am. Dec. 425.

1. *Morris v. McNeal*, 2 Russ. 604; *Brown v. Haff*, 5 Paige (N. Y.) 235.

To the issuing of the writ it is no objection that the land, the subject matter of the bill, is without the State, provided the decree may be in force by acting on the person of a party. *Enos v. Hunter*, 9 Ill. 211.

2. *Bishop on Marriage and Divorce*, § 505.

3. *Denton v. Denton*, 1 Johns. Ch. 364; *McGee v. McGee*, 8 Ga. 295; *Prather v. Prather*, 4 Des. 33; *Devall v. Devall*, 4 Des. 79; *Yule v. Yule*, 2 Stock. 138; *Kirby v. Kirby*, 1 Paige 261; *Bayly v. Bayly*, 2 Md. Ch. 326. And see *Harper v. Rooker*, 52 Ill. 370; *Bylandt v. Bylandt*, 2 Halst. Ch. 28; *Lyon v. Lyon*, 21 Conn. 185, 199, note.

4. *Coglar v. Coglar*, 1 Ves. Jr. 94. The writ cannot be granted unless prayed for in the bill. *Sharpe v. Taylor*, 11 Sim. Ch. 50; *Reed v. Reed*, 1 Ch. Cas. 115; *Shaftoe v. Shaftoe*, 7 Ves. 71; *Dawson v. Dawson*, 7 Ves. 173.

5. *Coglar v. Coglar*, 1 Ves. Jr. 94; *Shaftoe v. Shaftoe*, 1 Ves. Jr.—; *Dawson v. Dawson*, 7 Ves. Jr. 173; 14 Ves. 261; 1 Jack. & Walk. 457; 1 Turn. & Russ. 322.

And being in the nature of equitable

bail it will not be granted under circumstances that would not entitle the party to bail at law, therefore in case of alimony it will only issue for arrears actually due. *Haffey v. Haffey*, 14 Ves. 261; 1 Jack. & W. 407; *Angier v. Angier*, Prec. Ch. 497; *Story Eq. Juris.*, § 1472; *Cooper Eq. Pr.*, ch. 3, 149, 150; *Bailey v. Cadwell*, 51 Mich. 217.

6. And it seems that even where there has been a decree for alimony the writ will not issue pending an appeal from it by the husband. 3 *Dan. Ch. Prac.* (Perk. ed.), ch. 40, § 1; *Street v. Street*, 1 T. & R. 322; *Shaftoe v. Shaftoe*, 7 Ves. 171; *Dawson v. Dawson*, 7 Ves. 173; *Haffey v. Haffey*, 14 Ves. 261; *Coglar v. Coglar*, 1 Ves. 94; *Bailey v. Cadwell*, 51 Mich. 217; *Story Eq. Jur.*, § 1472.

*Contra.*—Though the doctrine of the text is the undoubted English doctrine, many of the States have followed the decision of CH. KENT in *Denton v. Denton*. In that case the learned chancellor granted the writ pending suit for alimony, saying: "The process in cases like this, where the intended departure of the husband is clearly made out, appears to me to be essential to justice." *Denton v. Denton*, 1 Johns. Ch. (N. Y.) 364, 441; *S. P. Forrest v. Forrest*, 10 Barb. (N. Y.) 46; 5 *How. Pr.* (N. Y.) 125.

It is no ground for the dissolution of an injunction and *ne exeat*, issued in a suit by the wife for a divorce, that the husband does not intend to dispose of property, or to reside permanently out of the State. *Hammond v. Hammond*, 1 Clarke (N. Y.) 151.

In *New Jersey* the writ will not be granted until petition for divorce is filed. *Bylandt v. Bylandt*, 6 N. J. Eq. 28. The court of chancery in this State have uniformly followed the decision of *Denton v. Denton*, 1 Johns. Ch. (N. Y.) 364; *Yule v. Yule*, 10 N. J. Eq. 138.

diction, the writ has been issued upon the necessary affidavits.<sup>1</sup>

**IV. THE APPLICATION FOR THE WRIT<sup>2</sup>—1. The Time at Which the Application May be Made.**—The writ may be granted at any stage of the proceedings in equity, but only upon a bill filed.<sup>3</sup> A statute of the United States provides that "writs of *ne exeat* may be granted by any justice of the supreme court, in cases where they may be granted by the supreme court; and by any circuit justice or circuit judge, in cases where they might be granted by the circuit court of which he is judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same, that the defendant designs quickly to depart from the United States."<sup>4</sup> The writ may be granted in a proper case at or after decree, though the bill contains no prayer for it.<sup>5</sup>

**2. How the Application Is to be Made.**—The application may be made by motion or petition, more generally by motion, supported

1. *Jones v. Alphenian*, 16 Ves. 470; *Jones v. Sampson*, 8 Ves. 593; *Russell v. Ashby*, 5 Ves. 96; *Amsinck v. Barclay*, 8 Ves. 597; *Hannay v. McIntire*, 11 Ves. 55; *Howden v. Rogers*, 1 V. & B. 129; *Dick v. Swinton*, 1 V. & B. 371; 2 Story Eq. Jur., §§ 1471-1473; *Atkinson v. Leonard*, 3 Bro. (C. C.) 223; *Rhodes v. Cousins*, 6 Rand. (Va.) 188; s. c., 18 Am. Dec. 715; *Mitchell v. Bunch*, 2 Paige (N. Y.) 606; s. c., 22 Am. Dec. 669; *Nixon v. Richardson*, 4 Desaus. (S. Car.) 108.

The plaintiff, even in matters of account, must swear positively to a debt or balance due to him, but he need swear only according to his belief as to the amount. *Thorne v. Halsey*, 7 Johns. Ch. (N. Y.) 189; *Gernon v. Boecaline*, 2 Wash. (U. S.) 130; *Gilbert v. Colt*, Hopk. Ch. (N. Y.) 496; *Denton v. Denton*, 1 Johns. Ch. (N. Y.) 364; *Clayton v. Mitchell*, 1 Del. Ch. 32.

"We think the writ is not grantable when the account is open and unliquidated, although the plaintiff states in his affidavit that a certain sum is due. Such an allegation, although in terms the statement of a fact, that is, of the defendant's actual indebtedness, must nevertheless be qualified by the subject matter to which it relates. It relates to a long and unliquidated account, as to facts which are future and contingent. It can amount to nothing more than a strong declaration of a confident expectation or belief, and is not sufficient ground for issuing the writ, unless it is accompanied and supported by proper accounts and documents." *SHAW, C. J.*, in *Rice v. Hale*, 5 Cush. (Mass.) 241;

*Porter v. Spencer*, 2 Johns. (N. Y.) 169, *Atkinson v. Leonard*, 3 Bro. (C. C.) 218; *Johnson v. Clendenin*, 5 Gill & J. (Md.) 463.

2. In view of the settled policy of our laws against imprisonment for debt, every application for a writ of *ne exeat* should be closely scrutinized, and promptly rejected when the complaint is not clearly within the spirit of the law, cited in *Gresham v. Peterson*, 25 Ark. 380. See *Wallace v. Duncan*, 13 Ga. 41; *Tomlinson v. Harrison*, 8 Ves. Jr. 33; *Burnsides v. Blythe*, 11 B. Mon. (Ky.) 12; *Russell v. Ashby*, 5 Ves. Jr. 96.

3. *Ex parte Bruncker*, 3 P. Wms. 312; *Samuel v. Wiley*, 50 N. H. 355; *Dunham v. Jackson*, 1 Paige (N. Y.) 629; *Mattocks v. Tremaine*, 3 Johns. Ch. (N. Y.) 75; *The Georgia Lumber Co. v. Bissell*, 9 Paige (N. Y.) 225.

A solicitor's bill being taxed and reported overpaid £60, on motion and affidavit of his going beyond the sea, a *ne exeat regno* was granted, though no bill was in court whereon to ground the writ. *Lloyd v. Cardy*, Prec. Ch. 171.

4. The district judges of the United States courts have no authority to issue the writ of *ne exeat*. *Gernon v. Boecaline*, 2 Wash. (U. S.) 130.

The writ of *ne exeat* is not issuable in *Michigan* by a circuit court commissioner or injunction master as a matter of interlocutory chancery practice. *Bailey v. Cadwell*, 51 Mich. 217.

5. *Collinson v. ———*, 18 Ves. Jr. 453. See also *Patterson v. McLaughlin*, 1 Cranch (C. C.) 352; *Lewis v. Shainwald*, 7 Sawy. (U. S.) C. C. 403;



by an affidavit, or the writ may be prayed for in the bill.<sup>1</sup> It may be *ex parte*, as any notice to the defendant might frustrate the object of the writ by giving him an opportunity to get without the jurisdiction of the court.<sup>2</sup>

3. **The Affidavit.**—The application for the writ must be supported by an affidavit made by the complainant or some person conversant with the facts.<sup>3</sup> This affidavit must contain positive allegations<sup>4</sup> that there is an equitable debt due certain in amount,<sup>5</sup> though in case of account it is sufficient if he swears to the amount to the best of his knowledge and belief,<sup>6</sup> that the defend-

Lowenstein v. Biernbaum, 8 W. N. C. 163; Union Ins. Co. v. Kellogg, 5 W. N. Cas. 477; Graham v. Stucken, 4 Blatchf. (U. S.) 50.

1. It is not necessary to entitle complainant to the writ that he should have prayed for it in his bill. Collinson v. ———, 18 Ves. 453. Nor need the bill be amended when application is made. 1 Hoff. Ch. Pr. 91; Gilbert v. Colt, Hopk. Ch. (N. Y.) 498; 1 Turn. & V. 987; 3 Dan. Ch. Pr. (Perk. ed.) 1810.

In a petition for a *ne exeat*, a defective statement of facts will not deprive the master in chancery of jurisdiction in its issuance. Bassett v. Bratton, 86 Ill. 152.

2. Collinson v. ———, 18 Ves. 453; Samuel v. Wiley, 50 N. H. 355.

3. Dawson v. Dawson, 7 Ves. Jr. 173; McGee v. McGee, 8 Ga. 295; s. c., 52 Am. Dec. 407; Cable v. Alvord, 27 Ohio St. 666.

4. In an affidavit to found a motion for a writ of *ne exeat*, it is sufficient to refer to the facts charged in the bill as showing the ground of the complainant's demand or complaint without restating them in the affidavit, if the facts so charged are such as to entitle the plaintiff to the writ. 1818, Clayton v. Mitchell, 1 Del. Ch. 32. Mere apprehensions of the plaintiff will not warrant the issuance of the writ. Forrest v. Forrest, 10 Barb. (N. Y.) 46; 5 How. Pr. (N. Y.) 125. See Bushnell v. Bushnell, 7 How. Pr. (N. Y.) 389; s. c., 15 Barb. 399; Cox v. Scott, 5 Har. & J. (Md.) 384; Williams v. Williams, 3 N. J. Eq. 130; Rhodes v. Cousins, 6 Rand. (Va.) 188; s. c., 18 Am. Dec. 715; Woodward v. Schatzell, 3 Johns. Ch. (N. Y.) 412; De Rivaflinoli v. Corsetti, 4 Paige (N. Y.) 264; s. c., 25 Am. Dec. 532; Lehman v. Logan, 7 Ired. Eq. (N. Car.) 296.

In *Georgia*, where, on an application for a writ of *ne exeat*, the bill was verified by the affidavit of the complainant,

who swore that the facts stated were true so far as they concerned herself, and, so far as they concerned the acts and deeds of others, she believed them to be true, and the bill alleged that the defendant had threatened to leave the State, it was held that this was sufficient. McGee v. McGee, 8 Ga. 295; s. c., 52 Am. Dec. 407.

Sufficiently strong allegations in a bill, sworn to only "to the best of her knowledge and belief," were held not sufficient to support a writ of *ne exeat*. Bryan v. Ponder, 23 Ga. 480.

Under Ga. Stat. 1813, extending the right to writ of *ne exeat* to cases where the property, for the forthcoming of which the surety (petitioner) is liable, is about to be removed, a petition stating that the petitioners are informed and believe that it is about to be removed, was held insufficient, in not stating the facts which were the grounds of the belief. Woodes v. Symmes, 25 Ga. 69. And see Wallace v. Duncan, 13 Ga. 41; Holliday v. Riodan, 25 Ga. 629.

5. Darley v. Nicholson, 1 Dr. & W. 66; Yule v. Yule, 10 N. J. Eq. 138; Sherman v. Sherman, 3 Bro. (C. C.) 370. Holliday v. Hiodan, 25 Ga. 629; Howden v. Rogers, 1 Ves. & B. 129; Mattocks v. Tremaine, 3 Johns. Ch. (N. Y.) 75; Rhodes v. Cousins, 6 Rand. (Va.) 188; s. c., 18 Am. Dec. 715; Gilbert v. Colt, Hopk. Ch. (N. Y.) 496; Gernon v. Boecaline, 2 Wash. (U. S.) 130; Thorne v. Halsey, 7 Johns. Ch. (N. Y.) 189; Rice v. Hale, 5 Cush. (Mass.) 241. The debt may have appeared from a master's report. Yule v. Yule, 10 N. J. Eq. 141; Collinson v. Collinson, 18 Ves. 352. Or from other matter before the court. Rice v. Hale, 5 Cush. (Mass.) 412. Plaintiff must swear positively that a debt or balance is due; though he may state his belief as to the amount. Thorne v. Halsey, 7 Johns. Ch. (N. Y.) 189.

6. Rico v. Gaultier, 3 Atk. 501; Redman v. Hetherston, 5 Ves. Jr. 91; Jones

ant entertains a positive intention to go abroad,<sup>1</sup> and that the debt will be endangered thereby.<sup>2</sup> It is not sufficient if a belief of the defendant's intention to go abroad is stated, but the affidavit must be positive as to this intention, or to his declarations to that effect, or to other facts from which this intention may be deduced.<sup>3</sup>

**V. AGAINST WHOM ISSUED.**—The writ may issue as well against a foreigner, who is within the jurisdiction of the court, as against a citizen.<sup>4</sup>

*v. Sampson*, 8 Ves. 593; *Jackson v. Petrie*, 10 Ves. Jr. 164; *Mattocks v. Tremaine*, 3 Johns. Ch. (N. Y.) 75; *Gernon v. Boecaline*, 2 Wash. (U. S.) 130; *Clayton v. Milton*, 1 Del. Ch. 32; *McGehee v. Polk*, 24 Ga. 406.

In case of account, the plaintiff, in a bill for a *ne exeat*, must swear positively that something is due him, though as to the amount of the debt he may swear as to his belief. *Thorne v. Halsey*, 7 Johns. Ch. (N. Y.) 189.

1. *Mattocks v. Tremaine*, 3 Johns. Ch. (N. Y.) 75; *Rhodes v. Cousins*, 6 Rand. (Va.) 188; s. c., 18 Am. Dec. 715; *Orme v. McPherson*, 36 Ga. 571; *Yule v. Yule*, 10 N. J. Eq. 138; *Gresham v. Peterson*, 25 Ark. 377; *Houseworth v. Hendrickson*, 27 N. J. Eq. 60; *Sherman v. Sherman*, 3 Bro. (C. C.) 370; *Gilbert v. Colt*, Hopk. Ch. (N. Y.) 500; *Gernon v. Boecaline*, 2 Wash. (U. S.) 130; *Thorne v. Halsey*, 7 Johns. Ch. (N. Y.) 189; *Rice v. Hale*, 5 Cush. (Mass.) 241; *Beames on Ne Exeat* 25; 7 Ves. 417, 410; 7 Ves. 470.

An affidavit for a *ne exeat* is sufficient if it is positive as to the defendant's intention to go abroad, although upon knowledge and belief only, as to preparations and threats. *Moore v. Gleaton*, 23 Ga. 142.

2. It is sufficient to allege that the debt will be endangered by the departure of the defendant, without alleging that his purpose in going abroad is to avoid the jurisdiction of the court. *Etches v. Lance*, 7 Ves. Jr. 417; *Stewart v. Graham*, 19 Ves. 313; *Yule v. Yule*, 10 N. J. Eq. 140; *Atkinson v. Leonard*, 5 Bro. (C. C.) 218; *Mattocks v. Tremaine*, 3 Johns. Ch. (N. Y.) 75; *Rhodes v. Cousins*, 6 Rand. (Va.) 188; s. c., 18 Am. Dec. 715; *McGehee v. Polk*, 24 Ga. 406; *King v. Huntley*, 2 Hawaiian Rep. 457.

The affidavit must set out that defendant has disposed of, or is about to remove, his property (*Dean v. Smith*, 23 Wis. 483; s. c., 99 Am. Dec. 198;

*Fitzgerald v. Gray*, 59 Ind. 254); and should show that the property sold by the defendant, with intent to depart, etc., was not exempt from execution. 1876, *Jones v. Kennicott*, 83 Ill. 484.

3. *Etches v. Lance*, 7 Ves. 417; *Amisnck v. Barclay*, 8 Ves. Jr. 597; *Beames on Ne Exeat* 33; *Jones v. Alphenin*, 16 Ves. 470; *Sherman v. Sherman*, 3 Bro. (C. C.) 370; *Yule v. Yule*, 10 N. J. Eq. 138; *Moore v. Gleaton*, 23 Ga. 142; *Woodes v. Symmes*, 25 Ga. 69.

Upon an application for a *ne exeat*, the fact that the information of defendant's intention to depart came from those who would most probably have informed him of the intended application for a *ne exeat*, if they had been asked for an affidavit, is a sufficient reason for not producing their affidavits. *Oidionaux v. Helie*, 2 Ch. Sent. 609.

4. The writ can issue only against those whom the court cannot reach by attachment or execution. 3 Bl. Com. 213; 3 Dan. Ch. Pr. 1801.

It is no objection to a court of equity entertaining a bill respecting land, that the land is not within its jurisdiction, where its decree can be enforced by acting on the person of a party; and in a proper case the court will restrain the party from leaving the jurisdiction by a *ne exeat*. *Enos v. Hunter*, 9 Ill. 211; *Woodward v. Schatzell*, 3 Johns. Ch. (N. Y.) 412.

It is not necessary that the defendant should be actually in the State when the writ of *ne exeat* is applied for. *Parker v. Parker*, 12 N. J. Eq. 105.

A writ of *ne exeat* may issue against a foreigner or citizen of another State, and on demands arising abroad. *Mitchell v. Bunch*, 2 Paige (N. Y.) 606; s. c., 22 Am. Dec. 669; *Gilbert v. Colt*, Hopk. Ch. (N. Y.) 500; *Forrest v. Forrest*, 5 How. Pr. (N. Y.) 125; s. c., 10 Barb. (N. Y.) 46; *McNamara v. Dwyer*, 7 Paige (N. Y.) 237; s. c., 32 Am. Dec. 627. Cannot issue against a female in an

**VI. TENOR OF THE WRIT, THE BOND, ETC.**—It commands the officer to whom it is directed to cause the defendant to appear before him and give bail not to go without the jurisdiction of the court without its permission;<sup>1</sup> and, in case he refuses to give bail, to commit him to jail until he does so;<sup>2</sup> and when he has taken security, to make and return a certificate thereof to the court.<sup>3</sup> The writ must be marked on the back with the sum for which the defendant is to give security, in words at length.<sup>3</sup>

action founded on contract. *Adams v. Whitcomb*, 49 Vt. 708.

1. *DeCarliere v. DeCalonne*, 4 Ves. 577; *Flack v. Holb*, Black & W. 416.

The sum in which defendant shall be held to bail is determined by the court, at a sum sufficient to cover a reasonable amount of future interest; and the sheriff must take a bond for that sum without any addition. *Gilbert v. Colt*, Hopk. Ch. (N. Y.) 496; *McNamara v. Dwyer*, 7 Paige (N. Y.) 239; s. c., 32 Am. Dec. 627.

The Georgia act of 1830 allowed a writ of *ne exeat regno* to run in the alternative, that the defendant shall not go beyond the seas, or that he shall give bonds for the eventual condemnation money. *McGehee v. Polk*, 24 Ga. 406.

**Service.**—Under the New Jersey statute forbidding service of any writ, process, etc., on Sunday, service of a writ of *ne exeat* on Sunday is void, and the bond given on issuing the writ so served should be cancelled. 1876, *Jewett v. Bowman*, 27 N. J. Eq. 275.

**The Bond.**—A *ne exeat* bond only binds the sureties to the extent of the final decree of the court; and if the defendant continually remain in the district, according to the condition of the bond, they will be discharged altogether. *Zantzinger v. Weightman*, 2 Cranch (C. C.) 478.

A bond given, on a writ of *ne exeat*, to restrain the obligor from leaving the State, etc., conditioned to "appear at the court of common pleas at Union court house on the fourth Monday in June next [when no court was to sit], to answer to a bill in equity," etc. (over which subject the court had no control), was held to be void. *Darby v. Hunt*, 2 Treadw. Const. (S. Car.) 740.

If a defendant arrested upon a *ne exeat* does not appear, so that he may be made amenable to the process of court, the sheriff is responsible for the debt; but he will not be compelled to pay the debt without giving him time to produce the defendant or to recover the

debt upon the bail bond. *Brayton v. Smith*, 6 Paige (N. Y.) 489.

In *South Carolina* the writ of *ne exeat* requires the defendant to find surety that he will not depart the State without leave of the court. The sureties have the same rights as bail. *Commissioner v. Phillips*, 2 Hill (S. Car.) 631.

The perfecting of an appeal of a *ne exeat* cause may be a ground for a temporary suspension of the action on the recognizance therein, but not for an abatement. The taking of the recognizance by the sheriff, and entering it on the order of arrest in such proceeding, is no necessary part of the issue, service, or return of the order. *Fitzgerald v. Gray*, 61 Ind. 109.

**Leave of Absence.**—By consent of parties, leave of absence may be granted to a defendant who has given bail upon a *ne exeat*, notwithstanding the bail bond, but without prejudice to the bail. *Dupont v. Goffe*, 1 Dessaus. (S. Car.) 143.

2. *Foster's Federal Prac.*, § 263. A writ of *ne exeat* should be made returnable to the first day of the term next after it issues. *Crocker v. Dunkin*, 6 Blackf. (Ind.) 535.

3. The court allowing the writ directs a sum in which the defendant is to be allowed to bail, sufficient to cover the debt, costs, etc. *Beames on Ne Exeat*; *Gilbert v. Colt*, Hopk. Ch. (N. Y.) 500; *McNamara v. Dwyer*, 7 Paige (N. Y.) 239; *Gleason v. Bisby*, 1 Clarke (N. Y.) 537.

In fixing the amount of security to be given by the defendant in a writ of *ne exeat*, the court will exercise a sound discretion, having due regard to the rank of the parties and the property of the husband. *Denton v. Denton*, 1 Johns. Ch. (N. Y.) 441.

A *ne exeat* should be marked by the officer issuing it, at the time, with the sum in which the defendant is to be held to bail; but where it is marked by the clerk it will be presumed to have been

**VII. HOW AND WHEN THE WRIT IS DISCHARGED.**<sup>1</sup>—The application for the discharge of the writ is made by motion, and, if security has been given, notice of the motion should state that application will be made as well for the discharge of the writ as that the bond may be given up and cancelled.<sup>2</sup> The motion must be made within a reasonable time, or the application will be refused.<sup>3</sup> If it appears that there has been some irregularity in the application for the issuance of the writ, or if the defendant disproves the complainant's charges on the merits, the court will discharge the writ.<sup>4</sup> But the unsupported affidavit of the defendant denying the allegations of the debt, and the defendant's intention to depart contained in the plaintiff's affidavit, will not be sufficient grounds for a discharge.<sup>5</sup> If from the affidavit of the plaintiff

so marked in pursuance of a fiat of the proper officer. *Gleason v. Bisby*, 1 Clarke (N. Y.) 551; *Viadero v. Viadero*, 7 Hun (N. Y.) 313.

1. In *Massachusetts* the supreme court may discharge the defendant from custody under a writ of *ne exeat*, in the same manner as if he were a poor prisoner committed in execution. *Rice v. Hale*, 5 Cush. (Mass.) 238.

2. Dan. Ch. Pr. (3rd Am. ed.) 1817.

Where L has been arrested on a *ne exeat*, and has given the usual bail to the sheriff upon such arrest, and afterwards, by an agreement between him and the complainant, the *ne exeat* was discharged upon his executing the usual bond to answer the bill and abide the decree, it was held, that as L had not, in his agreement, reserved his right of questioning the propriety of issuing the *ne exeat*, he was precluded from moving that the bond be given up and cancelled, upon the ground that the *ne exeat* was improvidently issued. *Jesup v. Hill*, 7 Paige (N. Y.) 95.

3. Dan. Ch. Pr. (3rd Am. ed., 1817); *Harris v. Hardy*, 3 Hill (N. Y.) 393; *Miller v. Miller*, 1 N. J. Eq. 386. One arrested on *ne exeat* may apply for a discharge on affidavits before answer filed. *Cary v. Cary*, 39 N. J. Eq. 20.

4. The writ will not be discharged upon the defendant's denying the intention. *Amsinck v. Barclay*, 8 Ves. Jr. 594.

The plaintiff having twice held the defendant to bail in actions at law, obtained a writ of *ne exeat* discontinuing his action at law. He was discharged, on the principle that a man cannot be arrested and held twice to bail on the same cause. But the court will not interfere, after the writ has been discharged in equity, to direct the party be dis-

charged from a subsequent arrest at law for the same demand; but will leave it with the court of law to determine whether, under the circumstances, the common law process ought to be made available. Dan. Ch. Pr., ch. 50; *Walker v. Christian*, 7 Sim. 367; *Leo v. Lambert*, 3 Russ. 417; *Pratt v. Wells*, 1 Barb. (N. Y.) 425.

A *ne exeat* ought to be dissolved where there is sufficient remedy at law. *Hawthorn v. Kelly*, 30 Ga. 965.

A defendant in chancery being in prison in Indiana, on a writ of *ne exeat* to secure his performance of a decree for a pecuniary demand against him, claimed by the bill, was discharged from custody on motion under the act of 1842 abolishing imprisonment for debt, no fraud on the subject being shown. *West v. Walker*, 6 Blackf. (Ind.) 420.

A *subpoena* and *ne exeat* were taken out and delivered to the sheriff at the same time. The sheriff being unable to serve them, in consequence of defendant's departure from the county, a new writ of *ne exeat* was sent to the county in which defendant then was, and immediately after the service of the second *ne exeat*, a new *subpoena* was sent to the same county, but defendant left the State before the *subpoena* could be served. Held, that the arrest of defendant upon the *ne exeat* was regular, though he had not been served with a *subpoena*. *Georgia Lumber Co. v. Bissell*, 9 Paige (N. Y.) 225.

5. *Russell v. Ashby*, 5 Ves. 98; *Boehm v. Wood*, T. & R. 332; *Myer v. Myer*, 25 N. J. Eq. 28; *Houseworth v. Hendrickson*, 27 N. J. Eq. 60; *Fitch v. Richardson*, 1 Morris (Iowa) 245; *O'Conner v. Debriane*, 3 Edw. Ch. (N. Y.) 230; *Cowdin v. Cram*, 3 Edw. Ch. (N. Y.)

and the answer of the defendant is made a strong *prima facie* case that nothing is due, the writ will be discharged.<sup>1</sup> When the writ is discharged another application may be made founded upon new affidavits. If issued for more than is due, the court will not discharge the writ, but will order the sum to be reduced.<sup>2</sup> Upon payment of the amount of the complainant's claim into court,<sup>3</sup> or upon giving security to abide the decree, the court will discharge the writ.<sup>4</sup>

**NECKLACES.**—Where a testatrix bequeathed her necklaces of every description, pearls, garnets, cornelians, and watches, to B and, by a subsequent testamentary disposition, all her trinkets and pearls, with various specific articles to C, it was held that a certain diamond necklace passed to C and not to B.<sup>5</sup>

**NEGATIVE.**—See BURDEN OF PROOF, 2 Am. & Eng. Encyc. of Law 649; OPEN AND CLOSE.

**NEGATIVE EASEMENT** (see also EASEMENT, 6 Am. & Eng. Encyc. of Law 139) is an easement, or, as it is sometimes called, an amenity, and consists in restraining the owner from doing that with, and upon, his property which, but for the grant or covenant, he might lawfully have done, and hence is called a negative easement, as distinguished from that class of easements which com-

231; *Glenton v. Clover*, 10 Abb. Pr. (N. Y.) 422.

One arrested on *ne exeat* will be refused a discharge where it appears that he has boasted that his property was out of his hands, but that he still controlled it, and would leave the State before anything could be done with him, etc. *Cary v. Cary*, 39 N. J. Eq. 20.

Where, on an application for *ne exeat*, it appeared that defendant had applied to be relieved from his administratorship on the ground that he was going to leave the State, an answer that he had so intended, but did not at the time of filing the answer, but might change his mind—*held*, not sufficient to prevent the granting of the writ. *Conyers v. Gray*, 67 Ga. 329.

1. *Leo v. Lambert*, 3 Russell 417. Where defendant's answer is before the court it should be taken into consideration. *Gilbert v. Colt*, Hopk. Ch. (N. Y.) 496.

2. *Grant v. Grant*, 3 Russell 398.

3. *Evans v. Evans*, 1 Ves. Jr. 86; *Stewart v. Stewart*, 19 Ves. 314; *Gilbert v. Colt*, Hopk. Ch. (N. Y.) 501.

4. *Baker v. Dumaresque*, 2 Atk. 66; *Jerningham v. Glass*, 3 Atk. 409; *Reddam v. Hetherston*, 5 Summer Ves. 91; *Woodard v. Schatzell*, 3 Johns. Ch. (N.

Y.) 412; *Atkinson v. Leonard*, 3 Bro. (U. S.) 218-224; *Parker v. Parker*, 12 N. J. Eq. 105.

In *New York* it is a matter of course to discharge a writ of *ne exeat* upon the defendant's giving security to answer the plaintiff's bill, where a discovery is necessary, and to render himself amenable to the process of the court pending the litigation, and to such process as may be issued to compel a performance of the final decree. *Georgia Lumber Co. v. Bissell*, 9 Paige (N. Y.) 225; *McNamara v. Dwyer*, 7 Paige (N. Y.) 239; s. c., 32 Am. Dec. 627; *Mitchell v. Bunch*, 2 Paige (N. Y.) 606; s. c., 22 Am. Dec. 669; *Gleason v. Bisby*, 1 Clarke (N. Y.) 551.

He can be relieved from the restraint by giving a bond in double the value of the claim, under Ga. Code, § 3228; but the court cannot impose other conditions as the ground for relief. *Bleyer v. Blum*, 70 Ga. 558.

In a suit on a *ne exeat* bond, the sureties cannot object to any irregularity in the original proceeding previous to judgment against their principal; that judgment is conclusive upon them, and they are bound by his laches, in not making a better defence. *Blue v. Sheppard*, 28 Ga. 566.

5. *Atty. Gen. v. Harley*, 5 Russ. 173.

pels the owner to suffer something to be done upon his property by another.<sup>1</sup>

**NEGLECT**—(See also **DIVORCE**, 5 Am. & Eng. Encyc. of Law 745; **NEGLIGENCE**).—Omission or forbearance to do a thing that can be done or that is required to be done.<sup>2</sup>

1. Trustees of Columbia College v. Lynch, 70 N. Y. 447; Washb. on Easem. 5. "A negative easement, by which the owner of lands is restricted in their use, can only be created by covenant in favor of other lands not owned by the grantor and covenantor." Trustees of Columbia College v. Lynch, 70 N. Y. 448.

2. Anderson's L. Dict.; Malone v. United States, 5 Ct. Cl. 486.

Neglect does not generally imply carelessness or imprudence — simply an omission to do or perform some work, duty or act. Rosenplaenter v. Roessle, 54 N. Y. 268. To neglect is "to omit by carelessness or design." Webster's Dict., followed in New York Guaranty etc. Co. v. Gleason, 53 How. Pr. (N. Y.) 127. "No neglect can be imputed to the plaintiff in omitting to do that which cannot be done." New York Guaranty etc. Co. v. Gleason, 53 How. Pr. (N. Y.) 127; Wake-man v. Paulmier, 39 N. J. L. 341.

"The ordinary meaning of the word neglect is an omission, from carelessness, to do something that can be done and ought to be done." Hart v. Chase, 46 Conn. 207. See also Willoughby v. Willoughby, 9 Q. B. 923; s. c., 58 E. C. L. 935.

**Neglect or Default.**—"A 'neglect' and a 'default' (in a covenant for quiet enjoyment) seems to imply something more than the mere want of discretion with respect to the covenantor's own interests; something like the breach of a duty or legal obligation existing at the time; those words, in their proper sense, implying the not doing some act to secure his title which he ought to have done, and which he had the power to do; and the not preventing or avoiding some danger to the title which he might have prevented or avoided." Per TINDAL, C. J., in Woodhouse v. Jenkins, 9 Bing. 441, 442; Sug. V. & P. 602-604. See also Coite v. Lynes, 33 Conn. 109.

**"Neglect to Deposit."**—Where a guest offered the clerk of a hotel a small package for deposit within the safe, but did not mention that it contained jewelry or other valuables, and the clerk re-turned it, saying, "Take it to your room;

it will be just as safe there"—held, that was a "neglect to deposit." It would have been otherwise if guest had told the clerk that the package contained valuables. Bendetson v. French, 46 N. Y. 266. See also Rosenplaenter v. Roessle, 54 N. Y. 262.

**Neglect and Fault (Distinguished).**—See **FAULT**, 7 Am. & Eng. Encyc. of Law 817, n. 2.

**Distinguished from Omit.**—"If the word 'neglect' imports something more than the word 'omit,' it must because it imports that the party had opportunity to do the thing which he omitted to do. If he did not have such opportunity, he cannot be said to have neglected it." Johnson v. Huntington, 13 Conn. 50.

**Distinguished from Refusal.**—As used in respect to the payment of money, "refusal is the failure to pay money when demanded; neglect is the failure to pay money which the party is bound to pay without demand." Kimball v. Rowland, 6 Gray (Mass.) 224.

**"Neglect or Refuse."**—In a condition to a deed which was as follows: "Whenever E C or her heirs or assigns shall neglect or refuse to support said fence, this deed to be void." "Both these terms [neglect and refuse], in connection with the subject matter, imply some previous demand, notice, or request—if the fence has decayed, or been removed, to replace it," and after notice defendant has refused or neglected to replace it. Merrifield v. Coblelgh, 4 Cush. (Mass.) 178.

**In Indictment.**—A prisoner was convicted on an indictment charging him with neglect to provide food and clothing for his child, but omitting to allege ability. Held, that the ability to provide was implied in the word "neglect." Reg. v. Ryland, L. R., 1 C. C. R. 99.

**In Bill of Lading.**—A provision in a bill of lading, whereby common carriers by water agreed to deliver merchandise in good order, "all loss and damage . . . from any act, neglect, or default whatsoever of the pilot, master, or mariners being excepted, and the owners being in no ways liable for any consequences above excepted," does not ex-clude the carriers from liability for a loss

NEGLIGENCE.<sup>1</sup>

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occasioned by the delivery of the goods by the mate of the vessel, without authority or direction from the plaintiffs, to a carman who was not empowered to receive them. *Guillaume v. Hamburgh etc. Packet Co.*, 42 N. Y. 212.

**In Statute.**—The neglect of an attorney to pay over money collected for his client is a "neglect" in a "professional employment," within the exception of Pa. act of July 12th, 1842, abolishing imprisonment, etc. *Wills v. Kane*, 2 Grant Cas. (Pa.) 60.

An overseer who neglects to sign the burgess delivered by him, under section 15 of § 5 & 6 W. IV, ch. 76 (Municipal Corporation act), incurs the penalty imposed by section 48, although his neglect was neither wilful nor corrupt. 49 E. C. L. 96.

To "neglect" doing "is the omission to do some duty which the party is able to do." Per PATTERSON, J., in *King v. Burrell*, 12 A. & E. 468; s. c., 49 E. C. L. 96.

Wilful neglect is an intentional failure to perform a manifest duty in which the public has an interest, or which is important to the person injured, in either preventing or avoiding the injury. *Kentucky Cent. R. Co. v. Gastineau*, 83 Ky. 128.

To "wilfully neglect to do a thing" is intentionally or purposely to omit to do it (per MELLOR, J., *R. v. Downes, inf.*); and therefore to pray, instead of sending for a doctor, is to "wilfully neglect" to provide medical aid within §§ 37, 31 & 32 V., ch. 122; *Reg. v. Downes*, 1 Q. B. D. 25; *Reg. v. Morby*, 8 Q. B. D. 571.

Wilful neglect or misconduct inducing to adultery (§ 31, Matrimonial Causes act, 1857) means marital neglect or misconduct, and not such compulsory absence as is occasioned by a term of imprisonment. It means also such neglect or misconduct as has led up to the respondent's fall from virtue—i. e., the first lapse. *St. Paul v. St. Paul*, L. R., 1 P. & D. 739; *Cummington v. Cummington*, 1 Sw. & Tr. 475; *Allen v. Allen*, 28 L. J. P. & M. 81; *Badcock v. Badcock*, 31 L. T., O. S. 268; *Proctor v. Proctor*, 34 L. J. P. & M. 99; *Dering v. Dering*, L. R., 1 P. & D. 531; *Davies v. Davies*, 32 L. J. P. & M. 111; *Hawkins v. Hawkins*, 10 P. D. 177.

See also *Washburn v. Washburn*, 9 Cal. 476; *Holt v. Holt*, 117 Mass. 202; *DIVORCE*; 5 Am. & Eng. Encyc. of Law 807.

1. **Cross References.**—This article, dealing as it does with only the principles

**I. INTRODUCTION.**—This article deals with the general principles of the law of negligence and the rules concerning their application to different relations and states of fact. It does not undertake to treat the law of negligence in detail in its particular applications to the many and varied relations known to the law.<sup>1</sup>

**II. ANALYTICAL DESCRIPTION.**—There has been no satisfactory definition of negligence.<sup>2</sup> It is, however, susceptible of an analytical description. Negligence is either actionable or not action-

of the law of negligence, and leaving the application to the many relations known in law to be made in other parts of the work, must, of necessity, require many references. The following table of cross references is therefore appended.

**Negligence of Public Officers and Private Persons.**—See NOTARY PUBLIC; PUBLIC OFFICERS; SHERIFFS; MARSHALS AND CONSTABLES; ATTORNEY AND CLIENT; AUCTIONS AND AUCTIONEERS; BAILMENTS; DRUGGIST; FORWARDING MERCHANTS; GUARDIANS; INNS AND INNKEEPERS; MALPRACTICE; MERCANTILE AGENCIES; PHYSICIANS AND SURGEONS.

**Negligence of Municipal Corporations.**—See BRIDGES; FIRE DEPARTMENT; GAS COMPANIES; HIGHWAYS; LATENT DEFECTS; LAW OF THE ROAD; LACHES; MUNICIPAL CORPORATIONS; STREETS; SIDEWALKS; STREET RAILWAYS.

**Negligence of Railway Corporations.**—See CARRIERS OF GOODS; CARRIERS OF PASSENGERS; CARRIERS OF STOCK; CROSSINGS; COUPLING CARS; FELLOW-SERVANTS; FIRES BY RAILWAYS; LATENT DEFECTS; RAIL COMPANIES.

**Negligence of Other Private Corporations.**—See CARRIERS OF GOODS; CARRIERS OF PASSENGERS; CARRIERS OF STOCK; CORPORATIONS; FOREIGN CORPORATIONS; EXPRESS COMPANIES; GAS COMPANIES; STEAMBOATS; STREET RAILWAYS; TELEGRAPH COMPANIES; TURNPIKES; WAREHOUSES.

**Negligence in Special Relations.**—See AGENCY; BAILMENTS; CARRIERS OF PASSENGERS; EXPRESS COMPANIES; FELLOW-SERVANTS; INNS AND INNKEEPERS; LANDLORD AND TENANT; MASTER AND SERVANT; PARENT AND CHILD.

**Negligence in Care and Use of Property.**—See ANIMALS; BAILMENTS; BRIDGES; DAMS; FENCES; FERRIES; PERSONAL PROPERTY; REAL PROP-

ERTY; WATER AND WATER COURSES.

**Negligence Generally.**—See CONTRIBUTORY NEGLIGENCE; COMPARATIVE NEGLIGENCE; ACCIDENT; ACT OF GOD; DAMAGES; DEATH; EXPLOSIONS; FIRE; FLOODS; INSURANCE; INEVITABLE ACCIDENT; LACHES; PARTIES TO ACTIONS; TORTS.

**1. Authorities.**—In this discussion of the law of negligence free use has been made of the text books upon the subject and acknowledgment is here made once for all of the use of the following books and editions: Thompson on Negligence; Wharton on Negligence (2nd ed.); Shearman and Redfield on Negligence (4th ed.); Campbell on Negligence (2nd ed.); Saunders on Negligence (Hooper's ed.); Beven on Negligence; Beach on Contributory Negligence; Deering on Negligence; Cooley on Torts (2nd ed.); Bishop on Non-Contract Law; Pollock on Torts; Holland's Jurisprudence (4th ed.); Pierce on Railroads; Thompson on Carrier of Passengers; Patterson's R. Accident Law; Bigelow's Lea. Cas. on Torts; Wood's Master and Servant (2nd ed.).

Especial obligations are also acknowledged to the very valuable notes in the Am. Decisions, Am. Reports, Am. St. Rep. and Am. & Eng. R. Cases.

Necessarily such an article as this can be little more than a compilation, but for much original research and valuable suggestions, acknowledgment is made to Hon. Geo. W. Easley, of Harriman, Tenn., and H. D. Whitney, Esq., of Chattanooga, Tenn.

The definition of negligence in this article is believed to be correct, inclusive and exhaustive. It owes much of its accuracy to the acute criticism and suggestion of Mr. Easley, whose wide experience in the practical application of the law of negligence enabled him to point out clearly the errors of other definitions.

**2.** See Shear. & Red. on Neg., § 2; *post*, subtitle DEFINITION, note, where



able. It is actionable when it proximately causes a legal injury.<sup>1</sup> It is not actionable when it is only a remote cause or a mere condition of damage,<sup>2</sup> or when it does not cause any damage.<sup>3</sup>

Actionable negligence, proximately causing legal injury and damage, falls into three divisions. It may be:

1. A pure tort.<sup>4</sup>
2. A breach of contract in the nature of a tort, and which may be treated as such independent of the contract;<sup>5</sup> or,
3. An inadvertent breach of contract which cannot be regarded as independent of the contract and tortious.<sup>6</sup>

With breaches of contract, not susceptible of being regarded as torts, this article does not deal. It is limited to the other two divisions.<sup>7</sup>

Negligence which does not cause any damage, mere carelessness, the mere breach of a legal duty, from which no evil results flow, are also outside the scope of this discussion.<sup>8</sup>

the various definitions are presented and reviewed. The many definitions which are usually given "are some evidence that a definition of any other value than as an illustration of some phase or phases of the subject, is impossible." Beach on Contrib. Neg., § 2.

1. Cooley on Torts (2nd ed.) 816 (679); Atkinson v. Goodrich Transp. Co., 60 Wis. 141; Wharton on Neg., § 74, *et seq.*; Heaven v. Pender, L. R., 11 Q. B. 503; Hayes v. Michigan etc. R. Co., 111 U. S. 288.

2. Scheffer v. Washington City etc. R. Co., 105 U. S. 249, 252; 8 Am. & Eng. R. Cas. 59; Bishop on Non-Contract Law, § 40; McClary v. Sioux City etc. R. Co., 3 Neb. 44; Bodkin v. Western Union Tel. Co., 31 Fed. Rep. 134.

3. Cooley on Torts (2nd ed.) 752 (630); Broom's Com. (4th ed.) 656; Shear. & Red. on Neg., §§ 4, 23; Pollock on Torts 19.

4. Pollock on Torts 19. To constitute a tort, two things must occur: 1, actual or legal damage to plaintiff; 2, a wrongful act committed by the defendant. BAYLY, J., in *Rex v. Pagram Commrs.*, 8 B. & C. 362; Addison on Torts 1; Cooley on Torts (2nd ed.) 3. It will thus be seen that actionable negligence may be a pure tort.

5. Bishop on Non-Contract Law, § 74-76; Clark v. St. Louis etc. R. Co., 64 Mo. 440; Southern Express Co. v. McVeigh, 20 Gratt. (Va.) 264. See also Shear. & Red. on Neg., § 22. It is there said that the owner of property may recover directly from the wrongdoer for any tortious injury to the property

without noticing any contract which the wrongdoer may have made with respect to such property, of which the wrongful act is a violation." *Baltimore etc. R. Co. v. Kemp*, 61 Md. 74; *Green v. Clark*, 12 N. Y. 343; *Needles v. Howard*, 1 E. D. Smith (N. Y.) 54; *Weed v. Saratoga etc. R. Co.*, 19 Wend. (N. Y.) 537; *Dows v. Cobb*, 12 Barb. (N. Y.) 310; *Piper v. Manny*, 21 Wend. (N. Y.) 282; *Marshal v. York etc. R. Co.*, 21 L. J. 34; *Pollock on Torts* 429, *et seq.*; 1 Chitty's Plead. (16th ed.) 151-2.

6. Bishop on Non-Contract Law, § 76; *Pollock on Torts* 432-435; *Courtney v. Earle*, 10 C. B. 73; s. c., 20 L. J. C. P. 7. "The doctrine is not, that the breach of any contract may at the election of the party injured, be treated as a tort, but it is applicable only where the law casts its separate obligation." Bishop on Non-Contract Law, § 76.

7. In other words this article does not treat of actions for injuries that are the result of the mere nonperformance of a promise, because a mere nonperformance of a contract, while a breach of the contract, is not a substantive tort. There must be a misfeasance or malfeasance as well as mere nonfeasance to make a breach of contract actionable as a tort, whether the action be in form *ex contractu* or *ex delicto*. *Pollock on Torts* 434; *Courtney v. Earle*, 10 C. B. 73; 20 L. J. C. P. 7; *Walsh v. Chicago etc. R. Co.*, 42 Wis. 23.

8. This follows from what was said *supra*, viz: Negligence is actionable only when it proximately causes legal injury, and this treatise is to be con-

Excluding the foregoing classes of so-called negligence from consideration, actionable negligence arises from—

1. A legal duty, not dependent on contract, to use ordinary care under the circumstances in which the person from whom the duty is owing is placed.<sup>1</sup>

2. A breach of that duty by a failure to use such care, the failure being inadvertent and not wilful;<sup>2</sup>

3. Damage to another proximately caused in natural sequence by such inadvertent breach of duty.<sup>3</sup>

This leads to an attempt at a

**III. DEFINITION OF NEGLIGENCE.**—Actionable negligence is the inadvertent failure of a legally responsible person to use ordinary care under the circumstances in observing or performing a noncontractual duty, implied by law, which failure is the proximate cause of injury to a person to whom the duty is due.<sup>4</sup>

finned to a discussion of actionable negligence only. See Wharton on Neg. (2nd ed.), § 77; Pollock on Torts 18, 20; Id. 26-7; Pierce on Railroads 310; Chicago etc. R. Co. v. Rend, 6 Ill. App. 243; Congrove v. New York etc. R. Co., 13 Hun (N. Y.) 329; Barringer v. New York etc. R. Co., 18 Hun (N. Y.) 398.

1. Morris v. Brown, 111 N. Y. 318; s. c., 7 Am. St. Rep. 751; Cooley on Torts (660, 661); Pollock on Torts 352.

2. Shear. & Red. on Neg., §§ 6, 9; Wharton on Neg., §§ 3, 11; Lecture on Jurisprudence (Austin) 20; Beven on Neg. 1, 2.

3. Broom's Com. (5th ed.) 368; Rockford v. Tripp, 83 Ill. 247; Tutein v. Hurley, 98 Mass. 211; s. c., 93 Am. Dec. 154; Pollock on Torts 18, 20; Id. 26-45. Compare the analysis by Shearman and Redfield (§ 5): "Negligence consists in:

"1. A legal duty to use care.

"2. A breach of that duty.

"3. The absence of distinct intention to produce the precise damage, if any, which actually follows.

"With this negligence, in order to sustain a civil action there must concur:

"1. Damage to the plaintiff.

"2. A natural and continuous sequence uninterrupted by connecting the breach of duty with the damage as cause and effect." Approved in Beven on Neg. 9.

See also Wharton's (§ 3): "It will be seen therefore that in order to constitute negligence . . . there must be:

"1. Inadvertence.

"2. Imperfection in the discharge of a duty.

"3. A duty which is thus imperfectly discharged.

"4. Injury to another or to the public as a natural and ordinary sequence."

4. The elements of this definition will be substantiated by the authorities which are cited in the discussion of each one separately.

**Other Definitions.**—There have been many definitions of negligence by various authors, but no one has seemed to be sufficient to the author of any one of the others. The one most frequently cited is that of ALDERSON, B. viz: "The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; and an action may be brought, if thereby mischief is caused to a third party *not intentionally*." Blythe v. Birmingham Water Works Co., 25 L. J. Ex. 213.

Mr. Pollock adds to this definition the explanatory clause: "Provided, of course, that the party whose conduct in question is already in a situation that brings him under the duty of taking care." Pollock on Torts 355.

This definition, though valuable as a description, is entirely too wide for a definition of negligence from the standpoint of legal liability; since it would include even improvident business enterprises, which in their undertaking hold out employment, in their collapse involve ruin, perhaps to thousands; but which, though both committing and omitting what a reasonable man would neither do nor omit, yet bring in their train no legal responsibility whatever. See Beven on Neg. 1, 2.

This definition is followed in *Smith v. L. & S. R. Co.*, L. R., 5 C. P. 102; *Sunney v. Holt*, 15 Fed. Rep. 880; *Backus v. Hart*, 13 Fed. Rep. 691; *Chicago etc. R. Co. v. Johnson*, 103 Ill. 512; *Parrott v. Wells*, 15 Wall. (U. S.) 534, 536; *Crandall v. Goodrich Transp. Co.*, 16 Fed. Rep. 75, and numerous other cases.

**Brett's Definition.**—Mr. Brett, J., in *Heaven v. Pender*, 11 Q. B. D. 503-507, defines it: "Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property." See also *Bishop on Non-Contract Law*, § 436, and note.

**Justice Swayne's Definition.**—"Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission." *Baltimore etc. R. Co. v. Jones*, 95 U. S. 439. But this is rather a statement of what constitutes proper care than a definition of negligence.

**Bishop's Definition.**—"Negligence is any lack of carefulness in one's conduct, whether in doing or in abstaining from doing, wherefrom, by reason of its not filling the full measure of the law's requirement in the particular circumstances, there comes to another a legal injury to which he did not himself contribute by his own want of carefulness or other wrong." *Bishop on Non-Contract Law*, § 436.

**Horace Smith's Definition.**—"Negligence in law is a breach of duty unintentional and proximately producing injury to another possessing equal rights." *Smith's Law of Neg. 1.*

This definition is peculiar, owing to the introduction of a new element, viz, "possessing equal rights." The proposition is that the question of negligence only arises where the rights of the parties are equal; or in other words, where the rights are unequal the question of negligence does not arise. But this is obviously an incorrect view; e. g., to let off fire-works in the street, though unlawful, will, if carefully done, produce no injury to any person and in such event no remedy arises, but if negligently done and causing injury to a

neighbor a right of action arises. Here there is no equality of right for the negligent person had no right whatever, yet it is clearly a case of actionable negligence. Beven on Neg. 5.

**Austin's Definition.**—The most formally scientific analysis of negligence is that of Austin. He draws a distinction between negligence, heedlessness and rashness, which, though closely allied, are broadly distinguished by differences.

"In cases of *negligence* the party performs not an act to which he is obliged; he breaks a positive duty. In cases of *heedlessness* or *rashness*, the party does an act which he is bound to forbear; he breaks a negative duty. In cases of *negligence*, he adverts not to the act which it is his duty to do. In cases of *heedlessness*, he adverts not to consequences of the act he does. In cases of *rashness*, he adverts to those consequences of the act; but by reason of some assumption which he examines insufficiently he concludes that those consequences will not follow the act in the instance before him."

The view of negligence which commends itself to Mr. Austin is that "it applies exclusively to injurious omissions—to breaches by omission of positive duties." But whatever is philosophic value, this circumscribes negligence in far too narrow limits for the purposes of practical jurisprudence. See *Lectures on Jurisprudence* (Austin) 20.

**Dr. Wharton's Definition.**—Dr. Wharton in his work on Negligence (§ 3) describes negligence in its civil relations as "such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as produces, in an ordinary and natural sequence, a damage to another." Quoted and approved in *Salmon v. Railroad Co.*, 38 N. J. L. 11.

The objection to this definition, according to Mr. Beven, lies in the element introduced by the words "inadvertent imperfection." "Inadvertence in its ordinary meaning," he says, "is closely allied, if not synonymous with heedlessness; whereas the scope of negligence is much wider than that of mere heedless or inadvertent acts and extends to neglects of which the consequences are clearly foreseen *though not willed*; as the allowing a drain pipe to be stopped and thereby causing a flood, where the injurious consequence has clearly been foreseen, but, though

mere *inertia* of the person whose duty it was to clear it, no prevention has been applied. This is neither an inadvertent act, since the consequences were foreseen, *nor yet a wilful one*, since they were not willed; the negligent person trusting to the chapter of accidents or to the act of some third person to save him from the consequences of his sluggishness." Beven on Neg. 3.

This criticism of the use of the term "inadvertent," in a definition of negligence, we do not deem quite well taken. Inadvertent as used in the definition in the text means in effect *unwilful*. The negligent person may, it is true, advert to the act or omission which renders him chargeable with negligence at the time he is guilty of such act or omission, but he cannot advert to the injurious consequences of such an act or omission without taking himself out of the category of the merely negligent, and putting himself in the position of one inflicting a wilful injury. See *post*, subtit. III, 1, INADVERTENCE.

**Shearman and Redfield's Definition.**—"Negligence, constituting a cause of civil action, is such an omission, by a responsible person, to use that degree of care, diligence and skill which it was his legal duty to use for the protection of another person from injury, as, in a natural and continuous sequence, causes unintended damage to the latter." Shear. & Red. on Neg., § 3.

It has been objected to this that it does not include the negligence of a competent servant for which the master is responsible. If, observes an able English authority, the servant were incompetent, to the knowledge of the master, the master being a responsible person, would be liable for entrusting work to an incompetent servant. But if the servant is competent, then the master has done his duty; and this is shown by considering that if the person injured were a fellow-servant, the master would not be liable, on the ground that he had done his duty; yet, in the event of injury being done to a third person, he would be liable, and his liability would be dependent, not on any amount of care, diligence and skill he could or ought to have exerted, but on the simple issue whether the servant had exercised the care which was due to the injured person. True, the servant is, for the purposes of personal liability, a responsible person. Still, in law, the master is no less guilty of neg-

ligence; yet, this liability of the master would find no place under the terms of the definition. Beven on Neg. 9. But this criticism seems rather strained and unwarranted, leaving out of view the true meaning of the principle which governs the relations of master and servant.

**Pollock's Definition.**—"Some relation of duty public or private, special or general must exist, either by contract or as an implication of public policy, before one man becomes liable to another for the consequences of a careless act or omission on the part of the first man which causes injury to the second man, and when such duty does exist and such careless act or omission occurs causing an injury in direct and regular sequence, the careless act becomes in the eyes of the law actionable negligence for which the party injured has a right of action against the person inflicting the injury." Pollock on Torts 352. Compare Bishop on Non-Contract Law, § 446.

**Other Definitions.**—Many other definitions have been given in various cases, but every element which has ever attempted to be embraced within the term, has already been given in the preceding. See, however, *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531; *Cooley on Torts* 630; *Unger v. Forty-Second St. etc. R. Co.*, 51 N. Y. 497; *Kelsey v. Barney*, 12 N. Y. 425; *Cayzer v. Taylor*, 10 Gray (Mass.) 274; *Fletcher v. Boston etc. R. Co.*, 1 Allen (Mass.) 9; *O'Brien v. Philadelphia etc. R. Co.*, 3 Phila. 76; *Bizzell v. Booker*, 16 Ark. 308; 1 *Thompson Neg.* 135; *Kerwhacker v. Cleveland etc. R. Co.*, 3 Ohio St. 172; s. c., 1 *Thomp. on Neg.* 472, 483; *Campbell on Neg.* (2nd. ed.), § 1, *et seq.*; *Chicago etc. R. Co. v. Johnson*, 103 Ill. 512, 521; *Great Western R. Co. v. Haworth*, 39 Ill. 346, 353; *Carter v. Columbia etc. R. Co.*, 19 S. Car. 20, 24; *Hyman v. Nye*, L. R., 6 Q. B. 685; *Grant v. Mosely*, 29 Ala. 302; *Frankfort etc. Turnpike Co. v. Philadelphia etc. R. Co.*, 54 Pa. St. 345; *Texas etc. R. Co. v. Murphy*, 46 Tex. 356; *Blaine v. Chesapeake etc. R. Co.*, 9 W. Va. 252; *Northorn etc. R. Co. v. State*, 29 Md. 420; *Barber v. Essex*, 27 Vt. 62; *Gardner v. Heartt*, 3 Den. (N. Y.) 232, 236; *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255, 267; *Amick v. O'Hara*, 6 Blackf. (Ind.) 258; *Tally v. Ayres*, 3 Sneed (Tenn.) 677; *Vaughan v. Taffvale R. Co.*, 5 Hurlst. & N. 679; *Philadelphia etc. R.*

1. **Inadvertence an Element of Negligence.**—The element which distinguishes actionable negligence from criminal wrong or wilful tort is inadvertence on the part of the person causing the injury. He may advert to the act or omission of which he is guilty, but he cannot advert to it as a failure of duty—that is, he cannot be conscious that it is a want of ordinary care—without subjecting himself to a charge of having inflicted a wilful injury, because one who is consciously guilty of a want of ordinary care is by implication of law chargeable with an intent to injure, malice being but the “wilful doing of a wrongful act.”<sup>1</sup> And necessarily the

Co. v. Stinger, 78 Pa. St. 225; Baltimore etc. R. Co. v. Jones, 95 U. S. 442; Brown v. Congress etc. R. Co., 49 Mich. 153.

**Is Negligence a State of Mind?**—Mr. Pollock, while not disputing that psychologically negligence may be a state or condition of mind, yet in speaking of his definition, says: “This it will be observed says nothing of the party’s state of mind, and rightly. Jurisprudence is not psychology, and law disregards many psychological distinctions, not because lawyers are ignorant of their existence, but because for legal purposes it is impracticable or useless to regard them . . . Negligence is the contrary of diligence, and no one describes diligence as a state of mind. The question for judges and juries is not what a man was thinking or not thinking about, expecting or not expecting, but whether his behavior was or was not such as we demand of a prudent man under the given circumstances. Facts which were known to him, or by the use of appropriate diligence would have been known to a prudent man in his place, come into account as a part of the circumstances.” Pollock on Torts, pp. 355, 356. But compare Holland’s Jurisprudence (4th ed.) 94; Wharton on Neg. (2nd ed.), §§ 13, 14, 15; Campbell on Neg. 3.

1. Gardner v. Heartt, 3 Den. (N. Y.) 232; Gove v. Farmers’ etc. Ins. Co., 48 N. H. 41; Beven on Neg. 1, 2; Lectures on Jurisprudence (Austin) 20; Wharton on Neg., §§ 3, 11; Smith on Neg. 2, 3; CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 80, 81. Compare CRIMINAL LAW, 4 Am. & Eng. Encyc. of Law, *et seq.*; Shear. & Red. on Neg., §§ 6, 19. See also MALICE, 14 Am. & Eng. Encyc. of Law 5; State v. Robins, 60 Me. 324; Earl of K., 9 Cla. & F. 321.

Therefore an instruction that gross

negligence is that degree of negligence which indicates *intentional* wrong is clearly erroneous. Louisville etc. R. Co. v. McCoy, 81 Ky. 403.

“For one may act in perfect good faith and still be guilty of gross negligence.” Lincoln v. Buckmaster, 32 Vt. 652.

**Lack of Intent No Defence.**—Since inadvertence is a necessary element of negligence it can plainly be no plea that the injury caused was unintentional. Sharp v. Bonner, 36 Ga. 418; Tally v. Ayres, 3 Sneed (Tenn.) 677; Danner v. South Carolina etc. R. Co., 4 Rich. (S. Car.) 329; Amick v. O’Hara, 6 Blackf. (Ind.) 258; Blaen Avon Coal Co. v. McCulloh, 59 Md. 403; Wallard v. Worthman, 84 Ill. 446; Bishop on Non-Contract Law, § 499.

**Criminal Liability for Negligence.**—Rev. Stat. U. S., § 5344, provides that “every captain . . . or other person employed on any steamboat or vessel by whose misconduct, negligence or inattention to duties . . . the life of any person is destroyed . . . shall be deemed guilty of manslaughter.” See also United States v. Holtzhauer, 40 Fed. Rep. 76. But as negligence proper excludes the idea of intentional wrong and as a crime always involves intent, criminal negligence is a self-contradictory term so far as the civil law is concerned. The criminal feature is entirely foreign to this discussion.

“Inadvertent,” as used in this connection and in the definition, is not intended to convey the idea that the party did not advert to his failure to use care, but means that such failure was *not willed*. If allowed to coin a word, we should say “an unwilful” or “an unwilling” failure. A careful study of the true meaning of negligence will sustain this application of the element of inadvertence. It applies not to the act causing the damage, nor yet to the damage only, but to the *failure to use*

guilty person cannot advert to the injurious consequences of his conduct with a consciousness that they are to follow, without becoming, in contemplation of law, chargeable with a wilful injury. When the original act or omission is thus actually, or, by presumption of law, wilful, the guilty person, upon an old principle of the common law, is held responsible for all the consequences of his wrongful act.<sup>1</sup> For an inadvertent failure to use ordinary care resulting in damage, an action for a negligent injury may be maintained, and a recovery be had for all consequences of which such inadvertent failure was the *proximate cause*.<sup>2</sup> But when the injury was caused wilfully, as above defined, the action is not limited to a recovery for a *negligent* injury, and damages can be recovered for consequences of which the original wrongful act was only the *remote* cause;<sup>3</sup> but in such case a charge of negligence will not admit direct proof of wilful-

*ordinary care in observing or performing the duty a person may owe.* See Beven on Neg. 4, 5, 6; Smith on Neg. 1; definitions *supra*; Gardner v. Heartt, 3 Den. (N. Y.) 232.

Mr. Bishop thus describes this feature: "Negligence is neither an intent to commit injury nor a mental condition free from fault. There are other mental states occupying a like middle ground. Thus if two persons are fighting and one of them unintentionally strikes a third person, he is answerable to such third person, and his want of malice toward him will only mitigate the damages. The reason is simply that the injury came from an intentional wrongful act; while a like injury from a well meant lawful one would not be actionable if carefully performed; though if negligently, it would be." Bishop on Non-Contract Law, § 501; James v. Campbell, 5 Car. & P. 372; Vandenburg v. Truax, 4 Den. (N. Y.) 464; Noyes v. Shepherd, 30 Me. 173; Weaver v. Ward, 1 Hob. 134.

1. Pollock on Torts 28, 29; CONTRIBUTORY NEGLIGENCE, 5 Am. & Eng. Encyc. of Law 81, and cases cited; Bigelow on Torts 313, note 4; Loop v. Litchfield, 42 N. Y. 358; s. c., 1 Am. Rep. 543; Binford v. Johnson, 82 Ind. 29; Cooley on Torts (76) 84; Rex v. Latimer, 17 Q. B. D. 359; Scott v. Shepherd, 2 Wm. Bl. 892; s. c., 1 Smith's L. Cas. (549); Ricker v. Freeman, 50 N. H. 420; s. c., 9 Am. Rep. 267.

To support their idea as to this element of negligence which is that the inadvertence relates to the actual injury caused, rather than to the *act* causing the injury, Shear. & Red. on Neg., § 6,

give as an illustration the following: "If a mischievous boy strike a horse for the very purpose of making it run away, his act would be one of wilful injury as to the owner of the horse, but only of negligent injury, as to a child run over by the horse in a distant street." But the idea conveyed by this illustration is clearly erroneous since, as shown *supra*, the principle that a wilful wrongdoer is liable for all the consequences of his misconduct is one old and well established. CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 81, and authorities cited; DAMAGES, 5 Am. & Eng. Encyc. of Law 11, 12; cases cited *supra*.

2. Fleming v. Beck, 48 Pa. St. 309; 2 Thompson on Neg. 1084; Baltimore etc. R. Co. v. Reaney, 42 Md. 117; Cooley on Torts (68) 73; McLelland v. Louisville etc. R. Co., 94 Ind. 276; *post*, subtit. PROXIMATE CAUSE; DAMAGES, 5 Am. & Eng. Encyc. of Law 6, *et seq.*

3. Suth. on Dam. 71; Bigelow on Torts 313, note 4; DAMAGES, 5 Am. & Eng. Encyc. of Law 11, and cases cited; Morgan v. Curley, 142 Mass. 107; Smith v. Goodman, 75 Ga. 198; West v. Forrest, 22 Mo. 344; Hawes v. Knowles, 114 Mass. 519; Bishop on Non-Contract Law, §§ 16, 142; Day v. Woodworth, 13 How. (U. S.) 363; Bishop's Crim. Law (7th ed.), § 343, 335; Jefferson etc. R. Co. v. Riley, 39 Ind. 568 (brakeman threw a burning stick from train without warning, and at a place where passengers were passing, and where it was their duty to pass in order to board the train. The act was

ness,<sup>1</sup> nor will a charge of wilfulness be maintained by proof of mere negligence.<sup>2</sup> To confuse wilfulness with negligence is either to hold the defendant responsible for consequences of his negligence, which that negligence only remotely caused, or to limit his liability to the consequences of his wilfulness, which are merely proximate; in the one case doing injustice to the defendant, in the other allowing a guilty person to escape full punishment.<sup>3</sup>

Since negligence necessarily implies inadvertence and lack of intent, such an expression as "wilful negligence" is a contradiction in terms and can mean nothing.<sup>4</sup> Its use arises from a confusion

conclusively presumed to have been wilful and defendant was held liable for remote consequences); *Drake v. Keily*, 93 Pa. St. 495; *Carter v. Louisville etc. R. Co.*, 98 Ind. 555; 8 Am. & Eng. R. Cas. 347; 22 Am. & Eng. R. Cas. 360; *Sauter v. New York Cent. etc. R. Co.*, 66 N. Y. 50; *Brown v. Chicago etc. R. Co.*, 54 Wis. 342; 3 Am. & Eng. R. Cas. 444.

1. *Pennsylvania R. Co. v. Smith*, 98 Ind. 42; *Shear. & Red. on Neg.*, § 7. Thus where the declaration alleges that the defendant's servants sounded the whistle "wilfully, wantonly and maliciously whereby, etc." no recovery can be had thereunder on mere proof of negligence without proof of recklessness or malice." *Chicago etc. R. Co. v. Dickson*, 88 Ill. 431.

2. *Indiana etc. R. Co. v. Burdge*, 94 Ind. 46; 18 Am. & Eng. R. Cas. 192; *Shear. & Red. on Neg.*, § 7. Compare *Louisville etc. R. Co. v. Bryan*, 107 Ind. 51; *Belt R. etc. Co. v. Mann*, 107 Ind. 89; *Louisville etc. R. Co. v. Ader*, 110 Ind. 376.

3. See CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 80, 81; DAMAGES, 5 Am. & Eng. Encyc. of Law 11, 12.

4. "Wilful Negligence" Self-Contradictory.—This is seen from the universally accepted idea as to the element of inadvertence in negligence. See definitions, *supra*. See also *Cleveland etc. R. Co. v. Asbury*, 120 Ind. 289; *Taylor v. Holman*, 45 Mo. 371; *Louisville etc. R. Co. v. Bryan*, 107 Ind. 51.

The term "wilful negligence" is used in *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235; s. c., 71 Am. Dec. 263; *Toledo etc. R. Co. v. Beggs*, 85 Ill. 80—and "wanton and reckless negligence" is found used in *Louisville etc. R. Co. v. Hall*, 87 Ala. 708; *Columbus etc. R. Co. v. Bridges*, 86 Ala. 448.

This proposition, found in a work on negligence (*Deering*, § 2), is therefore full of contradictions, though it is sustained by one of the cases appended to it, viz: "To constitute wilful negligence the wrong done must be either intentional or such a wanton disregard of the rights of others as amounts to bad faith." Citing *Louisville etc. R. Co. v. Filbern*, 6 Bush (Ky.) 574; *Claxton v. Louisville etc. R. Co.*, 13 Bush (Ky.) 636; *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235.

In the first case the term used was "wilful neglect," and the other language was, "or the wrong done must, etc., or such a wanton disregard of security and right as to imply bad faith." See note following.

In the case of *Cleveland etc. R. Co. v. Asbury*, 120 Ind. 289, the complaint in an action for negligence charged defendant with negligence but used the qualifications "wanton," "wilful" and "with the intention" to injure plaintiff. It was held, however, that the gravamen of the action was simple negligence, and that the complainant stated a good cause of action. See also *Louisville etc. R. Co. v. Mitchel*, 87 Ky. 327; *Hays v. Gainesville etc. R. Co.*, 70 Tex. 602.

Upon this element of inadvertence, Mr. Smith has to say in explaining his definition, that if the act be intentional it becomes fraudulent or criminal, or it may be a trespass, and with such classes a treatise upon negligence has nothing to do. "Intentional negligence," a phrase sometimes used, seems to involve a contradiction in terms; so also the words "wilful negligence" are often used. If by wilful is meant intentional, the same objection applies, but if by wilful only recklessness is meant, the phrase "wilful negligence" is unobjectionable. *Smith on Law of Negligence* \*4.

of "negligence" with "neglect," which latter may be intentional; and because it is overlooked that the failure to use ordinary care must be inadvertent, or such failure is wilful and not negligent at all. Negligence and wilfulness are the opposites of each other. They indicate radically different mental states.<sup>1</sup> The distinction between negligence and wilful tort is important to be observed, not only in order to avoid a confusion of principles, but it is necessary in determining the question of damages, since in case of an injury by the former, damages can only be compensatory; while in the latter they may also be punitive, vindictive, or exemplary.<sup>2</sup> The distinction is also needful because of the defences which may be set up; contributory negligence of the plaintiff is no bar to an action for a wilful tort, though it is a complete bar to an action for negligence.<sup>3</sup>

Negligence is also to be carefully distinguished from fraud, the distinction arising in this case as before, upon the element of inadvertence. Fraud is invariably intentional, either actually or

In *Louisville etc. R. Co. v. Bryan*, 107 Ind. 51, the court observes: "The words 'wilful negligence' used in conjunction have not always been employed with strict regard for accuracy of expression. To say that an injury resulted from the negligence or wilful conduct of another is to affirm that the same act is the result of two exactly opposite mental conditions. It is to affirm in one breath that the act was done through inattention, thoughtlessly, heedlessly, and at the same time purposely and by design. It seems to be supposed that by coupling the words together, the middle ground between negligence and wilfulness between cases of nonfeasance and misfeasance may be arrived at. It is only necessary to say that the distinction between cases falling within one class or the other is clear and well defined, and cases in any one class are not aided by importing attributes pertaining to the other." See also *Terre Haute etc. R. Co. v. Graham*, 95 Ind. 286; s. c., 12 Am. & Eng. R. Cas. 77.

1. *Wilful neglect*, under a Kentucky statute, is defined in a "bridge case" to be "a knowledge of the company of the insufficiency of its bridge for that end, i. e., for safe travel, and after lapse of a reasonable time a voluntary failure to remedy the defect; and a palpable and perilous defect which any competent judge of such a structure could discover by ordinary vigilance may authorize a presumption of such knowledge and of wilful neglect." *Shelby Co. v. Searce*, 2 Duv. (Ky.) 576. See also on the same

subject, *Lexington v. Lewis*, 10 Bush (Ky.) 677; *Jacobs v. Louisville etc. R. Co.*, 10 Bush (Ky.) 263; 2 Thompson on Neg. 1003 (5), 1233, note 8; *Louisville etc. R. Co. v. Filbern*, 6 Bush (Ky.) 574; s. c., 99 Am. Dec. 690; *Paducah etc. R. Co. v. Letcher* (Ky. 1888), 12 Am. & Eng. R. Cas. 61.

2. *Post*, subtit. XVIII, MEASURE OF DAMAGES; DAMAGES, 5 Am. & Eng. Encyc. of Law 21, 212; *Walrath v. Redfield*, 11 Barb. (N. Y.) 368; 1 Suth. on Damages 724; *Day v. Woodworth*, 13 How. (U. S.) 363; *Shear. & Red. on Neg.*, § 748, note.

The recovery of punitive or vindictive damages is allowed only where the act causing the injury has been wilfully done, or where the circumstances indicate that there was a deliberate, pre-conceived or positive intention to injure, or show that reckless disregard of the safety of person or property which is equally culpable. *Wallace v. New York*, 2 Hilt. (N. Y.) 440; *Moody v. McDonald*, 4 Cal. 297.

3. *Derby v. Kentucky Cent. R. Co.* (Ky. 1887), 4 S. W. Rep. 303; *Carroll v. Minnesota Valley R. Co.*, 13 Minn. 30; s. c., 97 Am. Dec. 221; *Beach on Contributory Neg.* 49, 51, 53; CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 80.

Contributory negligence is a bar to any action for injuries received unless such injury was the result of intentional wrong on the part of the defendant. *Carroll v. Minnesota Valley R. Co.*, 13 Minn. 30; s. c., 97 Am. Dec. 221.



constructively; negligence is never so.<sup>1</sup>

**2. Inevitable Accident.**—There is no liability for an injury inflicted by one person upon another, even though the injured person be free from fault, if the cause of the injury was unusual and one which reasonable and careful human foresight could not have foreseen as such, and which under the circumstances such care and foresight could not have guarded against.<sup>2</sup> Such an injury, without any want of ordinary care upon the part of the person inflicting it, is considered an inevitable accident. But where the accident and want of ordinary care concur in producing an injury the negligent person is liable for the consequences, if without his negligence the injury would not have been caused by the accident

**1. Negligence Is Never Fraud.**—*Gardner v. Heartt*, 3 Den. (N. Y.) 232; *Shear. & Red. on Neg.*, § 20; *Deering on Neg.*, § 5; *Wilson v. New York etc. R. Co.*, 11 Gill & J. (Md.) 58; *FRAUD*, 8 Am. & Eng. Encyc. of Law 635.

It may, however, in some cases, be clear evidence of fraud. *Deering on Neg.*, § 5; *Story on Bailments*, § 19; *Shear. & Red. on Neg.*, § 20; *Com. v. Rodes*, 6 B. Mon. (Ky.) 174; *Wilson v. New York etc. R. Co.*, 11 Gill & J. (Md.) 58; *Gardner v. Heartt*, 17 Den. (N. Y.) 231.

This distinction between negligence and fraud is well presented by *BEARDSLEY, J.*: "Fraud and negligence are by no means identical in their nature or effect. Fraud is a deceitful practice or wilful device resorted to with intent to deprive another of his right, or in some manner to do him an injury. It is always positive; the mind concurs with the act; what is done, is done designedly and knowingly. But in negligence, whatever may be its grade, there is no purpose to do a wrongful act, or to omit the performance of a duty. There is, however, an absence of proper attention, care or skill. It is strictly nonfeasance, not malfeasance. This is the general idea, and it marks the distinction between negligence and fraud. In the first, there is no positive intention to do a wrongful act; but in the latter, a wrongful act is ever designed and intended. Negligence, in its various degrees, ranges between pure accident and actual fraud, the latter commencing where negligence ends. Negligence is evidence of fraud, but still is not fraud." *Gardner v. Heartt*, 3 Den. (N. Y.) 232.

**2. Cooley on Torts** 80; *ACCIDENT*, 1 Am. & Eng. Encyc. of Law 82;

*ACT OF GOD*, vol. 1, p. 173; *CONTRIBUTORY NEGLIGENCE*, 4 Am. & Eng. Encyc. of Law 41.

"No case or principle can be found, or if found can be maintained, subjecting a person to liability for an act done without fault on his part . . . All the cases concede that an injury arising from inevitable accident or which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility." *Harvey v. Dunlop, Hill & Den. Supp.* (N. Y.) 193; *Holmes v. Mather, L. R.*, 10 Exch. 261; s. c., 16 Am. Rep. 384; *Brown v. Collins*, 53 N. H. 442; s. c., 16 Am. Rep. 372; 1 *Thomp. on Neg.* 61; *The Nitro-Glycerine Case*, 15 Wall. (U. S.) 524; s. c., 1 *Thomp. on Neg.* 42; *Loosee v. Buchanan*, 51 N. Y. 476; s. c., 10 Am. Rep. 623; 1 *Thomp. on Neg.* 47; *Sheldon v. Sherman*, 42 N. Y. 484; s. c., 1 Am. Rep. 569; *Bizzell v. Booker*, 16 Ark. 308; *Brown v. Susquehanna Boom Co.*, 109 Pa. St. 57 (extraordinary flood); *Viterbo v. Friedlander*, 120 U. S. 707 (same); *Ellet v. St. Louis etc. R. Co.*, 76 Mo. 518; s. c., 12 Am. & Eng. R. Cas. 183, 196, note (where the subject of extraordinary floods is discussed at length).

A casualty, happening against the will and without the negligence or other default of the party, is as to him an inevitable casualty. *Hodgson v. Dexter*, 1 Cranch (C. C.) 109. See *The Lotty*, Olc. Adm. 329.

In an action to recover damages occasioned by the overflow, in a season of great rains, of a ditch that defendant was bound to keep in repair, *held*, that although defendant was not liable if the overflow was the act of God, yet,

alone.<sup>1</sup> So where there is a purely accidental occurrence, producing injury, but without fault on the part of the person to whom it is attributed, there can be no action for negligence sustained, since the injury was evidently not owing to a failure to exercise proper care; the damage is present, but the thing amiss, the *injuria*, is wanting.<sup>2</sup>

"Inevitable accident" and "an act of God" are not convertible terms, though they have sometimes been so treated, the former being much the more comprehensive and embracing the latter.<sup>3</sup>

If defendant should have anticipated the rains and consequent overflow, and could have guarded against the overflow by repairing and digging out the ditch, he was liable. *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197.

1. "The fact that a natural cause contributes to produce an injury which could not have happened without the unlawful act of the defendant, does not make the act so remote as to excuse him." *Salisbury v. Herchenroder*, 106 Mass. 458; s. c., 8 Am. Rep. 354; 2 *Thompson on Neg.* 1067. See also *ACCIDENT, ACT OF GOD*, 1 Am. & Eng. Encyc. of Law; *INEVITABLE ACCIDENT*, vol. 10; *CONTRIBUTORY NEGLIGENCE*, vol. 4, p. 41; *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197; *Baltimore etc. R. Co. v. School Dist.* 96 Pa. St. 65; s. c., 2 Am. & Eng. R. Cas. 166; *Ellett v. St. Louis etc. R. Co.*, 76 Mo. 518; s. c., 12 Am. & Eng. R. Cas. 183; *Barnard v. Poor*, 21 Pick. (Mass.) 378 (plaintiff's property consumed by a fire negligently lit by defendant on adjoining lot; fire spread by wind); *Dickinson v. Boyle*, 17 Pick. (Mass.) 78; *Woodward v. Aborn*, 35 Me. 271; *Wharton on Neg.*, § 86.

See also *post*, subtit. *COMBINED AND CONCURRENT CAUSES*.

Where the fall of a railroad bridge is caused by an act of God, a cloud-burst, for instance, a railroad employee cannot hold the company liable unless its negligence, to an extent amounting to a want of ordinary care, contributed to the disaster. *Rodgers v. Central Pac. R. Co.*, 67 Cal. 607.

Therefore, in an action for the falling of a wall, it is proper to charge that if the wall fell by reason of an extraordinary rainstorm, and defendant had used such care in its construction as persons of ordinary prudence would have exercised under the same circumstances, defendant was not liable. *Couts v. Neer*, (Tex. 1888), 9 S. W. 40.

2. *Accidents*.—*Cooley on Torts* (2nd

ed.) (80) 92; *Weaver v. Ward*, 1 Hob. 134; *Sheldon v. Sherman*, 42 N. Y. 484; s. c., 1 Am. Rep. 569; *Boynton v. Rees*, 9 Pick. (Mass.) 527; *American Express Co. v. Smith*, 33 Ohio St. 511; *Burton v. Davis*, 15 La. An. 448; *Brown v. Collins*, 53 N. H. 442; s. c., 16 Am. Rep. 372; *Hanlon v. Ingram*, 3 Iowa 81.

Thus where a party in selfdefence fired a pistol at his assailant and accidentally shot a third party, he was not liable for the injury done. *Morris v. Platt*, 132 Conn. 75; *S. P. Paxton v. Boyer*, 67 Ill. 132; s. c., 16 Am. Rep. 615.

Where a railroad employee in getting out of the way of a train suddenly started without signal, stepped between the railroad track and a sand bank two feet distant, and while there a quantity of sand fell from the bank, striking him and knocking him against the moving cars, and the wheels of one of the cars ran over his leg and injured him, it was held that, as the immediate and direct cause of the injury was the falling of the bank, and this was not the effect or consequence of the omission or act of the defendant, plaintiff could not recover. *Handelun v. Burlington etc. R. Co.* (Iowa, 1887), 32 N. W. Rep. 4.

So in accidents from machinery where their liability to happen is proved only by their happening. *Richards v. Rough*, 53 Mich. 212; *Sjorgren v. Hall*, 53 Mich. 274.

An accident may be defined as an event happening unexpectedly and without fault; where there is fault there is liability; e. g., where one drives against another by getting on the wrong side of the road in the dark. *Leame v. Bray*, 3 East 593; *Wakeman v. Robinson*, 1 Bing. 213 (pulling wrong rein by mistake); *Shawhan v. Clarke*, 24 La. An. 390; *Sullivan v. Scripture*, 3 Allen (Mass.) 564.

3. *ACCIDENT*, 1 Am. & Eng. Encyc. of Law 82; *ACT OF GOD*, vol. 1, p. 601; *INEVITABLE ACCIDENT*, vol. 10, p. 601;

An "act of God" is such an inevitable accident as occurs without the intervention of man.<sup>1</sup>

**3. Ordinary Care Defined.**—No act or omission constitutes negligence unless there has been a want of ordinary care upon the part of the person charged with the act or omission. If there has been no want of ordinary care by such person, there has been no negligence, no *injuria*, even though damage has resulted from the act or omission complained of. Therefore, the failure to use ordinary care is an essential element of negligence, without which it cannot exist.<sup>2</sup> It is difficult to define the term "ordinary care"; it is a relative term, always dependent on relationship and circumstances. Whether it has been exercised or not can be determined only by the application of a test presently to be stated, and by a consideration of the circumstances of each particular case.<sup>3</sup> There is no fixed standard by which care may be measured and then designated as "great," "ordinary" or

Shear. and Red. on Neg., § 16; Pollock on Torts 115, *et seq.*; Wharton on Neg., § 553; Nugent v. Smith, 1 C. P. Div. 423; Merritt v. Earle, 29 N. Y. 115; s. c., 86 Am. Dec. 202; McArthur v. Sears, 21 Wend. (N. Y.) 190; Fergusson v. Brent, 12 Md. 9; s. c., 71 Am. Dec. 582.

In some cases, however, the two terms have been considered as synonymous. Fish v. Chapman, 2 Ga. 349; s. c., 46 Am. Dec. 393; Neal v. Saunderson, 2 Smed. & M. (Miss.) 572; s. c., 41 Am. Dec. 609.

1. Childester v. Consolidated Ditch Co., 59 Cal. 197; McGrew v. Stone, 53 Pa. St. 436.

2. Wabash etc. R. Co. v. Locke, 112 Ind. 404 (tall brakeman case); Vaughn v. Taff etc. R. Co., 5 H. & N. 679, 688 (WILLES, J., "Negligence is the absence of care according to the circumstances"); Philadelphia etc. R. Co. v. Stinger, 78 Pa. St. 225; Ford v. London etc. R. Co., 2 F. & F. 730, 732; Milwaukee etc. R. Co. v. Arms, 91 U. S. 494; Beven on Neg. 10.

For example: A boarded a train to look for his wife. Before he got off the train started and he was injured. His wife, although without his knowledge, had gotten off, as had all other passengers, and nobody had any special knowledge of his situation. Here there was no failure on the part of the railway company to use ordinary care and therefore the company was not liable for his injury. Griswold v. Chicago etc. R. Co., 64 Wis. 652.

The hose of a fire company lay across the track of a railroad and an

engine passing ran over the hose cutting it in two, thereby indirectly causing a house to burn down which would otherwise have been saved. It appeared that the engineer had no knowledge of the hose being on the track and no signal was given him to stop. The railway company was held not liable because there was no failure to exercise ordinary care. Mott v. Hudson River R. Co., 1 Robt. (N. Y.) 585. *Contra*, if engineer had knowledge of the hose being there and could have stopped. Metallic Compression Casting Co. v. Fitchburg R. Co., 109 Mass. 277.

3. Simpkins v. Columbia etc. R. Co., 20 S. Car. 258; s. c., 19 Am. & Eng. Cas. 467; Davis v. Columbia etc. R. Co., 21 S. Car. 93; s. c., 28 Am. & Eng. R. Cas. 440.

A failure on the part of anyone engaged in the pursuit of his own peculiar occupation to observe precautionary rules, established by competent authority to guard against accidents and prevent injuries to others, is, in legal contemplation, a want of ordinary care. Philadelphia etc. R. Co. v. Kerr, 25 Md. 521.

Ordinary care and negligence are correlative terms, the latter being the absence of the former. Bishop on Non-Contract Law, § 438. Ordinary care depends on circumstances and is such care as a person of ordinary prudence would have exercised. Fowler v. Baltimore etc. R. Co., 18 W. Va. 579; s. c., 8 Am. & Eng. R. Cas. 480; Louisville etc. R. Co. v. McCoy (Ky. 1883); 15 Am. & Eng. R. Cas. 277.

Common Prudence, Due Care, etc.—

"slight."<sup>1</sup> In some relations, a slight want of care is a want of ordinary care because of the high duty that is owing.<sup>2</sup> In other relations, only a great failure of care is a want of ordinary care, because there is only a duty of imperfect obligation owing.<sup>3</sup>

Ordinary care has sometimes been considered synonymous with "common prudence;" the terms "due care" and "reasonable care" are also often substituted for it, there being no practical difference in their meanings. *Richmond etc. R. Co. v. Howard*, 79 Ga. 44 (common prudence); *Shear. & Red. on Neg.*, § 9; *Wharton on Neg.*, § 3; *Wormell v. Maine Cent. R. Co.*, 79 Me. 397; s. c., 31 Am. & Eng. R. Cas. 272.

"Negligence is the absence of due care." *Carter v. Columbia etc. R. Co.*, 19 S. Car. 24; s. c., 15 Am. & Eng. R. Cas. 414.

1. *Bishop on Non-Contract Law*, § 439; *Cooley on Torts* (2nd ed.) (662) 794; *Meredith v. Reed*, 26 Ind. 334, 336; *Beven on Neg.*, 16; *Shear. & Red. on Neg.*, § 47, *et seq.*; *Pratt v. Wells, Fargo etc.*, 15 Wall. (U. S.) 524.

"Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence,' but after all it is only the absence of the care that was required under the circumstances." *DAVIS, J.*, in *Milwaukee etc. R. Co. v. Arms*, 91 U. S. 494.

"Negligence moreover is not absolute or intrinsic but always relative to some circumstances of time, place or person." *Degg v. Midland R. Co.*, 1 H. & N. 781. Approved in *Potter v. Faulkner*, 1 B. & S. 800; *Wharton on Neg.*, § 25.

Thus a railroad company operating its trains on city streets must use greater care than in less frequented localities, and any neglect of any precaution proper in the peculiar circumstances of the locality constitutes negligence. *Norfolk etc. R. Co. v. Budge*, 84 Va. 63.

**Sort of Care as Distinguished from Amount of Care.**—Mr. Smith draws a curious distinction between the sort of care and the amount of care that is to be exercised. The sort of care, he says, depends upon the duty or position of the party and is a question of law. The amount of care to be taken depends upon circumstances and is a question of fact. Thus, if a person give me a glass jug and a deal box to carry, the sort of care which I

have to exercise depends upon my position with respect to that person: for example, Am I paid, or am I not? But the amount of care will differ and be probably greater in respect to the glass jug or deal box. *Smith on Law of Negligence* \*14; *Philadelphia R. Co. v. Boyer*, 97 Pa. St. 101; s. c., 2 Am. & Eng. R. Cas. 172.

2. This is the case where the relation of passenger and carrier exists between the negligent party and him who is injured. See *Shear. & Red. on Neg.*, §§ 45, *et seq.*; *CARRIERS OF PASSENGERS*, 2 Am. & Eng. Encyc. of Law 738; *Sandham v. Chicago etc. R. Co.*, 38 Iowa 88; *Taber v. Delaware etc. R. Co.*, 71 N. Y. 489; *Cooley on Torts* (662), *et seq.*; *Milwaukee etc. R. Co. v. Arms*, 91 U. S. 494; *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378; *Sherlock v. Alling*, 44 Ind. 184.

Carriers of passengers are required to use the highest degree of prudence and in some cases the *utmost human skill* and foresight, and a failure to do so constitutes them guilty of a failure to use ordinary care under the circumstances. *Coddington v. Brooklyn etc. R. Co.*, 102 N. Y. 66; s. c., 26 Am. & Eng. R. Cas. 393; *Sharp v. Grey*, 9 Bing. (Eng.) 457; *Ingalls v. Bills*, 9 Met. (Mass.) 1; s. c., 43 Am. Dec. 346; *Moreland v. Boston etc. R. Co.*, 141 Mass. 31; *Sandham v. Chicago etc. R. Co.*, 38 Iowa 88; *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 553; *Patterson's R. Acc. Law* 231, § 236.

In the law of bailments also this principle is illustrated. Where the bailment is for the exclusive benefit of the bailee, he is brought into such a relation as makes him owe a high and special duty to use care in the use of the property bailed, and a slight neglect to use care constitutes him guilty of a want of ordinary care. See *BAILMENTS*, 2 Am. & Eng. Encyc. of Law 54; *CARRIERS OF GOODS*, vol. 2, pp. 772-74; *Story on Bailments* (9th ed.) 23; *Coggs v. Bernard*, 2 Ld. Raym. 209; *Green v. Hollingsworth*, 5 Dana (Ky.) 173.

3. Where a person comes upon the land of another merely by sufferance, or as a trespasser, the land owner owes

While in still other relations, although the duty due is positive, it yet does not involve the idea of great care in its observance, and therefore the failure to exercise care must be something more than a slight failure to exercise care, although it may not involve the idea of a failure to use the highest care possible.<sup>1</sup>

This must not be confused with the idea that there are degrees of negligence. For the reason stated above and amply shown elsewhere, there can be no degrees of negligence,<sup>2</sup> but the standard of care required should and does vary with the different relationships in which parties stand to each other, and the different duties that are created or implied by law as existing between them under different circumstances.<sup>3</sup> It follows that when the

to him only a very slight duty at most, and therefore 'is guilty of a want of proper care only when he has failed to exercise even the slightest care to prevent injuries. See *Bush v. Brainard*, 1 Cow. (N. Y.) 78 (plaintiff's cow killed from her having drank syrup left by defendant on his own land); *Lary v. Cleveland etc. R. Co.*, 78 Ind. 323; s. c., 3 Am. & Eng. R. Cas. 498 (plaintiff injured by the fall of a ruinous house on defendant's land, and in which he had taken refuge from a storm—no recovery. The want of care which existed in this case was such as might have rendered defendant liable had the relation of host and invited guest existed between them); *Zoebis v. Tarbell*, 10 Allen (Mass.) 385 (plaintiff entered a room intended for employees only, and on the door of which was painted "no admittance" and was injured—no recovery). See also *Severy v. Nickerson*, 120 Mass. 306; *Hargreaves v. Deacon*, 25 Mich. 1; *Cahill v. Layton*, 57 Wis. 600; *McAlpine v. Pavell*, 70 N. Y. 126; *Larimore v. Crown Point Iron Co.*, 101 N. Y. 391; *Pierce on Railroads* 330; *Johnson v. Boston etc. Co.*, 125 Mass. 75; *Morissey v. Eastern etc. R. Co.*, 126 Mass. 377.

The law of bailment will again furnish an additional illustration to the principle in discussion, *e. g.*, where the bailment is for the sole benefit of the bailor, such a relation exists as to make the duty owing by the bailee a very slight one, and only a great want of care will constitute a violation of it. *BAILMENTS*, 2 Am. & Eng. Encyc. of Law 52; *Story on Bailments*, § 23.

1. This state exists in a great majority of the cases which arise under the law of negligence. For example, in case of a person run over by a railway

train at a crossing; here the railway company did not owe the high duty which its owes to passengers, yet it owed more than the very slight duty which it owes to trespassers. There is a mutual duty owing between the parties. Consequently, the defendant in such case is held liable only when it is shown that he failed to exercise more than a slight degree of care. See *Central etc. Co. v. Rockafellow*, 17 Ill. 541; *Brand v. Schenectady etc. R. Co.*, 8 Barb. (N. Y.) 368; *Pendleton etc. R. Co. v. Shires*, 18 Ohio St. 255; *Cleveland etc. R. Co. v. Terry*, 8 Ohio St. 579; *Macon etc. R. Co. v. Davis*, 18 Ga. 679; *Bradley v. Boston etc. R. Co.*, 2 Cush. (Mass.) 539; *Toledo etc. R. Co. v. Goddard*, 25 Ind. 185; *Deering on Neg.*, § 238; *CROSSINGS*, 4 Am. & Eng. Encyc. of Law.

The rights and duties of travellers using a highway are mutual, reciprocal and equal; each must use ordinary care to avoid injury. *Chicago etc. R. Co. v. Still*, 19 Ill. 499; *Deering on Neg.*, § 239, and cases cited; *Pennsylvania R. Co. v. Krick*, 47 Ind. 368; *Runyon v. Central R. Co.*, 25 N. J. L. 556; *Stevens v. Oswego etc. R. Co.*, 18 N. Y. 422; *Continental Imp. Co. v. Stead*, 95 U. S. 161, 165; *Leavenworth etc. R. Co. v. Rice*, 10 Kan. 426; *Pennsylvania R. Co. v. Goodman*, 62 Pa. St. 329. Compare *Warner v. New York etc. R. Co.*, 44 N. Y. 465; *Shaw v. Boston etc. R. Co.*, 8 Gray (Mass.) 45.

2. *Post*, subtit. IV, DEGREES OF NEGLIGENCE; *CONTRIBUTORY NEGLIGENCE*, 4 Am. & Eng. Encyc. of Law 21-23; *Hinton v. Dibbin*, 2 Q. B. 661; *Steamboat New World v. King*, 16 How. (U. S.) 469; *Milwaukee etc. R. Co. v. Arms*, 91 U. S. 494; *Beven on Neg.* 16.

3. *Fletcher v. Boston etc. R. Co.*, 1

circumstances require great care it is but ordinary care under the circumstances; when they require but slight care that also is ordinary care, and where they do not require the highest, and yet will not admit the lowest kind of care, the care called for is, as in the other cases, ordinary care.<sup>1</sup> Therefore ordinary care varies with the facts of each particular case, and the same act or omission

Allen (Mass.) 9; Shear. & Red. on Neg., §§ 10, 43; Baldwin v. St. Louis etc. R. Co., 63 Iowa 210; s. c., 15 Am. & Eng. R. Cas. 166; Norfolk etc. R. Co. v. Ormsby, 27 Gratt. (Va.) 455; Broom's Leg. Maxims 329; Richardson v. Kier, 34 Cal. 775; Jamison v. San Jose etc. R. Co., 55 Cal. 593; s. c., 3 Am. & Eng. R. Cas. 350.

The fact that the approach of a railroad to a highway crossing is obscured by embankments or otherwise, imposes upon travellers by the highway, as well as upon the railroad company, special care to avoid collisions, therefore the diligence which amounts to proper care in an ordinary case would be negligence in this special one. Haas v. Grand Rapids etc. R. Co., 47 Mich. 401; s. c., 8 Am. & Eng. R. Cas. 268.

So a driver may be in the exercise of reasonable care although he is lying down upon his load wrapped up in his blankets. Parish v. Eden, 62 Wis. 272.

The rule has been thus stated: "Ordinary care" has relation to the situation of the parties and the business in which they are engaged, and varies according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which it is to be exerted. Fletcher v. Boston etc. R. Co., 1 Allen (Mass.) 9; Cayzer v. Taylor, 10 Gray (Mass.) 274; Central R. Co. v. Moore, 24 N. J. L. 824; Pennsylvania R. Co. v. Ogier, 35 Pa. St. 60.

**Running of Trains Within Cities.**—In running a railroad train within the limits of a town or city, care should always be used by the servants of the company—the degree to be proportioned to the danger to be apprehended of inflicting injury on others. At street crossings a high degree of vigilance should be exercised. The signals required by law for the protection of travellers upon the highway should be given, and the servants of the company in charge of the train should be at their posts, observant of the track, and ready at a moment's notice to avert if possible any apprehended danger. A less

degree of vigilance will ordinarily be required between streets than at crossings or when the train is running longitudinally in a street; but some vigilance is required even there, and the degree will necessarily vary with the attendant circumstances. In any case the requisite degree of vigilance may be properly designated by the words "ordinary care," that is, such care as would ordinarily be used by prudent persons performing a like service under similar circumstances. Frick v. St. Louis etc. R. Co., 75 Mo. 595; s. c., 8 Am. & Eng. R. Cas. 280.

**In Cities and Towns.**—The degree of care and foresight to be used must always be in proportion to the nature and magnitude of the injury that would be likely to result from the occurrence that is to be anticipated and provided against. Morrill on City Neg. 114, § 6; Mayor etc. of New York v. Bailey, 2 Den. (N. Y.) 433.

Therefore, the more populous the thoroughfare, the greater care necessary on the part of the corporation, and for this reason only greater care is requisite in cities than in villages. Morrill on City Neg. 115, § 6; Smid v. New York, 49 N. Y. Super. Ct. 126; Pomfrey v. Saratoga Springs, 104 N. Y. 459.

**Ordinary Care Proportionate to Probability of Injury.**—Ordinary care in every situation is proportionate to the injury that may arise to others; he who engages in what is more than ordinarily dangerous is bound to exercise a higher degree of care than would be required if the danger was only ordinary. Morgan v. Cox, 22 Mo. 373; s. c., 1 Thompson on Neg. 238 (accidental discharge of a gun); Dixon v. Bell, 5 M. & Sel. (Eng.) 198.

In Tally v. Ayres, 3 Sneed (Tenn.) 677, this principle was sustained and applied to a case where defendant's gun was accidentally discharged whereby plaintiff's mare was killed. See also 1 Thompson on Neg. 245, *et seq.*, §§ 1-8.

1. Milwaukee etc. R. Co. v. Arms, 91 U. S. 494; Cooley on Torts (662); Bishop on Non-Contract Law, §§ 439-

may be negligent as to one person, not negligent as to another, and negligence for which a third cannot recover because his contributory negligence bars his action; while as to the first person there would have been no contributory negligence although all did the same act.<sup>1</sup> Necessarily this makes the question of ordinary care usually a question of fact in each particular case, to be determined by the jury from the evidence.<sup>2</sup> But in determining whether there has been a want of ordinary care the jury should be guided by some rule of law laid down by the judge as a test of its existence, and this brings us to a consideration of the

**4. Test of Ordinary Care.**—When a person in the observance or performance of a duty due to another has neither done nor omitted to do anything which an ordinarily careful and prudent

442; *Blythe v. Birmingham etc. Co.*, 11 Exch. 781; *Smith v. London etc. R. Co.*, L. R., 5 C. P. 98, 102; *Wilson v. Bret*, 11 M. & W. 113. Thus it may not be negligent for a working mason laying a brick wall to drop a brick, for this sort of accident is inseparable from the business; but, if the wall is on the line of a thronged street, his employer would be guilty of negligence should he not adopt safeguards to prevent persons from walking where falling bricks may hit them. *Bishop on Non-Contract Law*, § 440; *Jager v. Adams*, 123 Mass. 26. So in case of snow and ice thrown from the roof of a house. *Althorf v. Wolfe*, 22 N. Y. 355.

1. This statement may be made clear by an illustrative case: A comes upon B's land by invitation and is injured by falling over or in an obstruction on such land; here there was a duty owing from B to A and the act of B in having the obstruction whereby A was injured is such a failure to use care as constitutes negligence. *Heaven v. Pender*, 11 Q. B. Div. 503; *Currier v. Boston Music Hall*, 135 Mass. 414; *Campbell on Neg.*, §§ 43, 44.

If, however, C, a trespasser, comes on B's land, there being no duty owing by B to keep his premises in such condition as that trespassers should not be injured, he would not be liable for an injury received by C; and thus the same act of B which constituted negligence as to A does not constitute negligence as to C. *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391; s. c., 54 Am. Rep. 718; *Evansville etc. R. Co. v. Griffin*, 100 Ind. 221; s. c., 50 Am. Rep. 783. Suppose a third party, D, comes upon the same premises at B's invitation but in passing over them

acts very carelessly, running on heedlessly and blindly and is injured by coming in contract with the obstruction—here though B might have been negligent yet D's recovery is barred because of his contributory negligence. *Johnson v. Willcox* (Pa. 1890), 19 Atl. Rep. 939; *The Sir Garnet Wolseley*, 41 Fed. Rep. 896; *Bedell v. Berkey*, 76 Mich. 435; *Schoenfield v. Milwaukee City R. Co.*, 74 Wis. 433.

If still another party, E, a child of tender years, came on B's premises uninvited, but lured by a construction likely to attract its attention and excite its curiosity, and such construction was left unguarded and was dangerous, the child could recover for injuries received because although the same act on B's part was not a want of ordinary care as to adults, it *was* as to infants. See this fully presented in CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 53; *Harriman v. Pittsburgh etc. R. Co.*, 45 Ohio St. 11; s. c., 32 Am. & Eng. R. Cas. 37.

2. *Post*, subtit. QUESTIONS OF LAW AND FACT; *Griffin v. Auburn*, 58 N. H. 121; *Kenney v. Hannibal etc. R. Co.*, 80 Mo. 573; *Sloan v. Central Iowa R. Co.*, 62 Iowa 728; 11 Am. & Eng. R. Cas. 145 (brakeman injured by failure to catch hold of brake rod); *Pennsylvania Co. v. Frana*, 112 Ill. 398; *Ohio etc. R. Co. v. Collarn*, 73 Ind. 261; 5 Am. & Eng. R. Cas. 554; *Shear. & Red. on Neg.*, §§ 25, 35, 53, *et seq.*; *Bishop on Non-Contract Law*, § 442. See also *New Jersey R. etc. Co. v. Pollard*, 22 Wall. (U. S.) 341; *Pennsylvania R. Co. v. Coon*, 111 Pa. St. 430; *Ford v. London etc. R. Co.*, 2 F. & F. 730, 732.

"There is no absolute rule as to what constitutes negligence, that conduct

person in the same relation and under the same conditions and circumstances would not have done or omitted to do, he has not failed to use ordinary care, and is therefore not guilty of negligence even though damage may have resulted from his action or want of action. And conversely, there has been a want of ordinary care, when a person in the observance or performance of a legal duty to another, has done or omitted to do something which an ordinarily careful and prudent person in the same relation and under similar circumstances and conditions would not have done or omitted, such act or omission being the proximate cause of injury to the other party to the relation.<sup>1</sup> The term "same conditions and circumstances" as used above is meant to include all the circumstances of time, place and attendant conditions, and a person cannot be chargeable with a want of ordinary care because in a situation of danger or emergency necessitating instant action he did not take all the precautions which,

which might be so termed in one case being in another properly considered ordinary care; nor in cases where it is concurrent will the same rule apply to adults and to children. It is therefore always a question of fact for the jury under the instructions of the court as to the relative degree of care or the want of it growing out of the circumstances and conduct of the parties. Philadelphia etc. R. Co. v. Spearen, 47 Pa. St. 300, 305 (AGNEW, J.).

1. Matson v. Maupin & Co., 75 Ala. 312; Richmond etc. R. Co. v. Howard, 79 Ga. 44; Funston v. Chicago etc. R. Co., 61 Iowa 452; 14 Am. & Eng. R. Cas. 640; Chicago etc. R. Co. v. Hedges, 105 Ind. 398; 25 Am. & Eng. R. Cas. 558; Needham v. Louisville etc. R. Co., 85 Ky. 423; Briggs v. Union St. R. Co., 148 Mass. 72; 37 Am. & Eng. R. Cas. 204; Jager v. Adams, 123 Mass. 26; Durant v. Palmer, 29 N. J. L. 546; Kay v. Pennsylvania R. Co., 65 Pa. St. 269; Gravelle v. Minneapolis etc. R. Co., 10 Fed. Rep. 711; Harris v. Union Pac. R. Co., 13 Fed. Rep. 591; G. H. etc. R. Co. v. Smith, 69 Tex. 406; Fuller v. Citizens' Nat. Bank, 15 Fed. Rep. 875; Nuller v. Union Pac. R. Co., 17 Fed. Rep. 67; Brown v. Congress etc. R. Co., 49 Mich. 153 ("Such care, precaution and vigilance as the circumstances justly demand and the want of which causes him injury"); 8 Am. & Eng. R. Cas. 383; Fowler v. Baltimore etc. R. Co., 18 W. Va. 579; 8 Am. & Eng. R. Cas. 480; Norfolk etc. R. Co. v. Ormsly, 27 Gratt. (Va.) 455; Reynolds v. Burlington, 52 Vt.

300; Baltimore R. Co. v. Jones, 95 U. S. 442; CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law, § 9; Pollock on Torts 36; Bishop on Non-Contract Law, §§ 436, 437.

Ordinary care is that degree of care which a person of ordinary prudence is presumed to use, under the peculiar circumstances, to avoid injury, and should be in proportion to the danger to be avoided, and the fatal consequences involved in his neglect. Toledo etc. R. Co. v. Goddard, 25 Ind. 185.

The case of Wabash etc. R. Co. v. Locke was one of unusual character. The deceased, A, was loading a flat car on a side track on the south side of defendant's main line distant from it 25 feet. Telegraph wires ran obliquely across the track, at the usual height of such wires. On the day of the injury a car of defendant's passed under the wires; the car was of unusual height (12 or 18 inches above the average), and standing on it was a tall brakeman (six feet three and a half inches). One of the wires was sagging slightly, and owing to the unusual height of the brakeman his head came in contact with the wire and he was knocked down and the wire was broken at the insulator. A brake wheel caught the wire and dragged it with the train, and in some unaccountable manner the wire wrapped around the body of deceased, dragged him under the moving train, where he was run over and killed. The court held that this was such an extraordinary combination of circumstances as no man could be ex-



pected or required to foresee or to provide against, and therefore the defendant could not be liable; that although it was true that deceased, being on defendant's premises by invitation, was entitled to have a duty owing him by defendant, yet as a matter of law there could be no negligence inferred on the part of defendant from the evidence. *Wabash etc. R. Co. v. Locke*, 112 Ind. 404.

In case of employees of railway companies a test is laid down in the case of *Louisville etc. R. Co. v. McCoy*, 81 Ky. 403, that ordinary care by the employees of a railroad company is that degree of care which a majority of men, of prudent and careful habits, would exercise under like circumstances to avoid injury to their own persons from the same risks which others undergo in obedience to orders, or by reason of their hazardous business. It is going too far to require that degree of care which any of such persons would take of "his family," placed under like circumstances.

**Test Applied in Other Cases.**—In an action for damages for flooding plaintiff's land, through defects in defendant's reservoir, the question is not whether the defendants might not have been more careful and made their work stronger, but whether a discreet and prudent man ordinarily would have so done, had his own interests been at risk. *Hoffman v. Tuolumne etc. Co.*, 10 Cal. 413; *Wolf v. St. Louis etc. Co.*, 10 Cal. 541.

The degree of negligence necessary to authorize a recovery against the hirer of a horse, which died during the bailment, is the omission of that diligence in the use and care of the horse which the generality of mankind use as to their own horses, and the omission of such diligence is called ordinary negligence. *Moore v. Cass*, 10 Kan. 288.

It is not negligence to fail to guard against an unexpected and thoughtless act of a child. *Gallaher v. Crescent City R. Co.*, 37 La. An. 288.

**Errors are frequently made** in instructing the jury as to the test to be applied because of a failure to adhere to the rule stated. Thus an instruction that the degree of care requisite is that exercised by an "ordinary man" is erroneous, since a man may be "ordinary" in various senses and yet be either reckless or unusually prudent and careful. *Austin etc. R. Co. v. Beatty*, 73 Tex. 592.

So also where the judge made an explanation to the jury that ordinary care meant "just such care as one of you similarly employed would have exercised under the circumstances" there was an erroneous statement of the test. *Louisville etc. R. Co. v. Gower*, 85 Tenn. 465.

In an action for an injury received on the highway the charge was that the expression "ordinary care" excluded the idea of extraordinary care and the idea of carelessness; that the plaintiff was bound to exercise a mean degree of care, "that measure of care and attention . . . that persons of ordinary care, men generally, ordinarily prudent men," exercise under similar circumstances; and that, if plaintiff "did what any ordinary man, any man of ordinary care and attention, would have done" he was "exercising such a measure of care as men ordinarily would have exercised," and had satisfied the rule. It was held that the charge failed to convey the true sense and force of the rule, and was therefore erroneous. *Reynolds v. Burlington*, 52 Vt. 300.

An instruction that the ordinary care to which the employees of a railroad company are bound toward passengers is the care taken by an ordinarily careful man of himself, his family, or his property, is erroneous. *Louisville etc. R. Co. v. McCoy*, 81 Ky. 403; 15 Am. & Eng. R. Cas. 277.

**Sex as Affecting Degree of Care Required.**—While in order to properly determine the degree of care to be required, it is allowed to take into account *all* the circumstances, age and sex of the parties included, it cannot be laid down as a rule of law that a less degree of care is required of a woman than of a man. *Michigan R. Co. v. Hassenmeyer*, 48 Mich. 205 (COOLEY, J.); s. c., 42 Am. Rep. 470; 6 Am. & Eng. R. Cas. 59; *Snow v. Provincetown*, 120 Mass. 580; *Daniels v. Clegg*, 28 Mich. 33; *Fox v. Glastenbury*, 29 Conn. 204.

In a case, however, where the actor was a woman, an instruction which charged that she was bound to observe the conduct of a woman of common and ordinary prudence, was considered not erroneous. *Bloomington v. Perdue*, 99 Ill. 329.

**Age as Affecting Degree of Care.**—The test of ordinary care in case of tender years is properly what might have been ordinarily expected of a child under

from a careful and deliberate retrospective view of the situation it appears might have been taken. The question is, what would an ordinarily careful and prudent person have done at the time of the emergency or danger, in the situation as it then presented itself to him for immediate action?<sup>1</sup>

**5. Negligence May be Either Act or Omission.**—As already indicated, a want of ordinary care may be shown either by an act done or by an omission to act. A failure to exercise ordinary care may be the doing what should not be done or the omitting of what should be done.<sup>2</sup> Diligence, the converse of negligence, may imply a forbearance to act as well as action.<sup>3</sup> The doctrine sometimes attempted to be maintained, that damage brought about by an omission merely, and without direct human agency, does not render the defendant liable for such negligent omission, is, therefore, not based upon principle.<sup>4</sup> If there is a duty well defined, it matters not whether the breach of it is committed by

such circumstances. The test as to what a *man* of ordinary prudence, etc., might have done under similar conditions, while correct, is more difficult of application. This subject is thoroughly treated in a previous article and need only be mentioned here. See CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 42, *et seq.*; Westbrook *v. Mobile* etc. R. Co., 66 Miss. 560; Sioux City etc. R. Co. *v. Stout*, 17 Wall. (U. S.) 657, note.

1. *Karr v. Parks*, 40 Cal. 188; *Moore v. Central R. Co.*, 47 Iowa 688; *Frandsen v. Chicago* etc. R. Co., 36 Iowa 372; *Bishop on Non-Contract Law*, § 47; *Lowery v. Manhattan R. Co.*, 99 N. Y. 158.

2. *Supra*, subtit. TEST OF ORDINARY CARE; CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 22; *Heaven v. Pender*, L. R., 11 Q. B. 506; *Holland's Jurisprudence* 94; *Grant v. Mosely*, 29 Ala. 302; *Harriman v. Pittsburgh R. Co.*, 45 Ohio St. 11; 32 Am. & Eng. R. Cas. 37; *Washington v. Baltimore R. Co.*, 17 W. Va. 190; s. c., 10 Am. & Eng. R. Cas. 794; *Wharton on Negligence*, § 79; *Pollock on Torts* 352.

This follows from the definition of a legal duty: "That what the law requires to be done or foreborne to a certain person, etc." *Wharton on Negligence*, § 24.

"Suppose that there is, to my knowledge, a peculiar danger in the matter, e. g., a concealed pit on the premises of which I neglect to warn the person, whom I know is going there by my permission; it is obviously important

whether the pit was dug by my orders, or whether it was there when I myself came to the premises, and I have only neglected to fence it." *Cotton v. Wood*, 8 C. B., N. S. 568; *Sanders on Neg.* 50; *Wharton on Negligence*, §§ 83, 345; *Carlton v. Franconia Iron etc. Co.*, 99 Mass. 216.

Thus, where the negligence consists in leaving on defendant's track, unattended, an engine fired up, with water in the boiler, which exploded and injured plaintiff who was walking on the track at a place where the public had for many years been accustomed to pass, the defendant was held liable for the negligent omission of its servants. *Davis v. Chicago* etc. R. Co., 58 Wis. 646; s. c., 15 Am. & Eng. R. Cas. 424.

Likewise, where a railroad company negligently omitted to remove a signal torpedo which had been deposited at a certain place where the public had long been accustomed to pass, it was held liable for an injury caused to a person by its explosion. *Harriman v. Pittsburgh* etc. R. Co., 45 Ohio St. 11; s. c., 32 Am. & Eng. R. Cas. 37.

3. *Grant v. Mosely*, 29 Ala. 302; *Wharton on Negligence*, § 24; *Id.*, §§ 79, *et seq.*

4. *Beven on Negligence* 4, 12; *Lectures on Jurisprudence* (Austin), No. 20; *Wharton on Neg.*, §§ 79, *et seq.*

A distinction between an omission and negligence in commission was taken in *Southcote v. Stanley*, 1 H. & N. 248; *Gallagher v. Humphrey*, 10 W. R., Q. B. 664.

misfeasance or nonfeasance; each is equally culpable.<sup>1</sup> The distinction between commission and omission, where there is no legal duty concerned, is entirely theoretic and has no place in this discussion.

**6. A Legally Responsible Person.**—Unless there is a legally responsible person chargeable with an inadvertent want of ordinary care resulting in damage to another, there is no person who can be required to respond in damages for an injury of such character. In other words, there must be a person who in contemplation of law is legally answerable for the results of a want of ordinary care on his part, before negligence in its proper sense can be established. If a person charged with negligence is wholly incapable of exercising care in the legal meaning of that word, he cannot be held responsible for a want of ordinary care.<sup>2</sup> It has been said that infants and lunatics are liable for negligence; but this statement is much, broader than the true doctrine and is

1. Dr. Wharton discusses this question at length and finally concludes with the principle involved in the text. Wharton on Neg., §§ 79-84; citing Cotton v. Wood, 8 C. B., N. S. 568; Carleton v. Franconia Iron etc Co., 99 Mass. 216; French v. Vining, 102 Mass. 132.

"An omission, therefore, may be a juridical cause, but it is not so because it is a positive though a negligent wrong." Wharton on Neg., § 83.

2. Wharton on Neg., §§ 87, 88; Cooley on Torts (105); Beven on Neg. 47-49; Dixon v. Bell, 5 M. & S. 198; Latt v. Booth, 3 C. & K. 292.

Dr. Wharton asserts positively that "neither an idiot nor a maniac can be a juridical cause. And the same reasoning applies to persons so young and inexperienced as to be unable to exercise an intelligent choice as to the subject matter. Wharton on Neg., § 88; citing Bartonshill Coal Co. v. Reid, 3 Macq. 266; Grizzle v. Frost, 3 F. & F. 622; Coombs v. New Bedford Cordage Co., 102 Mass. 572. Compare Shear. & Red. on Neg., § 121.

There are two theories of liability proposed: the one by Gross, J., who states the principle to be "that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, *though it happen accidentally or by misfortune*, yet he is answerable in trespass." Leame v. Bray, 3 East 593.

This theory would support the view that insane persons may be answerable for torts committed by them; it does not however say that such persons

could be guilty of *negligence*. But a different theory is believed to be the correct one, viz: "*No principle can be found or if found can be maintained, subjecting an individual to liability for an act done without fault on his part* . . . All cases concede that an injury arising from inevitable accident, or which in law or reason, which is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no ground for legal responsibility." NELSON, C. J., in Harvey v. Dunlop, Hill & D. Supp. (N. Y.) 193; quoted and approved in Parrot v. Wells, 15 Wall. (U. S.) 524.

Mr. Holmes, in common law, strongly inclines to the latter theory, and condemns the former as one never known to the common law at any time. He points out the test imposed by law as that already set forth (*ante*), saving from liability such as are wanting in mental faculty, deficiency in which is recognizable by all and implies an absolute inability to safeguard against the consequences of such deficiency. An infant is not required to know at his peril, nor a man of pronounced insanity to act at his peril. Holmes on the Common Law 82, 89; Beven on Neg. 15.

This theory is carried out in Morris v. Platt, 32 Conn. 75; Brown v. Kendall, 6 Cush. (Mass.) 292; Brown v. Collins, 53 N. H. 442; s. c., 16 Am. Rep. 372.

In those cases where intent is immaterial there is abundant authority for

saying that insanity constitutes no defence. And sometimes the judges to give effect to the broader diction, that insanity cannot be pleaded in an action for tort, add that because, in tort the intent is not material. *Krom v. Schoonmaker*, 3 Barb. (N. Y.) 647, 650. An illustration is a trespass by an insane person; it is uniformly held to be actionable. The reason whereof has been stated to be because no man shall be excused of a trespass except it may be judged utterly without his fault; as if a man by force take my hand and strike you. *Weaver v. Ward*, 1 Hobart 134. Now this explanation relegates the case not to the doctrine of immaterial intent, but to that of irresistible compulsion, *wherein the act of God, of which insanity is an instance, excuses*, so that on this question particular cases and legal doctrine are in flat conflict. Bishop on Non-Contract Law. § 507, and authorities cited.

"Negligence may arise either from the nonperformance or malperformance of the duty imposed by law. *Of course negligence cannot be attributed to an irresponsible person, as an idiot or a small child.*" GREEN, J., in *Washington v. Baltimore etc. R. Co.*, 17 W. Va. 190; s. c., 10 Am. & Eng. R. Cas. 749, 753.

**Unconscious Agents.**—For reasons which are obvious unconscious agents cannot be held liable for injurious consequences of their conduct to others; they are clearly unable to exercise any degree of care in their situation. The case of *Parrott v. Wells*, known as the nitro-glycerine case, 15 Wall. (U. S.) 524, affords the best illustration of this principle. There, the defendants were expressmen engaged in carrying packages between New York and California. They received at New York a box containing nitro-glycerine to be carried to San Francisco. There was nothing in the appearance of the box tending to excite any suspicion of the character of its contents. It was received and carried in the usual course of business, no information being asked or given as to its contents. On arriving at San Francisco the contents seemed to be leaking and resembled sweet oil. The box was thereupon taken for examination, as was the custom when any package appeared to be damaged, to the premises occupied by the defendant which were leased from the plaintiff. While an employee of

the defendants, by their direction, was attempting to open the box an explosion occurred, whereby the plaintiff's premises were greatly injured. The defendants had no knowledge of, and no reason to suspect, the dangerous character of the contents. They repaired the injuries to the premises immediately occupied by them, but in an action to recover damages for the injuries to the other portion of the premises, it was held that in such case there was no want of ordinary care on the part of defendant, since, being unconscious agents so far as the dangerous quality of the package was concerned, they could not be held liable for the same degree of care which would have been required had they been aware of its character. The court there reiterated the rule that the measure of care against accidents which one must take in order to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own. See also *Pearce v. Winsor*, 2 Cliff. (U. S.) 18; *Hoffman v. Tuolumne etc. Co.*, 10 Cal. 413; *Todd v. Cochell*, 17 Cal. 97; *Harvey v. Dunlop*, 1 Hill & D. Supp. (N. Y.) 193 (in which case, MR. JUSTICE NELSON observes that "No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part"); *Brown v. Kendall*, 6 Cush. (Mass.) 295; *Wharton on Negligence*, §§ 87, 88.

**Persons Under Duress.**—Persons under actual duress clearly cannot be held liable for a want of proper care, since they are not free agents. They are no more a juridical cause than the spark of fire which is used to fire a field of grain; they are merely conditions of injury. Thus, in the case of *Vandenburgh v. Truax*, 14 Den. (N. Y.) 464, a person chased a boy with an axe, and the boy in his terror ran into plaintiff's store, where he did considerable injury. It was held that the person chasing the boy was liable for the injury done; that the boy was not, as he acted entirely under duress. Again, where by the defendant's negligence a horse was frightened so that he ran away, bringing its driver into collision with the plaintiff, the defendant was held liable, the driver of the horse being merely a condition of injury, since he acted under duress. *Lowery v. Manhattan R. Co.*, 99 N. Y. 158. See also

the same rules apply as in the case of infants so young as to be incapable of any care,<sup>1</sup> but a person only partially idiotic or insane and capable of some degree of rational care and forethought may be held guilty of negligence for inflicting an injury by a failure to exercise the degree of care and forethought of which he is capable.<sup>2</sup> Thus the mental status and capacity must be constantly considered in the case of infants, idiots and lunatics when charged with negligence, and they should be held responsible or wholly freed from responsibility according to their capacity for exercising some care or their total want of such capacity.<sup>3</sup> When a person ceases to be an infant, and is not an idiot or lunatic, he

Torts 46, 47; Conklin v. Thompson, 29 Barb. (N. Y.) 218 (boy of 14 throwing squib); Fish v. Ferris, 5 Duer (N. Y.) 49 (boy over-driving horse; here the boy being capable of driving a horse was certainly capable of exercising a degree of care); Way v. Powers, 57 Vt. 135; Baker v. Morris, 33 Kan. 580; Huchting v. Engel, 17 Wis. 230 (child of 7 years injuring flowers); School District v. Bragdon, 23 N. H. 507; Peterson v. Haffner, 59 Ind. 130; s. c., 26 Am. Rep. 81, note; Bullock v. Babcock, 3 Wend. (N. Y.) 391; Harvey v. Dunlop, Hill & D. Supp. (N. Y.) 193; Barnard v. Haggis, 14 C. B., N. S. 45; Campbell v. Stakes, 2 Wend. (N. Y.) 138.

SANFORD, J., in Neal v. Gillett, 23 Conn. 437, 442, where infants of from 13 to 18 years of age were sued for negligently frightening a horse, causing him to run away, observes: "The youngest of these children was 13 years of age, and in the absence of all proof to the contrary, must be presumed to have been emancipated from the dominion of mere childish instincts; and we think it would be mischievous to hold that persons of the age of thirteen years are, on account of their youth alone, absolved from the obligation to exercise their rights with ordinary care. It may not be easy to fix upon the exact age when childish instincts and thoughtlessness shall cease to be an excuse for conduct which in an adult would be considered and treated as a want of ordinary care; but it is sufficient for the determination of this point that these defendants had clearly passed that age." See also Cooley on Torts (105), *et seq.*

1. Bishop on Non-Contract Law, §§ 505-510; *Id.*, § 516. See also notes preceding. Compare Cooley on Torts (99), and cases cited.

No person is held liable where there is no fault on his part, *e. g.*, where an injury was unavoidable. Brown v. Kendall, 6 Cush. (Mass.) 292; Alderson v. Waistell, 7 C. & K. 358 (in the first case, defendant in parting fighting dogs accidentally struck plaintiff). It would seem to us, therefore, that on similar grounds a lunatic should be held not liable. Our idea follows that of Mr. Sedgwick, who maintains that, "in the case of a *compos mentis*, although the intent be not decisive, still the act punished is that of a party competent to foresee and guard against the consequences of his conduct. An inevitable accident has always been held an excuse. In the case of a lunatic, it may be urged both that no good policy requires the interposition of the law, and that the act belongs to that class of cases which may well be termed inevitable accident." Sedgwick on Damages 455. See also Bishop on Non-Contract Law, § 507.

2. Washington etc. R. Co. v. Gladmon, 15 Wall. (U. S.) 401; Bishop on Non-Contract Law, §§ 505, *et seq.*; Cross v. Andrews, 2 Cro. Eliz. 622; Pollock on Torts 47; CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 42, *et seq.*

3. Cooley on Torts (105), where it is said that while an infant is liable generally for his torts springing from negligence, the question of actual maturity and capacity is important, *not only as it may bear upon the question whether negligence actually existed*, but also as it may guide in determining whether the plaintiff in the particular transaction was not himself chargeable with fault. See also Neal v. Gillett, 23 Conn. 437; Dowling v. Allen, 88 Mo. 293; CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 43, 44, where numerous authorities are collated.

is presumed by law to be capable of ordinary care and the law will not consider the relative capacity of different individuals who have reached such status, but requires of them all the care that would be exercised by an ordinarily careful and prudent person under given conditions and circumstances.<sup>1</sup> And this rule is applicable to persons who, while voluntarily intoxicated, are guilty of a want of ordinary care. In such cases they are held responsible for the results of such want of ordinary care on the principle that their want of capacity being voluntary they cannot afterward escape liability because of a temporary incapacity to exercise care, resulting from their own wilful misconduct in becoming intoxicated.<sup>2</sup>

**7. Person to Whom Duty Due.**—In order to maintain an action for a negligent injury it must appear that there was a legal duty due from the person inflicting the injury to the person on whom

All that is required of such persons is that they exercise the care and prudence proportioned to their capacity. *Robinson v. Cone*, 22 Vt. 213; s. c., 2 Thompson on Neg. 1129.

1. See Holland's Jurisprudence (4th ed.) 270-278; Pollock on Torts 358.

Thus it cannot be said that a less degree of care is required of a woman than of a man. *Michigan etc. R. Co. v. Hasenmeyer*, 48 Mich. 205; s. c., 42 Am. Rep. 470; 6 Am. & Eng. R. Cas. 59.

2. **Negligence of Persons Drunken.**—Bishop on Non-Contract Law, §§ 511-516; 1 Bishop's Crim. Law, §§ 397, 416; Cooley on Torts (114); *Cassady v. Magher*, 85 Ind. 228 (defendant when sued for driving into carriage of a licensed liquor dealer, claimed in defence that plaintiff sold him intoxicating liquors which incapacitated him from driving properly, but the defence was held not available); *Chicago etc. R. Co. v. Sullivan*, 63 Ill. 293; *Cleg-horn v. New York etc. R. Co.*, 56 N. Y. 44; *Sullivan v. Murphy*, 2 Miles (Pa.) 298; *Barbee v. Reese*, 60 Miss. 306; *Reed v. Harper*, 25 Iowa 87; *McKee v. Ingall*, 5 Ill. 30. Compare *Engleken v. Hilger*, 43 Iowa 563; *Kearney v. Fitzgerald*, 43 Iowa 580.

Drunkenness does not excuse contributory negligence; indeed it tends to show such negligence. Bishop on Non-Contract Law, § 513; *Alger v. Lowell*, 3 Allen (Mass.) 402; *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177; *Weltoy v. Indianapolis etc. R. Co.*, 105 Ind. 55; *Hubbard v. Mason City*, 60 Iowa 400; *Monk v. New Utrecht*, 104 N. Y. 552; *East Tennessee etc. R. Co. v. Winters*, 85 Tenn. 240.

#### Doctrine of This Section Restated.—

The conclusions arrived at in the foregoing discussion as to the legally responsible person are these:

(1) That lunatics and other persons devoid of reason (including infants too young to understand), since they cannot be required to exercise any care, cannot be guilty of *negligence*. Whether a person injured by such persons could recover for the pecuniary loss sustained, is a question of dispute, the slight weight of authority being in favor of such recovery; but where there is recovery it is not on the ground of negligence but rather on the ground afforded by the equitable maxim that where one of two innocent persons must suffer, the loss must fall upon him who is most in fault. Negligence is conceded to be a want of care (Beven, Shear. & Red., WILLES, J. and other authorities); how then can it be attempted to charge an insane person with a want of care when it was absolutely an impossibility for him to exercise any care at all?

(2) That persons only partially devoid of reason, such as lunatics with lucid intervals, semi-idiot, mono-maniacs, and children of various ages, being capable of exercising some care, are held chargeable for a failure to exercise that care of which they were capable.

(3) That persons drunken, having brought upon themselves the inability to use care cannot be excused for a failure to exercise care and the standard of ordinary care as to them is not altered because of their condition.

(4) That as between persons not

it was inflicted, and that such duty was violated by a want of ordinary care on the part of the defendant.<sup>1</sup> It is not sufficient that there be a general duty to the public which is violated, but in all civil cases the right to enforce such duty must reside in the individual injured because of a duty due him from his injurer, or he cannot recover.<sup>2</sup> The duty itself arises out of the various relationships of life, and varies in obligation under different circumstances. In one case the duty is high and imperative, in another it is of imperfect obligation. Thus it may be dependent on a mere licence to enter upon land or the bare obligation to avoid inflicting a wilful injury upon a trespasser, while upon the other hand, it may be a duty to care for the safety of a specially invited guest or of a passenger for hire.<sup>3</sup> In every case it is a duty implied by law as due from one person to another, and it may be due to an infant or lunatic as well as to a normal person

afflicted mentally and above the age of infancy, the law makes no distinction. A man of dull mind is chargeable with the same degree of care as one with a brilliant intellect; the reason being that an attempt to make such distinction would not only be futile but would bring about inextricable confusion.

1. Cooley on Torts (659, 660); Kahl v. Love, 37 N. J. L. 5; 111 Rights, Remedies and Practice (Lawson), § 1149, *et seq.*; Cole v. McKey, 66 Wis. 500; Baker v. Byrne, 58 Barb. (N. Y.) 438; Flint etc. R. Co. v. Stark, 38 Mich. 714; Eisenberg v. Missouri etc. R. Co., 33 Mo. App. 85; Evansville etc. R. Co. v. Griffin, 100 Ind. 221; s. c., 50 Am. Rep. 783; Galveston City Co. v. Hewitt, 67 Tex. 473; Bishop on Non-Contract Law, § 446, *et seq.*

2. Cooley on Torts (660); Bishop on Non-Contract Law, § 446; Winterbottom v. Lord Derby, L. R., 2 Ex. 322; 1 Thompson on Neg. 341; Kessell v. Butler, 53 N. Y. 612; Bradbee v. Christ's Hospital, 4 Mann. & Gr. 714; 5 Scott N. R. 79; Quincy Canal Co. v. Newcomb, 7 Met. (Mass.) 276; Sohn v. Cambern, 106 Ind. 302; *post*, subtit. III, 9, DAMAGE AN ESSENTIAL ELEMENT.

3. A private citizen owes no duty to those who come on his premises by licence merely and for their own convenience, or who are trespassers, to keep his premises in such condition that they shall not be injured. In entering on his property uninvited they assume all risks. Eisenberg v. Missouri etc. R. Co., 33 Mo. App. 85; Evansville etc. R. Co. v. Griffin, 100

Ind. 221; s. c., 50 Am. Rep. 783; Baltimore etc. R. Co. v. State, 62 Md. 479; s. c., 50 Am. Rep. 233; 19 Am. & Eng. R. Cas. 83; Morgan v. Pennsylvania R. Co., 19 Blatchf. (U. S.) 239; CARRIERS OF PASSENGERS, 2 Am. & Eng. Encyc. of Law 742; Galligan v. Metacommet Mfg. Co., 143 Mass. 527; Hargreaves v. Deacon, 25 Mich. 1; Zoebisich v. Tarbell, 10 Allen (Mass.) 385; s. c., 87 Am. Dec. 660, note; Larmore v. Crown Point Iron Co., 101 N. Y. 391.

Thus a person who goes upon the land of another, without invitation, to secure employment from the owner of the land, is not entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises, not obviously dangerous, which he passes in the course of his journey. Although it may be shown that the owner might have ascertained the defect by the exercise of reasonable care, yet he cannot be held liable since he owes no legal duty to a stranger so coming upon his premises, which requires him to keep the machinery in repair. Larmore v. Crown Point Iron Co., 10 N. Y. 391; s. c., 54 Am. Rep. 718.

**Liability to a Licensee.**—Where a person hoping to find a certain surgeon on board a foreign ship went aboard without objection being made, and on making enquiry was directed to a room beyond a certain passage pointed out, he went forward accordingly and was struck by a bag of flour being lowered through a hatch. It was held that being a mere licensee, if not a trespasser, he could not recover of the owner of the

vessel for the injuries thus sustained. *Metcalfe v. Cunard Steamship Co.*, 147 Mass. 66.

So, where a person entered a railroad station in the evening to take a train and, after finding that the last train had gone, remained therein for his own convenience several minutes longer, during which the station master, the usual closing time having arrived, puts out the lights, he becomes at most a mere licensee, and cannot recover for injuries sustained in leaving the station by reason of the extinguishment of the lights. *Heinlein v. Boston R. Co.*, 147 Mass. 136; 33 Am. & Eng. R. Cas. 500.

Plaintiff's intestate, an adult, was crossing defendant's land without right, except that persons with defendant's knowledge were in the habit of constantly crossing it, when he fell into a pool of water, over which a crust had so formed that it resembled dry land, and was drowned. *Held*, that an action against defendant was not maintainable. *Union Stock Yards etc. Co. v. Rourke*, 10 Ill. App. 474. See also as to licences, *Reardon v. Thompson*, 149 Mass. 267; *Eisenberg v. Missouri etc. R. Co.*, 33 Mo. App. 85.

**Trespassers.**—The plaintiff, while a trespasser, entered an abandoned and decaying freight house, and was injured by a piece of the building being blown against him in a sudden storm. *Held*, that he could not recover of the company, no duty being due him from them. *Lary v. Cleveland etc. R. Co.*, 78 Ind. 323; s. c., 41 Am. Rep. 572; 3 Am. & Eng. R. Cas. 308; *Trazer v. South and North Ala. R. Co.*, 81 Ala. 185.

One is under no duty to a mere trespasser to keep his premises safe, though the latter is an infant. *Frost v. Eastern R. Co.*, 64 N. H. 220.

**Meaning of licensee** as used in this connection is one who is on premises by sufferance; closely allied to a trespasser. Where a person has a legal licence, *e. g.*, one granted upon a stipulated rent per month, as in case of licence to use wharves he is more than a mere licensee as here intended and a higher duty is owing him. In such case, however, the person licensed is rather to be regarded as a *tenant*. See *Allegheny v. Campbell*, 107 Pa. St. 530.

Thus, where one merely suffers others to cross his land, *without express or implied permission*, he is not bound to keep the premises free from pitfalls

or obstructions. *Evansville etc. R. Co. v. Griffin*, 100 Ind. 221; s. c., 50 Am. Rep. 783.

**Intermeddlers.**—Likewise, where a complaint against a railroad company, to recover for personal injury showed that the plaintiff who was casually passing, at the request of an employee of the defendant, got upon a car that was moving slowly upon a switch, and applied the brakes to stop it, and while so engaged other servants of the defendant carelessly caused other cars of the defendant to collide violently with that which the plaintiff was upon, by reason of which the injury occurred, it was held that the plaintiff must be regarded as a mere intermeddler, to whom the defendant owed no duty, either as employee, passenger, or traveller on an intersecting highway, and that the complaint was bad on demurrer. *Everhart v. Terre Haute etc. R. Co.*, 78 Ind. 292; 4 Am. & Eng. R. Cas. 599.

As to one who, without right, is walking on a railroad right of way, the company owes no duty to provide a flagman at a street crossing. *Chicago etc. R. Co. v. Eininger*, 114 Ill. 79.

**In Case of Persons Invited.**—But where the plaintiff comes upon defendant's premises on an invitation from defendant, there is a duty owing to the plaintiff that such premises shall be in such condition as that he shall not be injured by them. *Heaven v. Pender*, 11 Q. B. Div. 503 (leading case); *Evansville etc. R. Co. v. Griffin*, 100 Ind. 221; s. c., 50 Am. Rep. 783; *Campbell on Neg.*, §§ 43, 44; *Lardin v. St. Catherine Dock Co.*, L. R., 3 C. P. 26; **CARRIERS OF PASSENGERS**, 2 Am. & Eng. Encyc. of Law 739, 742. See also **RAILWAY COMPANIES**.

Thus the proprietor of a hall to which the public is invited is bound to use ordinary care and diligence to put and keep the hall in a reasonably safe condition for persons attending in pursuance of such invitation; and if he neglects his duty in this respect, so that the hall is in fact unsafe, his knowledge or ignorance of the defect is immaterial. *Currier v. Boston Music Hall*, 135 Mass. 414.

If a structure which defendants invite the public to use is defectively or carelessly constructed, whereby a person lawfully upon it is injured, the defendants will be liable in damages notwithstanding they had no knowledge of its defective condition, and it had



been erected by a competent person. *Lingmore v. Great Western etc. R. Co.*, 35 L. J., C. P. 135. See also *Saunders on Negligence* 50; *Francis v. Cockrell*, L. R., 5 Q. B. 184; s. c., 39 L. J., Q. B. 113.

**Invitation Implied.**—The invitation need not be expressed but is in many cases to be implied, particularly in case of those who hold themselves out as willing to serve the general public in a certain capacity.

Thus one who occupies a building for business purposes is liable for its reasonably safe condition to all who enter it in the course of the ordinary business transactions there. *Welch v. McAllister*, 15 Mo. App. 492.

A licence to come upon one's premises in certain cases, especially if in the licensor's interest, may be regarded as an implied invitation, and thereby impose upon him the duty to warn those who come, of any danger in coming of which he knows or ought to know and they do not. *Powers v. Harlow*, 53 Mich. 507; s. c., 51 Am. Rep. 157.

By virtue of the principle just stated a railroad company owes a duty to those who come upon its premises, to meet a friend or see him depart, and is liable for injuries caused by a defect in such premises. *Texas etc. R. Co. v. Best*, 66 Tex. 116; *Hamilton v. Texas etc. R. Co.*, 64 Tex. 251; s. c., 53 Am. Rep. 756; 21 Am. & Eng. R. Cas. 336.

Similarly a railroad company is liable for injuries sustained by one who, waiting at the depot in the night to meet a train on which he expects his wife to arrive, falls into a hole on the grounds while in search of a place to urinate, the company having provided no accommodations. *McKone v. Michigan etc. R. Co.*, 51 Mich. 601; s. c., 47 Am. Rep. 596; 13 Am. & Eng. R. Cas. 29.

One who keeps a public house (*i. e.*, an inn or hotel) extends an implied invitation to all to come on his premises, and is therefore liable for injuries sustained in consequence of the bad condition of such premises. *Oxford v. Prior*, C. P., 14 Week. Rep. 611; *INNS AND INN KEEPERS*, 10 Am. & Eng. Encyc. of Law.

A coal merchant, furnishing tackle for use by his customers in unloading coal from the barge in which it is delivered, is liable to a servant of the customer for personal injuries sustained by reason of a defect in the tackle.

*Hayes v. Philadelphia etc. Iron Co.*, 150 Mass. 457.

See also wharf owners and their agents, so long as they keep the wharf open and occupied, or rented for the purpose of loading and dispatching vessels, are bound to *all whom the proffered facilities bring there* to use due care to keep the wharf and approaches in good condition. *Campbell v. Portland Sugar Co.*, 62 Me. 552; s. c., 16 Am. Rep. 503; *S. P. Smith v. London etc. Dock Co.*, L. R., 3 C. P. 326.

If a religious society gives notice of a meeting to be held at its house of worship, and invites the members of other societies to attend, a member of a church so invited, while on the land of the society, is not a mere licensee, and may maintain an action against the society for a personal injury sustained while in the exercise of due care, from the dangerous condition of the defendant's premises. *Davis v. Central Congregational Soc.*, 129 Mass. 367; 37 Am. Rep. 368. Other cases, see *White v. France*, 2 C. P. Div. 318; *Campbell on Neg.*, §§ 43, 44; *Conrad v. Clauve*, 93 Ind. 476; s. c., 47 Am. Rep. 388 (fair-grounds).

**Meaning of Invitation.**—"Invitation, in the technical sense of the word as employed in this class of cases, differs from invitation in the ordinary sense,—implying the relation between host and guest. In the case of host and guest, it would be thought hard that the hospitality of the former should expose him to the responsibilities implied by business relations. The guest must take the premises as he finds them, with every risk owing to their disrepair; although the host is bound to warn his guest of any concealed danger upon the premises known to himself." *Campbell on Law of Neg.*, § 44; *Smithcote v. Stanley*, 1 Hurl. & N. (Eng.) 247.

**Distinction Between Implied Invitation and a Licence.**—There is a distinction to be noticed between a mere licence and an implied invitation. In the first case, if there is any duty at all owing, it is very slight; in the second, there is a higher and assured duty. This subject is discussed in *Campbell on Neg.*, §§ 43, 44. The distinction is often difficult to be made. The principle seems to be that an invitation may be implied where there is a common interest or mutual advantage; while only a licence is inferred where the object is mere pleasure, or the benefit of the

or a corporation.<sup>1</sup> What the implied duty is must be determined in each particular case from the facts and circumstances, but in every case there must be some person to whom it is due and who has been injured by its nonobservance or no action can be sustained.<sup>2</sup>

**8. The Legal Duty.**—There can be no case of the negligent injury of one person by another in the absence of a legal duty due from the person inflicting the injury to the person on whom it is inflicted.<sup>3</sup> It must be a duty implied by law, although it

party using it. Thus a party at a railroad station is there under an *implied invitation*, since his presence there is for the mutual benefit of himself and the railroad company. See *Powers v. Harlow*, 53 Mich. 507; s. c., 51 Am. Rep. 154; *Campbell on Law of Neg.*, § 44.

An implied invitation has been inferred in the following cases: *Nicholson v. Lancashire etc. R. Co.*, 34 L. J. Exch. 84; *Indermaur v. James*, L. R., 1 C. P. 274; 2 C. P. 311; *Smith v. London etc. Co.*, L. R., 3 C. P. 326; *Holmes v. N. E. R. Co.*, L. R., 4 Ex. 254; 6 Ex. 123; *Chapman v. Rothwell*, 1 El., Bl. & El. 168 (a); *Smith v. Steele*, L. R., 10 Q. B. 125 (pilot injured by negligence of defendant's crew); *Wright v. L. etc. R. Co.*, L. R., 10 Q. B. 208; *Watkins v. G. W. R. Co.*, C. P. Div. 25 Week. Rep. 905. See also *supra*, note, INVITATION IMPLIED.

A mere licence has been inferred in these cases, viz: *Balch v. Smith*, 7 H. & N. 736; s. c., 31 L. J. Ex. 201; *Sullivan v. Waters*, 14 Irish C. L. R. 460; *Gantret v. Edgerton*, L. R., 2 C. R. 371; *Metcalf v. Cunard Steamship Co.*, 147 Mass. 66. See also *supra*, note, LIABILITY TO LICENSEES.

1. See *Holland's Jurisprudence* (4th ed.) 277-9; *Cooley on Torts* (660); *CONTRIBUTORY NEGLIGENCE*, 4 Am. & Eng. Encyc. of Law 42; *ante*, subtit. III, 6, A LEGALLY RESPONSIBLE PERSON.

2. *Bishop on Non-Contract Law*, § 446; *Kahl v. Love*, 37 N. J. L. 5; *Pollock on Torts* 325.

3. *O'Callaghan v. Cronan*, 121 Mass. 114; *Cooley on Torts* 60; *Kerwhacher v. Cleveland etc. R. Co.*, 3 Ohio St. 188; *Wharton on Neg.*, §§ 3, 24; *Ferguson v. Earl of Kinnoul*, 9 Cl. & F. 289 (Lord Brougham); *Rich v. New York etc. R. Co.*, 87 N. Y. 382; 11 Am. & Eng. R. Cas. 594; *Shear. & Red. on Neg.*, § 9; *Kahl v. Love*, 37 N. J. L. 5; *Cooley on Torts* 659-660; 634.

*Elliott v. Hall*, L. R., 15 Q. B. Div. 315; *Heaven v. Pender*, L. R., 11 Q. B. Div. 503; *Flint etc. R. Co. v. Stark*, 38 Mich. 714; *Warner v. Railroad Co.*, 6 Phila. (Pa.) 537; *Miller v. Woodhead*, 104 N. Y. 471; *Tourtellot v. Rosebrook*, 11 Met. (Mass.) 460; *Coggs v. Bernard*, 2 Ld. Raymond 909; *Mahan v. Brown*, 13 Wend. (N. Y.) 261.

"Actionable negligence exists only when the party, whose negligence occasions the loss owes a duty, arising from contract or otherwise, to the person sustaining such loss." *Kahl v. Love*, 37 N. J. L. 5.

To constitute negligence there must be a disregard of some duty or rule of conduct prescribed beforehand or arising so manifestly from the facts as to leave no doubt of its existence. *Warner v. Railroad Co.*, 6 Phila. (Pa.) 537.

A knowledge of his duty is presumed against every man; therefore, when a duty is imposed upon a person by law, he cannot be allowed to prove his ignorance of it. *Sherman v. Western etc. Co.*, 62 Barb. (N. Y.) 150.

In *Mayor etc. of Albany v. Cunliff*, 2 N. Y. 165, CADDY, J., observes: "Suppose that a party on a public road comes to a narrow and deep stream which he cannot cross without a bridge, and he immediately goes to work and makes a bridge, over which he with his horse and wagon passes, and shortly afterward another traveller attempts to pass over with a span of horses and a wagon, but unfortunately the bridge breaks down and both his horses are drowned—has he a remedy against the man who built the bridge? He has not, because the law imposed no duty on him to build it. Therefore, in every action against a corporation for negligence in omitting to repair a bridge, the plaintiff must first show that the corporation owed him a duty as one of the general public to repair the bridge." *Peck v. Batavia*, 32 Barb. (N. Y.) 634.

may arise out of contract.<sup>1</sup> It exists, however, independent of the contract in all cases where an action can be maintained in tort for negligent injuries, even though the injury may have grown out of a breach of contract. The distinction is this: when injuries result from breaches of contract of such character that only an action on the contract can be maintained, the action is not one sounding in tort, but rests entirely on the conventional duty created by the contract, and but for the contract there would be no right of action for such an injury, and consequently no duty not to do the thing causing it.<sup>2</sup> But when the act or omission causing an injury is in itself a breach of duty, whether a contract exists or not—*i. e.*, a tort—the duty is one implied by law, and when such a wrong is committed by one party to a contract, resulting in injury to the other party thereto, it is said that the injured party may waive the contract and sue in tort upon the breach of the implied duty, the existence of the contract between the parties being mere matter of inducement to show the existence of a relationship out of which the implied duty grew.<sup>3</sup> This distinction is well illustrated by cases arising out of the injury of passengers, who are being carried for hire, by the negligence of the carrier. In such cases if the injured passenger sue upon the contract, his recovery is limited to those damages

1. Holland's Jurisprudence (4th ed.) 73; Bishop on Non-Contract Law, §§ 132, 133; Boyden v. Burke, 14 How. (U. S.) 575-583.

No duty is considered in law except a *legal duty*, and all legal duties exist from implication of law. A contract merely creates this implication. See Wharton on Neg., § 24 (definition of legal duty); Holland's Jurisprudence (4th ed.) 73.

2. Cooley on Torts 2, 3; Bishop on Non-Contract Law, §§ 74, 75, 76; Id., § 79; Clark v. St. Louis etc. R. Co., 64 Mo. 440; Ray v. Tubbs, 50 Vt. 688; Cooley on Torts (106), *et seq.*; Brown v. Chicago etc. R. Co., 54 Wis. 342; s. c., 41 Am. Rep. 41; 3 Am. & Eng. R. Cas. 444; Hobbs v. London & South-western R. Co., L. R., 10 Q. B. 111; Candee v. Western Union Tel. Co., 34 Wis. 479; s. c., 17 Am. Rep. 452; Hadley v. Baxendale, 9 Exch. 341; Craker v. Chicago etc. R. Co., 36 Wis. 657; s. c., 17 Am. Rep. 504.

3. Cooley on Torts (2nd ed.) 2, 3; Id. 90; Rich v. New York etc. R. Co., 87 N. Y. 382; 11 Am. & Eng. R. Cas. 594; Bell v. Cummings, 3 Sneed (Tenn.) 275 (using hired slave for other purpose than as agreed upon in the contract of hiring—such use constituted a tort arising out of a breach of contract);

Lane v. Cameron, 38 Wis. 603 (using hired horse otherwise than agreed upon—tort); Clark v. St. Louis etc. R. Co., 64 Mo. 440; Vanleer v. Fain, 6 Humph. (Tenn.) 104 (same as Bell v. Cumming, *supra*); Horsely v. Branch, 1 Humph. (Tenn.) 208; Story on Bailments, § 397; O'Callaghan v. Cronan, 121 Mass. 114; Mahan v. Brown, 13 Wend. (N. Y.) 261; Kerwhacker v. Cleveland etc. R. Co., 3 Ohio St. 188; Dean v. McLean, 48 Vt. 412; s. c., 21 Am. Rep. 130; Whittaker v. Collins, 34 Minn. 299.

The language of FINCH, J., in Rich v. New York etc. R. Co., 87 N. Y. 382, is very applicable here: "We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and *ex delicto* there exists what has been termed a border land where the lines of distinction are shadowy and obscure, and the tort and the contract become so nearly coincident as to make their practical separation somewhat difficult." In such cases *the tort is dependent upon, while it is at the same time independent of, the contract*; for if the latter imposes a legal duty upon a person, the neglect of that duty may constitute a *tort founded upon contract*. See also Cooley on Torts (2nd ed.) 3, note.

proximately caused by the breach of contract alone.<sup>1</sup> But if he sue upon the tort, merely setting up the contract to show the relationship, he recovers for the breach of the implied duty of the carrier, and his damages are fully compensatory for all the injuries that may have followed in natural sequence from the negligence of the carrier.<sup>2</sup>

A legal duty has been well defined by Dr. Wharton as "that which the law requires to be done or forbore to a determinate person or to the public at large, and is correlative to a right vested in such determinate person or in the public."<sup>3</sup> The obligation involved is not a moral obligation, but it is the obligation imposed on every member of society by law so to conduct himself and use his property as not to injure others: *Sic utere tuo ut alienum non lædas*. The duty is not an absolute one; the

1. There are, in certain relations, duties imposed by law, a failure to perform which is regarded as a tort, though the relations themselves may be formed by contract covering the same ground. The case of common carriers furnishes a conspicuous illustration. The law requires a carrier to carry with impartiality and safety for all those who offer, and if he fails he is charged with a tort. When goods are delivered to be carried there is also a contract, express or by operation of law, that he will carry with impartiality and safety; and if he fails there is a breach of contract. So that for the breach of the general duty imposed by law because of the relation, one form of action may be brought, and for the breach of contract another form of action may be brought. Cooley on Torts (91) (2nd ed.) 106; Courtenay v. Earle, 10 C. B. 83 (Jervis, Ch. J.); Baltimore etc. R. Co. v. Kemp, 61 Md. 619 (passenger may sue in contract or in tort); Nevin v. Pullman Car Co., 106 Ill. 222; Austin v. Great Western R. Co., L. R., 2 I. B. 442; Ames v. Union R. Co., 117 Mass. 541. See also CARRIERS OF PASSENGERS, 2 Am. & Eng. Encyc. of Law 738; Bishop on Non-Contract Law, § 74; Clark v. St. Louis etc. R. Co., 64 Mo. 440. Compare Walsh v. Chicago etc. R. Co., 42 Wis. 23.

In suing upon contract for a breach of duty damages can be recovered only for such consequences as were the direct result of such breach, and were within the contemplation of the parties at the time of the formation of the contract. 1 Suth. on Dam. 74; Warwick v. Hutchinson, 45 N. J. L. 61; Weston

v. Grand Trunk R. Co., 54 Me. 376; DAMAGES, 5 Am. & Eng. Encyc. of Law 13; Walsh v. Chicago etc. R. Co., 42 Wis. 23.

2. Brown v. Chicago etc. R. Co., 54 Wis. 342; s. c., 41 Am. Rep. 41; 3 Am. & Eng. R. Cas. 444; Craker v. Chicago etc. R. Co., 36 Wis. 657; s. c., 17 Am. Rep. 504; Cooley on Torts 3, *et seq.*

In actions *ex delicto* for a breach of duty, whether arising out of contract or not, damages may be recovered not merely for all the direct consequences, but for such indirect results as might reasonably be expected to ensue; *i. e.*, for all the natural consequences of the wrongful act. Weston v. Grand Trunk R. Co., 54 Me. 376; Warwick v. Hutchinson, 45 N. J. L. 61; Greenleaf on Ev., §§ 254-256; Cooper v. Young, 22 Ga. 269; DAMAGES, 5 Am. & Eng. Encyc. of Law 6; Suth. on Dam., § 74, *et seq.*

3. Definition of Legal Duty.—Wharton on Negligence, § 24, citing Ferguson v. Earl of Kinnoul, 9 Cl. & F. 289; Brown v. Bowman, 11 Cl. & F. 44.

Every right whether moral or legal implies the active or passive furtherance by others of the wishes of the party having the right.

Wherever one is entitled to such furtherance on the part of others, such furtherance on their part is said to be their "duty."

Where such furtherance is merely expected by the public opinion of the society in which they live, it is their "moral duty."

Where it will be enforced by the power of the State to which they are amenable, it is their "legal duty." Holland's Jurisprudence (4th ed.) 73.

law only requires that one exercise ordinary care, according to the circumstances, in order to perform it.<sup>1</sup>

This duty, incumbent upon persons in all relations, may be considered as arising from three sources,<sup>2</sup> namely :

1. A duty may be general and owing to everybody as it may be particular and owing to a single person only, by reason of his peculiar position. In every case the person injured must point out the duty which is supposed to have been neglected and how it arose. Cooley on Torts (2nd ed.) (660) 790, 791.

**Ordinary Care.**—Wherever an absolute duty is imposed the question ceases to be one of negligence. See *Shear. & Red. on Neg.*, § 9; *Pennsylvania etc. Co. v. Graham*, 63 Pa. St. 290; *Hay v. Cohoes Co.*, 2 N. Y. 159; *Couch v. Steel*, 3 El. & B. 400 (failure to keep medicines on board ship as is required by statute). See also *Barker v. Byre*, 58 Barb. (N. Y.) 438; *Richards v. Schleusener*, 41 Minn. 49.

"Wherever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think, would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." *BRETT, J.*, in *Heaven v. Pender*, L. R., 11 I. B. 506; *Holland's Jurisprudence*, §§ 96, 97.

In *Boston Beef Packing Co. v. Stevens*, 12 Fed. Rep. 279, the court has to say: "Whoever for his own advantage authorizes his property to be used by another in such a manner as to endanger and injure unnecessarily the property or rights of another, is answerable for the consequences."

**Contagious Disease.**—In the case of *Smith v. Baker*, the defendant took his children while they were suffering from whooping cough, a contagious disease, to plaintiff's boarding house to board. The plaintiff's child and the children of the other boarders contracted the disease, whereby she was put to expense and labor in consequence of her child's sickness, and sustained pecuniary loss by reason of boarders being kept away. The defendant was held liable for the damages caused. Here was the existence of a duty on

the part of the defendant so to act as not to injure others, and a failure to observe proper care in order to carry out the duty rendered him liable for negligence. *Smith v. Baker*, 20 Fed. Rep. 709; s. c., 19 Cent. L. J. 173. See also *Span v. Ely*, 8 Hun (N. Y.) 256; *Aaron v. Broiles*, 64 Tex. 316; s. c., 53 Am. Rep. 764.

**No Unreasonable Duty.**—The duty which the law requires is no unreasonable one. Thus a railroad company is not liable for damage caused by sparks from its engine if it has made use of all the means known to science to prevent their escape and kept a reasonable watch upon the track, even though it might have been possible to prevent the injury by employing an army of men. *Rood v. New York etc. R. Co.*, 18 Barb. (N. Y.) 80; *Vaughn v. Taff Vale R. Co.*, 5 H. & W. (Eng.) 679.

So where a water supply company had constructed its works upon the best system known, and kept them in good order for many years, at the end of which time a frost of unprecedented severity caused the pipe to burst, it was held that the company was not liable for injuries caused thereby. *Blythe v. Birmingham Water Co.*, 11 Exch. 781. See also *Chicago etc. R. Co. v. Trotter*, 61 Miss. 417; 18 Am. & Eng. R. Cas. 159; *Parrott v. Wells*, 15 Wall. (U. S.) 524; *Bizzle v. Booker*, 16 Ark. 308; *Taylor v. Atlantic Mut. Ins. Co.*, 9 Bosw. (N. Y.) 369; *Louisville City Co. v. Weams*, 80 Ky. 420; *Shear. & Red. on Neg.*, § 11.

A city ordinance required that locomotives passing through the city should have a lookout in a certain position. Owing to changes in the plan of engines this became impracticable, and it was therefore held that a railroad was, under the circumstances, not chargeable with negligence in not complying with the ordinance. *Baltimore etc. R. Co. v. Mali*, 66 Md. 53; 28 Am. & Eng. R. Cas. 628. *Compare*, however, *Neier v. Missouri Pac. R. Co.*, 12 Mo. App. 35.

2. It is laid down by Mr. Smith in his excellent work on negligence thus: "Duties may arise out of express con-

(a) *From Implication of Law.*—In every undertaking there arises by implication of law certain rights and duties; the duty incumbent upon the party engaging in the undertaking is to so conduct it that no injury will result to others. Thus, a railway corporation, in assuming to provide means of transportation and travel, is under an implied duty to provide such means as shall be safe and shall not cause injury to the public.<sup>1</sup> So, property owners, since they enjoy the benefits accompanying ownership of property, are charged with the duty of seeing that no one is injured by their negligent use or care of it.<sup>2</sup> And, again, upon

tracts between parties, or may be imposed by law. It is not proposed in the present treatise to deal with the breach of those duties, which are expressly or impliedly provided for by the nature or terms of the contract, partly because the field so opened out will be too extensive, and partly because the term negligence is not, strictly speaking, applicable to such breaches of duty; the question in such cases being not whether the act done or omitted is negligent or not, but whether the act done or omitted is what was or was not expressly or impliedly agreed to be done or omitted.<sup>3</sup> Smith on the Law of Negligence \*6.

Further on it is said: "Duties divide themselves therefore into three heads: (1) Duties which arise out of rights; (2) Duties which arise out of employment; (3) Duties imposed by statutes.

"(1) Men are put by the law in possession of rights, and the law imposes upon all men in the exercise of any right and duty not to interfere with the equal rights of another, apart from any agreements which they may have made between themselves. If, in the exercise of a right which a man has by law, he unintentionally breaks or omits the duty of not interfering with the equal rights of another, which is imposed by law, and thereby injures another, he is guilty of a tort called negligence.

"(2) So, also, where two persons assume relations to each other of employer and employed, involving the performance of services, there the law implies or imposes the conditions that the performance must be carefully carried out. These are, strictly speaking, contracts, and the law implies certain terms as appertaining to these contracts.

"(3) And lastly, where a statute directs a person to perform a duty, and he omits to perform that duty with care, he is guilty of negligence."

It seems, however, to us that in the second division the class is too restricted to admit all which should properly belong to it. There should properly be included all duties which rest solely upon contract, and which cannot be enforced except by invoking the contract itself. In the third class Mr. Smith observes that if one omits to perform that duty with care, he is guilty of negligence, and the proper view would seem to be that if one omitted to perform the duty, no matter how, he is guilty of a want of ordinary care which constitutes negligence. See Smith on the Law of Negligence \*9. See also discussion immediately following, *infra*.

1. Bennett v. Dutton, 10 N. H. 481; s. c., Thompson Car. of Pas. 2; Hunt v. Missouri etc. Co., 14 Mo. App. 160; Philadelphia etc. R. Co. v. Derby, 14 How. (U. S.) 468; Shear. & Red. on Neg., § 406, *et seq.*; Cumberland Valley R. Co. v. Hughes, 11 Pa. St. 141; Worster v. Forty-second St. etc. R. Co., 50 N. Y. 203; Thompson on Car. of Pas., 26, *et seq.*; Id. 197, *et seq.* See also CARRIERS OF PASSENGERS, Am. & Eng. Encyc. of Law.

2. Mullen v. St. John, 57 N. Y. 567; Giles v. Diamond State Iron Co. (Del. 1887), 8 Atl. Rep. 368; Murray v. McShane, 52 Md. 217; Schell v. Second Nat. Bank, 14 Minn. 43; Chapman v. Rothwell, 1 El. B. & E. 168; Carleton v. Franconia Iron etc. Co., 99 Mass. 216; Firth v. Bawling etc. Co., L. R., 3 C. P. 254; Hotel Association v. Walters, 23 Neb. 280; Albert v. State, 66 Md. 325; Jennings v. VanSchaack, 13 Daly (N. Y.) 438; Graves v. Thomas, 95 Ind. 361; s. c., 48 Am. Rep. 727; Bennett v. Louisville etc. R. Co., 102 U. S. 577; 1 Am. & Eng. R. Cas. 71. See also REAL PROPERTY; STRUCTURES.

The owner and occupant of premises, who maintains a private passage way opening into his basement, within

every person holding himself out to the public as willing to act in a certain capacity, professional or otherwise, and who has induced persons to commit themselves or their property to his care, there is by implication of law a duty to use proper care in his conduct towards them; and, as a consequence of this duty, there is a liability to answer for injuries caused by breach of it.<sup>1</sup>

(b) *May be Created by Statute.*—A special duty concerning the conduct of persons in certain relations may be created by statute, and a failure to observe such statutory duty is sometimes said to be "negligence *per se*."<sup>2</sup> Except where the statute itself pro-

the limits of a public street, and which through his negligence has become dangerous to persons travelling on the street, is liable for injuries occasioned thereby; that the law also imposes a liability on the city does not relieve him. *Landrue v. Lund*, 38 Minn. 538.

One who, on his own land, so carelessly piles lumber that a child while on the land is injured by its falling, is liable, the lot being unfenced, and having been used as a playground and thoroughfare by children of the neighborhood. *Bransom v. Labrot*, 81 Ky. 638; s. c., 50 Am. Rep. 193.

Even where a building has been made unsafe by the acts of trespassers, which it was within the power of the owner to prevent, the owner is liable for injuries received by one on whom the building fell. *Tucker v. Illinois Cent. R. Co.* (La. 1890), 7 So. Rep. 124.

1. *Bishop v. Weber*, 139 Mass. 411; *Brown v. Purdy*, 54 N. Y. Super. Ct. 109 (physician held liable for failure to exercise ordinary care in treatment of his patient); *Ayers v. Russell*, 3 N. Y. Supp. 338 (physician held liable for negligence); *Bablitt v. Bumpus*, 73 Mich. 331 (attorney liable for negligence); *Phillips v. Edsall*, 127 Ill. 535 (same); *Cochrane v. Little*, 71 Md. 323 (attorney liable for negligently giving improper advice); *Moorman v. Wood*, 117 Ind. 144; *Fogarty v. Finlay*, 10 Cal. 239 (notary liable for negligence in preparing certificate of acknowledgment); *Shear. & Red. on Neg.*, § 600, *et seq.* See also ATTORNEY, MALPRACTICE, PHYSICIANS AND SURGEONS, PUBLIC OFFICERS, Am. & Eng. Encyc. of Law.

Thus a caterer was held liable for injuries caused by poisonous food furnished by him at a public entertainment. Since he assumed to act as a caterer and was employed as such, a duty was implied to him by law to perform with due care that which he had under-

taken. In his opinion, ALLEN, J., set forth this whole doctrine clearly and at length. *Bishop v. Weber*, 139 Mass. 411. See also *Morton v. Sewall*, 106 Mass. 143; s. c., 8 Am. Rep. 298 (case of an apothecary selling poison); *Thomas v. Winchester*, 6 N. Y. 397 (same as preceding); *Fleet v. Hollenkamp*, 13 B. Mon. (Ky.) 219. See also DRUGGISTS, MALPRACTICE, PHYSICIANS AND SURGEONS, BAILMENTS, etc., Am. & Eng. Encyc. of Law.

2. "Negligence *Per Se*."—1 Thompson on Neg., 506, § 8; Wharton on Neg., § 443; *Shear. & Red. on Id.*, § 13; *Terre Haute etc. R. Co. v. Voelker*, 129 Ill. 540; 39 Am. & Eng. R. Cas. 615; *Messenger v. Pate*, 42 Iowa 443; *Philadelphia etc. R. Co. v. Stebbing*, 62 Md. 504; 19 Am. & Eng. R. Cas. 36; *McRickard v. Flint*, 13 Daly (N. Y.) 541; *Billings v. Breinig*, 45 Mich. 65; *Jetter v. New York etc. R. Co.*, 2 Abb. Pr. (N. Y.) 458; *Siemens v. Eisen*, 54 Cal. 418; *Central R. etc. Co. v. Smith*, 78 Ga. 694; s. c., 34 Am. & Eng. R. Cas. 1; *Reynolds v. Hindman*, 32 Iowa 146; *Piper v. Chicago etc. R. Co.* (Wis. 1890), 46 N. W. Rep. 165.

So where defendant suspended a sign board over the street in violation of an ordinance he was liable for injury caused by its being blown down by a severe wind notwithstanding due care was exercised in constructing and fastening the sign. *Salisbury v. Herchenroder*, 106 Mass. 458; s. c., 8 Am. Rep. 354.

The rule has also been stated thus: "It is negligence to disregard a positive regulation that boats moving at night shall exhibit lights, even though the practice may be otherwise; and if injury is done, it is for the jury to determine how far it was connected with such negligence." *Billings v. Breinig*, 45 Mich. 65.

In *Illinois* a violation of a statutory requirement is held "gross negligence,"

vides that any injury which is done by the party violating its provisions shall be conclusively presumed to have resulted from the violation, there is scarcely reason in treating such failures to observe statutory duties as "negligence *per se*."<sup>1</sup> The fact that an injury has occurred which may be traced to a failure to observe a statutory duty, makes proof of such failure relevant and strong evidence tending to establish negligence,<sup>2</sup> and sometimes the

though it does not necessarily constitute "wilful negligence." *Ohio etc. R. Co. v. Eaves*, 42 Ill. 288; *Illinois etc. R. Co. v. Hetherington*, 83 Ill. 510.

The most frequent instances of a special duty created by statute is seen in statutes or ordinances regulating the speed of trains in certain localities, or the management of horses, or requiring warnings and signals to be given at railway crossings, etc. *Philadelphia etc. R. Co. v. Stebbing*, 62 Md. 504; 19 Am. & Eng. R. Cas. 36; *Correll v. Baltimore etc. R. Co.*, 38 Iowa 120; *Hoppe v. Chicago etc. R. Co.*, 61 Wis. 357; *CROSSINGS*, 4 Am. & Eng. Encyc. of Law.

Under Miss. Code (1880), § 1047, fixing the maximum rate of speed at which a train may pass through an incorporated town, the company is liable for injury done when that speed has been exceeded, though at the instant of collision the speed is within the prescribed limit. *New Orleans etc. R. Co. v. Toulmé*, 59 Miss. 284.

In the absence of statutory or municipal regulation as to speed of trains, no rate of speed is negligence *per se*. *Main v. Hannibal etc. R. Co.*, 18 Mo. App. 388; *Powell v. Railroad Co.*, 76 Mo. 80; *Wallace v. Railroad Co.*, 74 Mo. 594.

A railroad company may be chargeable with negligence in running its train through a city at a rate of speed greater than that permitted by a city ordinance, although before the passage of the ordinance the road was built on a grade and curve which rendered it impracticable to comply with the ordinance. *Neier v. Missouri Pac. R. Co.*, 12 Mo. App. 35. See also *Siemers v. Eisen*, 54 Cal. 418 (leaving horse unfastened in street in violation of ordinance); *Wright v. Chicago etc. R. Co.*, 27 Ill. App. 200 (violation of ordinance concerning storing of oil in certain places; such violation required to be shown to be the proximate cause in order to recover); *Pennsylvania Co. v. Hensll*, 70 Ind. 569; *Chicago etc. R. Co. v. Boggs*, 101 Ind. 522; s. c., 51 Am.

Rep. 761; 23 Am. & Eng. R. Cas. 282; *McGrath v. New York etc. R. Co.*, 63 N. Y. 522; *CROSSINGS*, 4 Am. & Eng. Encyc. of Law 921, *et seq.*

1. To treat such failure as "negligence *per se*" would be to relieve the plaintiff from all the consequences of his unlawful act where he contributed to the injury and impose an unreasonable liability upon the defendant.

**Other Elements of Negligence Must be Shown.**—Proof of a violation of a statute is really nothing more than a proof that defendant failed to exercise ordinary care; the elements of duty and of proximate cause have still to be established. See *Briggs v. New York Cent. R. Co.*, 72 N. Y. 26; *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Augusta etc. R. Co. v. McElmurry*, 24 Ga. 75; *Philadelphia etc. R. Co. v. Kerr*, 25 Md. 521; *Hanlon v. South Boston etc. R. Co.*, 129 Mass. 31; *Billings v. Breinig*, 45 Mich. 65; *Hayes v. Michigan etc. R. Co.*, 111 U. S. 228; 15 Am. & Eng. R. Cas. 394.

2. *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Kelley v. Hannibal etc. R. Co.*, 75 Mo. 138; 13 Am. & Eng. R. Cas. 638; *Salisbury v. Herchenroder*, 106 Mass. 458; *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228; 15 Am. & Eng. R. Cas. 394; *Shear. & Red. on Neg.*, § 12.

**Violation of Statute—Evidence of Want of Due Care.**—It is often stated that the violation of a statute is negligence *per se*, when what is meant is that it is evidence of one of the elements of negligence. See *Clark v. Boston etc. R. Co.*, 64 N. H. 323; 31 Am. & Eng. R. Cas. 548; *Briggs v. New York Cent. R. Co.*, 72 N. Y. 26; *Augusta etc. R. Co. v. McElmurry*, 24 Ga. 75; *Hanlon v. South Boston etc. R. Co.*, 129 Mass. 310; 2 Am. & Eng. R. Cas. 18; *Philadelphia etc. R. Co. v. Kerr*, 25 Md. 521; *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488 (reversing s. c., 23 Hun (N. Y.) 159); *Vincett v. Cook*, 4 Hun (N. Y.) 318; *Atlanta etc. R. Co. v. Wyly*, 65 Ga. 120; 8 Am. & Eng. R. Cas. 262; *Taylor v. Harwood*, 1 Taney



statute itself provides that in such cases the violation of the statute makes out a *prima facie* case of negligence where injury follows.<sup>1</sup>

And in one State at least the courts have construed such a statute to mean that when a violation of the statute has occurred and injury followed, it will be conclusively presumed that the violation was the proximate cause of the injury,<sup>2</sup> while proof of its observance is said to relieve from liability for injuries inflicted at the time of its observance.<sup>3</sup> Such doctrines are clearly anomalous and unsound, and in some cases a more sensible rule of construction seems to have been adopted even in the State in question.<sup>4</sup> The true rule is, unless the statute is meant to be highly penal and unjust, that it must always appear from the evidence that the failure to observe the statutory duty was the proximate

Dec. (U. S.) 437; CROSSINGS, 4 Am. & Eng. Encyc. of Law 921.

Thus in *New York* a new trial was ordered where the judge instructed the jury that such violation was "negligence." It was only evidence of negligence (*i. e.*, of a want of care). *Knuffle v. Knickerbocker Ice Co.*, 84 N. Y. 488.

The rule stated by Shear. & Red. (§ 13) is that "the violation of the statute or ordinance should always be deemed presumptive evidence of negligence, which if not excused by other evidence, including all the surrounding circumstances, should be deemed conclusive."

An instruction by the court that due diligence required defendant to comply with a certain statute is properly given, being sustained by the rule stated in the text. *Atlanta etc. R. Co. v. Wyly*, 65 Ga. 120; 8 Am. & Eng. R. Cas. 262.

1. So in *Mississippi, Georgia and Tennessee*. Code Miss. (1880), § 1059. *Chicago etc. R. Co. v. Trotter*, 60 Miss. 442; *Mobile etc. R. Co. v. Dale*, 61 Miss. 206; s. c., 20 Am. & Eng. R. Cas. 651; *Columbus etc. R. Co. v. Kennedy*, 78 Ga. 646; s. c., 31 Am. & Eng. R. Cas. 92; *Central R. Co. v. Brinson*, 64 Ga. 475; s. c., 8 Am. & Eng. R. Cas. 343; *Tennessee R. Co. v. Walker*, 11 Heisk. (Tenn.) 383; Code Tenn. (1884), §§ 1298-1300; CROSSINGS, 4 Am. & Eng. Encyc. of Law 922, note 1.

2. Under sections 1298-1300 of Tenn. Code (1884) a railroad company is held liable for the nonperformance of a statutory duty even though its observance would not have prevented the injury. *Tennessee R. Co. v. Walker*, 11 Heisk. (Tenn.) 383; *Nashville etc.*

*R. Co. v. Thomas*, 5 Heisk. (Tenn.) 262; *Collins v. East Tennessee etc. R. Co.*, 9 Heisk. (Tenn.) 841; *Louisville etc. R. Co. v. Connor*, 9 Heisk. (Tenn.) 20; CROSSINGS, 4 Am. & Eng. Encyc. of Law 922, note.

And under the same code it is held that contributory negligence of the plaintiff is no bar to the action, but may be considered in mitigation of damages. Cases *supra*. CROSSINGS, 4 Am. & Eng. Encyc. of Law 922, note; *Tennessee R. Co. v. Walker*, 11 Heisk. (Tenn.) 383.

3. *Tennessee R. Co. v. Walker*, 11 Heisk. (Tenn.) 383; *Hill v. Louisville etc. R. Co.*, 9 Heisk. (Tenn.) 823; *Nashville etc. R. Co. v. Thomas*, 5 Heisk. (Tenn.) 262.

The statutes, "if obeyed, these [railway] companies have an absolute impunity not always vouchsafed to them under the common law. Upon the construction of these statutes there has been *no variableness or shadow of turning* in the adjudicated cases." Opinion of SNEED, J., in *Hill v. Louisville etc. R. Co.*, 9 Heisk. (Tenn.) 823, 828, *citing* to support the above strange doctrine, *Smith v. Nashville etc. R. Co.*, 6 Coldw. (Tenn.) 589; *Nashville etc. R. Co. v. Smith*, 6 Heisk. (Tenn.) 174; *Louisville etc. R. Co. v. Stone*, 7 Heisk. (Tenn.) 468, and other cases.

4. This principle noted and well established in CROSSINGS, 4 Am. & Eng. Encyc. of Law 922; CONTRIBUTORY NEGLIGENCE, vol. 4, pp. 72-75; *Louisville etc. R. Co. v. Connor*, 9 Heisk. (Tenn.) 20, 26. See also *Lyons v. Child*, 61 N. H. 72 (statutory rule requiring travellers to turn to the right does not make a nonobservance of it negligence *per se*); *Pennsylvania*

cause of the injury that followed.<sup>1</sup> When this does appear, it is but reasonable to treat an inadvertent breach of the statutory duty as negligence,<sup>2</sup> and an intentional breach of it as wilfulness.<sup>3</sup> Apart from these peculiar cases there is really no such thing as "negligence *per se*." Upon a given state of facts and circumstances, showing an injury directly due to and proximately caused by a failure to observe a statutory duty, it may be held as a matter of law that the breach of the statutory duty was negligent; but this, although often confused therewith, is a very different thing from "negligence *per se*," so-called.<sup>4</sup>

R. Co. v. Hensil, 70 Ind. 569; s. c., 36 Am. Rep. 188; 6 Am. & Eng. R. Cas. 79 (failure to discharge statutory duty must be shown to have been the proximate cause of the injury); Hayes v. Michigan Cent. R. Co., 111 U. S. 228; 15 Am. & Eng. R. Cas. 394; New York etc. R. Co. v. Kellam, 83 Va. 851.

Putting ashes into a wooden barrel in violation of a municipal ordinance is not negligence *per se*; it is a question of fact whether it is negligent in a particular case. Cook v. Johnson, 58 Mich. 437; s. c., 55 Am. Rep. 703.

1. Pennsylvania R. Co. v. Hensil, 70 Ind. 569; s. c., 36 Am. Rep. 188; 6 Am. & Eng. R. Cas. 79; Evans etc. Brick Co. v. St. Louis etc. R. Co., 17 Mo. App. 624; Billing v. Breinig, 45 Mich. 6; Philadelphia etc. R. Co. v. Stebbing, 62 Md. 504; 9 Am. & Eng. R. Cas. 36; Hayes v. Michigan Cent. R. Co., 111 U. S. 228; 15 Am. & Eng. R. Cas. 394; Flattes v. Chicago etc. R. Co., 35 Iowa 191; Whelan v. New York etc. R. Co., 38 Fed. Rep. 15; Pike v. Chicago etc. R. Co., 39 Fed. Rep. 754; Heddles v. Chicago etc. R. Co., 74 Wis. 239; 39 Am. & Eng. R. Cas. 645; Chicago etc. R. Co. v. Hanley, 26 Ill. App. 351; Atchison etc. R. Co. v. Walz, 40 Kan. 433; Cordell v. New York etc. R. Co., 70 N. Y. 119; Fletcher v. Atlantic etc. R. Co., 64 Mo. 484. Shear. & Red. on Neg., § 27.

2. Illinois etc. R. Co. v. Hetherington, 83 Ill. 510 (violation of city ordinance does not necessarily make injury wilful). *Ante*, subtit. III, 1, INADVERTENCE.

3. CROSSINGS, 4 Am. & Eng. Encyc. of Law 924, 925; *ante*, subtit. 1, INADVERTENCE, ETC.; *post*, subtit. PROXIMATE CAUSE.

4. Chicago etc. R. Co. v. Boggs, 101 Ind. 522; 23 Am. & Eng. R. Cas. 282; s. c., 51 Am. Rep. 561; Pennsylvania Co. v. Hensil, 70 Ind. 569; s. c., 36 Am.

Rep. 188; Hayes v. Mich. Cent. R. Co., 111 U. S. 228, 241; 15 Am. & Eng. R. Cas. 394; Shear. & Red. on Neg., § 13; Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488; Salisbury v. Herchenroder, 106 Mass. 458; Kelley v. Hannibal etc. R. Co., 75 Mo. 138; 13 Am. & Eng. R. Cas. 638; CROSSINGS, 4 Am. & Eng. Encyc. of Law 923.

"The ordinances of a municipal corporation regulating the speed of trains passing through the city, or the blowing of the whistle on the engine, are only police regulations, and do not have the effect of changing the general law upon the same subject, or change the duties or rights of the parties growing out of the failure to do, or doing what the ordinance commands or prohibits." Whelan v. New York etc. R. Co., 38 Fed. Rep. 15, 17.

The true rule was laid down by WILLES, J., in Daniel v. Metropolitan R. Co., L. R., 3 C. P. 216, 222, and approved by the exchequer chamber, L. R., 3 C. P. 591; and by the house of lords, L. R., 5 H. L. 45. "It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is a reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to." Approved in Hayes v. Michigan Cent. R. Co., 111 U. S. 228; 15 Am. & Eng. R. Cas. 394. See also Milwaukee etc. R. Co. v. Kellogg, 94 U. S. 469; Williams v. Great Western R. Co., L. R., 9 Exch. 157.

The statutes represent the minimum degree of care to be observed by the defendant. Richardson v. New York Cent. R. Co., 45 N. Y. 846; Barry v. New York Cent. etc. R. Co., 92 N. Y. 289; 13 Am. & Eng. R. Cas. 615; Bradley v. Boston etc. C. Co., 2 Cush. (Mass.) 539; CROSSINGS, 4 Am. & Eng. Encyc. of Law 925.

(c) *From Contract or Agreement.*—In cases where there arises no duty by implication of law, there may be one created by act of the parties—*i. e.*, by contract; or a duty already existing may be thus strengthened.<sup>1</sup> The principles of the law of negligence as herein defined and limited are not applicable to breaches of con-

**Violation of Statutory Duty Excused When.**—The violation of a statutory duty may be excused under certain circumstances, when it appears that the object intended by the statute will best be promoted thereby, or when there is a conflict of statutes with other duties, or where conformity with the statute is impracticable. *Wakefield v. Connecticut etc. R. Co.*, 37 Vt. 330.

Thus where, owing to the peculiar circumstances of the case, sounding of a locomotive whistle is more likely to increase than to diminish the danger to one on the track, the failure to so sound the whistle as required by statute will not constitute negligence. See *Galena etc. R. Co. v. Loomis*, 13 Ill. 548; *Bellefontaine R. Co. v. Hunter*, 33 Ind. 362.

The signal adopted and habitually used at a certain elevator to notify the laborers engaged in loading and unloading railroad cars, of the incoming of a train, was a cry by one of the employees of the elevator company, "The cars are coming." The evidence showed that this was a safer signal at that place than the ringing of a bell or sounding of a whistle would have been. In an action brought against the railroad company by a laborer who had been at work at the elevator for some weeks and knew the accustomed signal, to recover damages for an alleged negligent wounding by an incoming train, *held*, that the failure to ring or whistle was not negligence. *Speed v. Atlantic etc. R. Co.*, 71 Mo. 303; 12 Am. & Eng. R. Cas. 77.

Again, defendant when charged with negligence in not sounding a whistle before passing a crossing as required by law, showed in evidence an ordinance prohibiting the sounding of locomotive whistles, etc., in that part of the city. *Held*, not liable for the failure to sound the whistle, etc. *Pennsylvania Co. v. Hensil*, 70 Ind. 569; s. c., 36 Am. Rep. 188.

Where a city ordinance required that when a locomotive engine was used within the limits of the city a man should be required to ride on the front of the locomotive engine when going

forward; and when going backward, on the tender, not more than twelve inches from the bed of the road; and in an action against a railroad company to recover damages for injuries claimed to have been sustained through defendant's negligence in the management of its engine, it was shown that the engine by which the plaintiff was injured was so constructed in accordance with modern improvements in locomotives that it would be unsafe to place a man in the position required by the ordinance, his absence from the tender at the time of the accident would not of itself be an act of negligence. *Baltimore etc. R. Co. v. Mali*, 66 Md. 53; 28 Am. & Eng. R. Cas. 628.

1. For example, a party owes no duty to a trespasser on his lands to keep the lands or structures upon them in such condition as that he shall not be injured when coming on them. But if the land owner has contracted with such person to come upon his land and work, a duty arises which makes the land owner liable for injuries received by such person through improper condition of the premises. See *Hargreave v. Deacon*, 25 Mich. 1; *Kohn v. Lovett*, 44 Ga. 251 (case of no duty owing to trespassers); *Heaven v. Pender*, 11 Q. B. Div. 503; *Beven on Neg.* 313, *et seq.*; *Patterson v. Wallace*, 1 Macq. 748; *Hough v. Texas etc. R. Co.*, 100 U. S. 213 (these latter cases showing duty of master to servant). See also *MASTER AND SERVANT*, 14 Am. & Eng. Encyc. of Law.

So if a person enters a coach of a railway company's train as a trespasser, the railroad company owes him at most a very slight duty; but when such party has paid his fare to the conductor, the duty owing to him by the company becomes immediately a strong and special one, by force of the contract entered into by the company's officer accepting the fare. *Gardner v. NewHaven etc. Co.*, 51 Conn. 143; 18 Am. & Eng. R. Cas. 170 (carrier company not liable to one not accepted as a passenger); *Duff v. Allegheny Valley R. Co.*, 91 Pa. St. 458 (not liable to a trespasser); *Chicago etc. R. Co. v. Michie*, 83 Ill. 427

tract for which an action *ex contractu only* can be maintained.<sup>1</sup> But they fully apply to all cases arising out of contract wherein the action is *ex delicto*—that is, upon the wrong itself, and not upon the contract alone.<sup>2</sup>

**9. Damage an Essential Element.**—It is obvious that there can be no action sustained on the ground of negligence when no damage has been caused; negligence without damage will no more sustain such an action than will damage without negligence; the two elements must both be present.<sup>3</sup> And it is essential that the damage has been suffered by the plaintiff; if, by a breach of duty to the public, the public have suffered, no ground of action is thereby afforded to an individual, unless he himself sustained an injury above that suffered by him in common with the rest of the public.<sup>4</sup>

(same). See CARRIERS OF PASSENGERS, 2 Am. & Eng. Encyc. of Law, as to liability after such person has become a *passenger*. See note immediately following.

Confusion is apt to arise here. In the examples just cited the plaintiff would almost invariably bring an action of tort, but the *duty*, a breach of which constitutes the ground of his action, would be created by the contract in each case.

1. Negligence as herein treated is considered only as the basis of an action *ex delicto*. See *ante*, subtit. II, ANALYTICAL DESCRIPTION; Bishop on Non-Contract Law, § 76; Pollock on Torts 432, 433.

Negligence as the basis of an action *ex contractu* is fully treated in other portions of this work. See BAILMENTS; CARRIERS OF GOODS; CARRIERS OF PASSENGERS; CARRIERS OF STOCK; TELEGRAPH COMPANIES, and similar titles.

Such actions *ex delicto*, however, may arise from the breach of a duty arising solely out of contract.

2. An action for negligence as herein treated may arise out of contract or not (*ante*, II ANALYTICAL DESCRIPTION), but it always sounds in tort. Lake Erie etc. R. Co. v. Acres, 108 Ind. 548; 28 Am. & Eng. R. Cas. 112; Cincinnati etc. R. Co. v. Eaton, 94 Ind. 474; 18 Am. & Eng. R. Cas. 274; s. c., 48 Am. Rep. 179; Lake Erie etc. R. Co. v. Fix, 88 Ind. 381; 11 Am. & Eng. R. Cas. 109; Bishop on Non-Contract Law, § 76; Shear. and Red. on Neg. §§ 4, 7; CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 32, note 6.

3. Shear. & Red. on Neg., §§ 4, 23;

Addison on Torts 1; Wharton on Neg., § 25; Broom's Com. (5th ed.) 368; Cooley on Torts (630), *et seq.*; 1 Thompson on Neg. 340; Harter v. Morris, 18 Ohio St. 492; Illinois etc. R. Co. v. Benton, 69 Ill. 174.

**Damnum absque injuria** affords no ground of action. See DAMNUM ABSQUE INJURIA, 5 Am. & Eng. Encyc. of Law 68. Neither therefore does *injuria sine damno*. Cases *supra*.

**Damage and Negligence Must Concur.**

—Thus, where a passenger, ascending the steps of a car at the invitation of the railway company's agent, is injured by the fall of a servant of the company against him, the fall being caused by his accidentally slipping while standing on the rails of the platforms of two cars, engaged in the performance of his duty, he (the passenger) cannot recover from the company for his injury since, although there was damage, there was no negligence; the risk of such accidents is assumed by the passengers. Skinner v. Atchison etc. R. Co., 39 Fed. Rep. 188.

4. "He and he only can maintain an action for an obstruction of the streets who has sustained some damage peculiar to himself, his trade or calling." KELLY, C. B., in Winterbottom v. Lord Derby, L. R., 2 E. 322; 1 Thompson on Neg. 341; Manley v. St. Helen's Canal Co., 2 H. & N. (Eng.) 840; Kessel v. Butler, 53 N. Y. 612.

For damages resulting to a shopkeeper by reason of the fact that customers are turned away from his shop by boardings used in the erection of a building, under a licence from proper authorities, no action lies; but if the building operations are so negligently

**IV. NO DEGREES OF NEGLIGENCE.**—While in some courts the classification of negligence as slight, ordinary and gross is maintained, it seems to be generally considered that such a classification is wrong in principle and leads to confusion and mistake.<sup>1</sup> The doctrine of several degrees of negligence arises from a confused idea as to what constitutes ordinary care; in some conditions and relations a high degree of care is required, and failure to observe that care is called "slight negligence," while it should be observed that the high degree required only furnishes the test as to what will constitute ordinary care under the circumstances.

conducted that bricks, etc., fall through the skylight upon an adjacent building and injure the goods of a shopkeeper therein, he may recover damages. *Bradbee v. Christ's Hospital*, 4 Mann. & Gr. 714; 5 Scott, N. R. 79; 2 Dow., N. S. 164; *Thompson on Neg.* 342.

See also *Quincy Canal v. Newscomb*, 7 Met. (Mass.) 276. The doctrine is well set forth in that case, the court saying: "When one suffers in common with all the public, although from his proximity to the obstructed way, or otherwise from his more frequent use of it, he may suffer to a greater degree than others, still he cannot have an action, because it would cause such multiplicity of suits as to be itself an intolerable evil. But when he sustains a special damage, differing in kind from that which is common to others, as where he falls into a ditch, unlawfully made in a highway, and hurts his horse, or sustains a personal damage, then he may bring his action." This view is sustained by numerous and high authority. *Sohn v. Cambern*, 106 Ind. 302; *Houck v. Wachter*, 34 Md. 265; s. c., 6 Am. Rep. 332; *Brant v. Plumer*, 64 Iowa 33; *Winterbottom v. Lord Derby*, L. R., 2 Ex. 316; *Blanc v. Klumpke*, 29 Cal. 156; *Moore v. Wabash etc. Canal*, 7 Ind. 462; *Willard v. Cambridge*, 3 Allen (Mass.) 574; *Shear. & Red. on Neg.*, § 24; *Wilkes v. Hungerford Mfg. Co.*, 2 Bing. (Eng.) N. Cas. 281; *Stetson v. Faxon*, 19 Pick. (Mass.) 147; *Thayer v. Boston*, 19 Pick. (Mass.) 511; *Greasy v. Codling*, 2 Bing. (Eng.) 263; *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114.

These cases all related to the obstruction of the highway whereby the public were put to great inconvenience. There is an *apparent exception* in the case of *Rose v. Miles*, 4 Mann. & Selw. (Eng.) 101. There it appears that the plaintiff was obstructed in navigat-

ing a river by the defendant's wrongfully moving a barge across it; it was held that he could maintain his action since he incurred great expense in being compelled to unload his barge and carry his goods overland.

1. See *COMPARATIVE NEGLIGENCE*, 3 Am. & Eng. Encyc. of Law 367, 368; *CONTRIBUTORY NEGLIGENCE*, vol. 4, p. 21; *Wharton on Neg.*, § 44; *Id.*, §§ 65, 66; *Shear. & Red. on Neg.*, § 48, *et seq.* *Cooley on Torts* (631, 632); *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Hinton v. Dibbin*, 2 Q. B. 661; *Steamboat New World v. King*, 16 How. (U. S.) 469; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196; *Deering on Neg.*, § 11, and cases cited; *State v. Boston etc. R. Co.*, 58 N. H. 410; *McPheeters v. Hannibal etc. R. Co.*, 45 Mo. 22; *Milwaukee etc. R. Co. v. Arms*, 91 U. S. 494.

JUSTICE DAVIS has to say: "Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence,' but after all it only means the absence of the care that was requisite under the circumstances." *Milwaukee etc. R. Co. v. Arms*, 91 U. S. 494. As is well said in the work on negligence by *Shearman & Redfield* (§ 48), "It is a solecism to speak of 'ordinary' negligence, since if the negligence were ordinary [*i. e.*, in accordance with the usual course of practice among all men of average prudence], it would cease to be negligence at all."

In *Wilson v. Brett*, 11 M. & W. 113, LORD CRANWORTH has said that gross negligence is ordinary negligence with a vituperative epithet attached. And this view is sanctioned in *Campbell on Neg.*, § 11; 1 *Smith's L. Cas.* 196; *Grill v. Gen'l Iron etc. Co.*, L. R., 1 C. P. 612; *Beal v. South Devon R. Co.*, 3 H. & C. 327; *Mariner v. Smith*, 5 Heisk. (Tenn.)

The same is true when only a slight or a moderate degree of care is required.<sup>1</sup> The doctrine is, however, maintained by the courts of Illinois, and in a modified form by those of one or two other States. In admiralty it has long existed; it is recognized by some text writers,<sup>2</sup> and has long been familiar in the law of bailments.<sup>3</sup>

#### V. NEGLIGENCE AS DEPENDENT UPON RELATIONSHIP AND DUTY.—

The degree of care required to be exercised in the discharge of any duty depends greatly upon the relationship which the parties sustain to each other. Thus, in the case of bailment for the sole benefit of the bailee, the law imposes upon him a duty to exercise much more care than where it is for the benefit of the bailor.<sup>4</sup> So in the case of common carriers, it has been a rule of

208; *McPheeters v. Hannibal etc. R. Co.*, 45 Mo. 22. Compare *Mueller v. Putnam Ins. Co.*, 45 Mo. 84.

And in *steamboat New World v. King*, 16 How. (U. S.) 469, CURTIS, J., observes: "It may be doubted if these terms [*i. e.*, slight, ordinary and gross negligence] can be usefully applied in practice. Their meaning is not fixed or capable of being so. One degree may be confounded with another, but it is quite impracticable to distinguish them. Their signification necessarily varies according to circumstances, to whose influences the courts have been obliged to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation."

This idea of JUSTICE CURTIS as to the inapplicability of the rules relating to the degrees of negligence is sustained by numerous and high authorities. *Smith v. New York Cent. R. Co.*, 24 N. Y. 222; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196; *Hinton v. Dibbin*, 2 Q. B. 661; *McAdoo v. Richmond etc. R. Co.*, 105 N. Car. 140; *Wilson v. Brett*, 11 M. & W. (Eng.) 113; *Wylde v. Pickford*, 8 M. & W. (Eng.) 443; *Storer v. Gowen*, 18 Me. 177; *Story on Bailments*, § 11; *Cooley on Torts* 631; 6 *Touiller's Droit Civil* 239; 11 *Id.* 203; *Lane v. Boston etc. R. Co.*, 112 Mass. 455; 6 *Albany Law Jour.* 313; 22 *Am. Law Reg.*, N. S. 126, note.

See an exhaustive discussion of this subject in *Beven on Neg.* 16, *et seq.*, where the origin and growth of the theory of degrees of negligence is reviewed, and the conclusion arrived at is that such a division is at the least useless and impractical.

In *Shearman and Redfield's* work on negligence the doctrine of degrees of negligence is criticised and its recognition deprecated, yet it is followed because, they say, more confusion would follow by rejecting it. *Shear. & Red. on Neg.*, §§ 48, 49.

JUSTICE WILLES also observes: "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of defendant to use. 'Gross' is a word of description, and not of definition, and it would have been only introducing a source of confusion to use the expression 'gross negligence' instead of the equivalent . . . a want of due care and skill . . . which was again and again used by the Lord Chief Justice in his summing up." *Grill v. General Iron etc. Co.*, L. R., 1 C. P. 612 (1865-66).

1. *Ante* subtit. III, 3, ORDINARY CARE; *post*, subtit. V, NEGLIGENCE AS DEPENDENT ON RELATIONSHIP AND DUTY.

2. The doctrine of the courts of Illinois is fully set forth in *COMPARATIVE NEGLIGENCE*, 3 *Am. & Eng. Encyc. of Law* 367. The modification of the doctrine as they exist in other States is also there set forth. *Shear. & Red. on Neg.*, §§ 48, 49; *Deering on Neg.*, § 11; *Wharton on Neg.*, §§ 44, 66.

3. *Story on Bailments*, § 17; *Coggs v. Bernard*, 2 *Ld. Raym.* 909; s. c., 1 *Smith's L. Cas.* 82, note; *BAILMENTS*, 2 *Am. & Eng. Encyc. of Law* 51.

4. *Ante*, subtit. III, 3, ORDINARY CARE; *Story on Bailments*, § 23; *Coggs v. Bernard*, 2 *Ld. Raym.* 909; s. c., 1 *Smith's L. Cas.* 82, note; *BAIL-*

law from the earliest times, that in consideration of the great danger to human life consequent upon their neglect of duty they must exercise the greatest practicable care for the safety of their passengers.<sup>1</sup> In other cases, where no high and special duties are present, an unusual and extraordinary degree of care is not required; the observance of a moderate degree of care being sufficient for the proper protection of all interests involved.<sup>2</sup> It is from a confusion of these principles that the idea as to three degrees of negligence has arisen. Into the application of these principles to the details of special relations we cannot here enter.<sup>3</sup>

**VI. CAUSAL CONNECTION—PROXIMATE CAUSE.**—It is a maxim that the law looks at the proximate and not at the remote cause of an injury.<sup>4</sup> Out of the application of this maxim grows the liability or nonliability of a defendant charged with the infliction of an injury by his negligence.<sup>5</sup> Unless the alleged negligence of the defendant was the proximate cause of the injury of which the plaintiff complains, there can be no recovery.<sup>6</sup> For consequences

MENTS, 2 Am. & Eng. Encyc. of Law 54; *Levy v. Pike*, 25 La. An. 630; *First Nat. Bank v. Ocean Bank*, 60 N. Y. 278; s. c., 19 Am. Rep. 181.

1. *Coddington v. Brooklyn etc. R. Co.*, 102 N. Y. 66; *Sharp v. Gray*, 9 Bing. 457; *Ingalls v. Bills*, 9 Met. (Mass.) 1; *Moreland v. Boston etc. R. Co.*, 141 Mass. 31; s. c., CARRIERS OF PASSENGERS, 2 Am. & Eng. Encyc. of Law 738, *et seq.*; *Carroll v. Staten Island etc. R. Co.*, 58 N. Y. 126; *Central R. Co. v. Freeman*, 75 Ga. 331.

See particularly *Shear. & Red. on Neg.*, § 51, where the special duty of carriers of passengers is adverted to, and numerous cases collected; and *Thompson on Carriers of Passengers*, 197, § 1, *et seq.*

2. *Ante*, subtit. III, 3, ORDINARY CARE; BAILMENTS, 2 Am. & Eng. Encyc. of Law 51; CROSSINGS, vol. 4; *Shear. & Red. on Neg.*, § 4, *et seq.*; *Levy v. Pike*, 25 La. An. 630.

3. See BAILMENTS, 2 Am. & Eng. Encyc. of Law 52, *et seq.*; CARRIERS OF PASSENGERS, vol. 2; CARRIERS OF GOODS, vol. 2; FELLOW SERVANTS, vol. 7; LANDLORD AND TENANT, vol. 13; MASTER AND SERVANT, vol. 14; MUNICIPAL CORPORATIONS, vol. 15; *Steamboat New World v. King*, 16 How. (U. S.) 469; *Smith v. New York etc. R. Co.*, 24 N. Y. 222; *ante*, subtit. IV, NO DEGREES OF NEGLIGENCE; *ante*, subtit. III, 3, ORDINARY CARE.

See also BAILMENTS; CARRIERS OF

PASSENGERS; CARRIERS OF GOODS; MUNICIPAL CORPORATIONS; TELEGRAPH COMPANIES; REAL PROPERTY; FELLOW SERVANTS, and similar titles.

4. *In jure causa proxima non remota spectatur* is a maxim of universal acceptance in cases arising out of tort. See *Broom's Legal Maxims* (2nd ed.) 165; *Aetna Ins. Co. v. Boone*, 95 U. S. 130; *Bishop on Non-Contract Law*, § 40, *et seq.*; *Hoag v. Lake Shore etc. R. Co.*, 85 Pa. St. 293; s. c., 27 Am. Rep. 653; *McGrew v. Stone*, 53 Pa. St. 436; *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353; s. c., 1 Am. Rep. 431; *Wharton on Neg.*, § 73.

The maxim means this: "When one is engaged in an act which the circumstances indicate may be dangerous to others, and the event whose occurrence is necessary to make the act injurious, can be readily seen as likely to occur under the circumstances, the defendant is liable if he does not take all the care which prudence would suggest to avoid the injury." *McGrew v. Stone*, 53 Pa. St. 436.

5. *Pollock on Torts* 26, *et seq.*; *Cooley on Torts* (68, 69-71); *Bishop on Non-Contract Law* § 455, *et seq.*; *Wharton on Neg.*, § 97; *Shear. & Red. on Neg.*, §§ 25-40; *Campbell on Neg.*, § 118.

6. See *Clifford v. Denver etc. R. Co.*, 9 Col. 333; *Oil City Gas Co. v. Robinson*, 99 Pa. St. 1; *Harlan v. St. Louis etc. R. Co.*, 65 Mo. 22. See also *Shear.*

of which his act or omission was only a mere condition or remote cause, the defendant is not liable.<sup>1</sup> In the determination of the question whether an injury was proximately caused by the de-

& Red. on Neg., § 25; Wharton on Neg. § 3; Deering on Neg., § 8, and cases cited.

The negligence complained of need not be the only cause or the "most proximate" (We take this expression from Mr. Bisnop). Bishop on Rights and Torts, §§ 450, 455; Baltimore etc. R. Co. v. Kemp, 61 Md. 74; s. c., 18 Am. & Eng. R. Cas. 220; 48 Am. Rep. 134; Terre Haute etc. R. Co. v. Buck, 90 Ind. 346; 18 Am. & Eng. R. Cas. 234; s. c., 49 Am. Rep. 168; Scott v. Hunter, 46 Pa. St. 192.

**Direct Cause.**—In instructing a jury as to plaintiff's negligence "proximately" contributing to his injury, the court used the word "directly." *Held*, not such error as to call for reversal. Davis v. Spicer, 27 Mo. App. 279. Shear. & Red. on Neg., § 25; Philadelphia R. Co. v. Stebbing, 62 Md. 504; 19 Am. & Eng. R. Cas. 36; Quincy etc. R. Co. v. Wellhoener, 72 Ill. 60; Harlan v. St. Louis etc. R. Co., 65 Mo. 22; Holbrook v. Utica etc. R. Co., 12 N. Y. 236; s. c., 64 Am. Dec. 502; Helsey v. Jewett, 28 Hun (N. Y.) 51.

Therefore an instruction to the jury which omits to state this essential element; i. e., that the injury must have been caused by the negligence, is erroneous. Chicago etc. R. Co. v. Carroll, 12 Ill. App. 643.

Upon the same principle it is held that the omission of the engineer to give the precautionary signals of the approach of a train, when it in no way contributes to the injury, does not render the company liable. Parker v. Wilmington etc. R. Co., 86 N. Car. 224; Hayes v. Michigan Cent. R. Co., 111 U. S. 228; 15 Am. & Eng. R. Cas. 394; Evans etc. Brick Co. v. St. Louis etc. R. Co., 17 Mo. App. 624. *Ante*, subtit III, 8, (b).

The negligence (i. e., failure on the part of the defendant to exercise ordinary care) must be the cause, the *proximate cause*. Negligence on the part of the defendant followed by an injury to plaintiff affords no ground of action, unless the proper causal connection can be shown to exist between the effect and alleged cause. The negligence must have been the *efficient cause* of the injury, for as GIBSON, C. J., has said: "The defendant is answerable for

the consequences of negligence and not for its abstract existence." Hart v. Allen, 2 Watts (Pa.) 116. And "the negligence must in some way connect itself, or be connected by evidence, with the accident. It must be . . . *incuria dans locum injuria*." Midland R. v. Jackson, L. R., 3 App. 198.

1. Thus in the famous squib case (Scott v. Shepard, 3 Wils. 403; 2 Wm. Bl. 892; 1 Smith's L. Cas. 549), where a lighted squib was thrown first by a wrongdoer, then by the person on whose stand it had fallen, then by a third one, and so on, it was held that the first thrower alone was liable for the injury caused by the squib's finally striking a bystander because the intermediate throwers acting from a sudden compulsion of instinct to save their property were mere conditions of damage. See also Bigelow's Leading Cas. in Tort 608; Wharton on Neg., §§ 85, 303; Michigan Cent. R. Co. v. Burrows, 33 Mich. 15; Salisbury v. Hergenroder, 106 Mass. 458; Addison on Torts 6; Cooley on Torts (69); Rockford v. Tripp, 83 Ill. 247.

An injury to a passenger on the highway was occasioned partly by ice with which the road was covered and partly by a defect in the structure of the road; the parties responsible for the defectiveness of the road were liable notwithstanding the fact that the ice contributed to the injury—the ice was a *condition* of the injury; the negligent construction of the road its *cause*. Atchison v. King, 9 Kan. 550; Wharton on Neg., § 86.

**Defendant's Delay Concurring with Inevitable Accident.**—Defendant is not liable where his negligence is no cause at all but merely a condition, even though it may be true that the injury would not have happened had he not been negligent. This is most frequently seen in the case of injuries caused by an inevitable accident occurring at or immediately after the time of the defendant's negligence; as where a train is delayed through defendant's negligence and its passengers are injured by a severe storm which would have been avoided had the train been on time—the storm is the proximate cause and the intervening between defendant's negligence and the damage



fault of the defendant lies the great difficulty of the law of negligence.<sup>1</sup> The constantly recurring problem is: Did the defendant's act or omission proximately cause the plaintiff's injury, and was such act or omission a want of ordinary care, or was the act or omission of the defendant only a remote cause or mere condition

releases defendant from liability. Memphis etc. R. Co. v. Reeves, 10 Wall. (U. S.) 176; McClary v. Sioux City etc. R. Co., 3 Neb. 44; Bishop on Non-Contract Law, § 43; Dubuque Wood etc. Assoc. v. Dubuque, 30 Iowa 176; Daniels v. Ballantine, 23 Ohio St. 532; Denny v. New York etc. R. Co., 13 Gray (Mass.) 48; s. c., 74 Am. Dec.; Morrison v. Davis, 20 Pa. St. 171. Compare, however, Denning v. Grand Trunk R. Co., 48 N. H. 455; s. c., 2 Am. Rep. 267; Pruitt v. Hannibal etc. R. Co., 62 Mo. 527; Condict v. Grand Trunk R. Co., 54 N. Y. 500; Shear. & Red. on Neg., § 40.

The defendant's train became uncoupled through a defective appliance; a brakeman, while engaged in repairing the mishap in the portion of the train remaining stationary, was, by the negligence of the engineer, backed upon by the engine and forward part of the train and killed. *Held*, that the proximate cause of the accident was the negligence of a fellow servant, the defective appliance being merely a condition of the injury. *Course v. New York etc. R. Co.*, 2 N. Y. Supp. 312.

1. See Shear. & Red. on Neg., § 25, where this difficulty is adverted to. It often occurs that an injury is brought about as the result of a long chain of happenings, where it becomes exceedingly difficult to trace the effect to its real proximate cause. See, as illustrative cases, *Township of West Mahoney v. Watson*, 116 Pa. St. 344; *Thomas v. Winchester*, 6 N. Y. 397; s. c., *Bigelow's L. Cases on Tort* 602; s. c., 57 Am. Dec. 455; *Wabash etc. R. Co. v. Locke*, 112 Ind. 404; *Terre Haute etc. R. Co. v. Buck*, 96 Ind. 346; 18 Am. & Eng. R. Cas. 234; s. c., 49 Am. Rep. 168; *Billman v. Indianapolis etc. R. Co.*, 76 Ind. 178; *Cincinnati etc. R. Co. v. Eaton*, 94 Ind. 478; s. c., 18 Am. & Eng. R. Cas. 254; *Brown v. Chicago etc. R. Co.*, 54 Wis. 342; s. c., 3 Am. & Eng. R. Cas. 444; *Jeffersonville etc. R. v. Riley*, 39 Ind. 568; *Scheffer v. Washington City etc. R. Co.*, 105 U. S. 249; s. c., 8 Am. & Eng. R. Cas. 59; *Lewis v. Flint etc. R. Co.*, 54 Mich. 55; s. c., 18 Am. & Eng. R. Cas. 263; *Ehrgott v. Mayor etc. of N. Y.*, 96

N. Y. 264; *West v. Ward*, 77 Iowa 323; s. c., 14 Am. St. Rep. 284, and note; *Seale v. Gulf C. etc. R. Co.*, 65 Tex. 274; s. c., 57 Am. Rep. 602.

In *Baltimore etc. R. Co. v. Reaney*, 42 Md. 117, 136, the court speaking through ALVEY, J., says: In the application of the maxim, *In jure non remota sed proxima spectatur*, there is always more or less difficulty, and attempts are frequently made to introduce refinements that would not consist with principles of rational justice. The law is a practical science, and courts do not indulge in refinements and subtleties as to causation that would defeat the end of natural justice. They rather adopt the practical rule, that the efficient and predominating cause in producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked to in determining the liabilities of the parties concerned."

In *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 44, JUSTICE MILLER observes: "We have had cited to us a general review of the doctrine of proximate and remote causes as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations." *Harrison v. Berkley*, 1 Strobh. L. (S. Car.) 525; s. c., 47 Am. Dec. 578; 2 *Thompson on Negligence* 1083-4, § 1. See also *Shear. & Red. on Neg.*, § 28; *Page v. Bucksport*, 64 Me. 53; *Stickney v. Maidstone*, 30 Vt. 741; 2 *Greenleaf on Ev.*, § 210, and cases cited; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141.

The border line at which the natural sequence ceases to exist, and it becomes unnatural, is extremely difficult to define with any exactness and must be left with the jury to determine according to the circumstances of each particular case whether the facts fit the standard of naturalness. *Harrison v.*

of the injury? What test can be applied to the varying standard of human conduct and natural consequences that will correctly solve this problem in all the cases where it arises? Is there any fixed and unbending rule that in every case will clearly distinguish proximate and remote causes, and discriminate between active, efficient causes, and apparent causes that are really merely conditions and not causes of following injuries? No ultimate test of such character has yet been formulated. It is by analysis and synthesis rather than by definition that the distinction between proximate and remote causes must be made.<sup>1</sup> Negligence, as we have seen,<sup>2</sup> may be actionable or not actionable. That is, it may proximately inflict an injury, or it may result harmlessly, or be but the remote cause or mere condition of an injury, of which some intervening act or negligence is the efficient and proximate cause.<sup>3</sup> It follows that, to constitute actionable negligence, there must be not only a causal connection between the negligence complained of and the injury suffered; but the connection must be by a *natural and unbroken sequence*—without intervening efficient causes—so that but for the negligence of the defendant the injury would not have occurred; it must not only be *a* cause, but it must be *the proximate*; that is, the direct and immediate efficient cause of the injury.<sup>4</sup> There

Berkley, 1 Strobn. L. (S. Car.) 525; s. c., 47 Am. Dec. 578.

1. The strong tendency therefore is always, in recognition of this perplexing state, to submit the question of proximate cause, *wherever there is any doubt*, to the jury to be decided as a matter of fact; but a test by which they are to be guided and governed is to be given to them by the court. That test will be presented further on. See *Milwaukee etc. R. Co. v. Kellogg*, 94 U. S. 469, 474; *Haverly v. State Line etc. R. Co.*, 26 W. N. C. (Pa.) 321; *Cosulich v. Standard Oil Co.*, 55 N. Y. Super. Ct. 385; *Wright v. Chicago etc. R. Co.*, 27 Ill. App. 200; *Kreuziger v. Chicago etc. R. Co.*, 73 Wis. 158; *McCabe v. Manhattan R. Co.*, 6 N. Y. Supp. 418; *Sweeney v. New York Steam. Co.*, 6 N. Y. Supp. 528; *Nelson v. Chicago etc. R. Co.*, 73 Iowa 576; *Pierce on Railroads* 441.

The question as to whether defendant's want of care was the proximate cause of the injury is of course not always a matter of doubt; therefore, where the facts are undisputed, it is generally a question for the court. *Pierce on Railroads* 441; *Township of West Mahoney v. Watson*, 116 Pa. St. 344; *post*, subtit. XVI, QUESTIONS OF LAW AND FACT.

2. *Ante*, subtit. II, ANALYTICAL DESCRIPTION; *Shear. & Red. on Neg.*, §§ 3, 4; *Broom's Com.* (5th ed.) 368.

3. *Shear. & Red. on Neg.*, § 4; *Broom's Com.* (5th ed.) 368.

In this latter authority it is stated that "It may be laid down as a true proposition that although bare negligence, unproductive of damage to another, will not give a right of action, negligence causing damage will do so." See also *Bishop on Non-Contract Law*, §§ 41, 42; *McClary v. Sioux City etc. R. Co.*, 3 Neb. 44 (defendant's train was behind time and was destroyed by a storm so that plaintiff was injured. *Held*, that defendant was not liable, since the *proximate cause* of the injury was the storm, his lateness being a mere condition). Similar cases are found in *Memphis etc. R. Co. v. Reeves*, 10 Wall. (U. S.) 176; *Morrison v. Davis*, 20 Pa. St. 171; *Denny v. New York etc. R. Co.*, 13 Gray (Mass.) 481; s. c., 74 Am. Dec. 645; *Dubuque Wood etc. Assoc. v. Dubuque*, 30 Iowa 176; *Bodkin v. Western Union Tel. Co.*, 31 Fed. Rep. 134.

4. The definition of a proximate cause as given by *Shearman and Redfield* (Neg., § 26) is applicable here. "A proximate cause of any event must be understood to be that which in a natural and continuous sequence unbroken

are but three classes of cases in which negligence is the proximate cause of an injury, viz: *First*. When the injury is such a direct and immediate consequence of the negligence as, under the surrounding circumstances of the case, a person of ordinary care and prudence might and ought to have foreseen as likely to follow from the negligence.<sup>1</sup> *Second*. When the injury, although it could not have been foreseen in form, as a likely and probable consequence, is a natural one, flowing *directly and immediately* in unbroken sequence, from the negligence, without any possible intervening and probably efficient cause to which it might have been due in whole or in part.<sup>2</sup> But, if in a case that would otherwise

by any new cause, produces that event, and without which that event would not have occurred." Wharton on Neg., § 3; Oll Creek etc. R. Co. v. Keighorn, 74 Pa. St. 320; Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. (U. S.) 52.

See also, as supporting the general proposition of the text (leading cases only are cited), Rockford v. Tripp, 83 Ill. 247; s. c., 25 Am. Rep. 381; Patch v. Covington, 17 B. Mon. (Ky.) 722; s. c., 66 Am. Dec. 186; Tutein v. Hurley, 98 Mass. 211; s. c., 93 Am. Dec. 154; Worcester v. Great Falls Mfg. Co., 41 Me. 159; s. c., 66 Am. Dec. 217; Fairbanks v. Kerr, 70 Pa. St. 86; s. c., 10 Am. Rep. 664; Ætna Ins. Co. v. Boon, 95 U. S. 130; Louisville etc. R. Co. v. Guthrie, 10 Lea (Tenn.) 432; 11 Am. & Eng. R. Cas. 478; Donnell v. Jones, 17 Ala. 689; s. c., 52 Am. Dec. 194; Harlan v. St. Louis etc. R. Co., 65 Mo. 22; Shear. & Red. on Neg., § 26; Cooley on Torts 69; Phillips v. Dickerson, 85 Ill. 11; s. c., 28 Am. Rep. 609; Mayne on Damages 15.

Therefore, where it appears on the face of the complaint that the negligence charged was not the proximate cause of the injury, a demurrer to the complaint will not be sustained. Kistner v. Indianapolis, 100 Ind. 210; Scheffer v. Washington City etc. R. Co., 105 U. S. 249; 8 Am. & Eng. R. Cas. 59.

"In order to make a defendant liable, his negligence must be the *causa causans* and not merely a *causa sine qua non*. KELLY, C. B., in Lord Bailiffs etc. v. Trinity House, 39 L. J. Exch. 163. See also Saunders on Neg. 7, § 2.

"Proximate."—The use of the word "proximate" has been objected to as failing to convey the proper meaning intended. But even those so objecting recognize the necessity of its use since it has become so completely identified with negligence by its use in all treatises and cases, and indeed the ob-

jection seems entirely unfounded. Ehrigott v. Mayor etc. of N. Y., 96 N. Y. 264, 281; Shear. & Red. on Neg., § 26.

1. Hoag v. Lake Shore etc. R. Co., 85 Pa. St. 293, 298; s. c., 27 Am. Rep. 653; Am. R. Rep. 405; Milwaukee etc. R. Co. v. Kellogg, 94 U. S. 469, 475; Scheffer v. Washington City etc. R. Co., 105 U. S. 249, 252; 8 Am. & Eng. R. Cas. 59; Sharp v. Powell, L. R., 7 C. P. 253; Phillips v. Dickerson, 85 Ill. 11; s. c., 28 Am. Rep. 609; Pollock on Torts 36, 37; Greenland v. Chaplin, 5 Exch. 248; Shear. & Red. on Neg., § 739; 2 Thomp. on Neg., 1084-5, § 2; Cooley on Torts 72, *et seq.*; Smith v. London etc. R. Co., L. R., 5 C. P. 98; Exch., L. R., 6 C. P. 14.

Thus, when horses are frightened in a street, it may be foreseen that they may run away, and that such running away may, and probably will, cause injury; therefore, if a party by a negligent act frightens such horses, and causes them to run away, he becomes liable for the injury that may result, since it is but the natural and probable consequence of his wrong doing. Billman v. Indianapolis R. Co., 76 Ind. 166.

2. Terre Haute etc. R. Co. v. Buck, 96 Ind. 346; 18 Am. & Eng. R. Cas. 234; Marble v. Worcester, 4 Gray (Mass.) 397, 405; Smith v. London etc. R. Co., L. R., 6 C. P. 14; Cooley on Torts [69-71]; Baltimore etc. R. Co. v. Kemp, 61 Md. 74; 18 Am. & Eng. R. Cas. 220 (leading case); Heirn v. McCaughan, 32 Miss. 17; Williams v. Vanderbilt, 28 N. Y. 217; Cincinnati etc. R. Co. v. Eaton, 94 Ind. 474; 18 Am. & Eng. R. Cas. 254.

In the leading case (Baltimore etc. R. Co. v. Kemp, *supra*) Mrs. K was injured slightly by the negligence of the railroad company. Shortly after, a cancer developed in the spot where she had been injured, and in a few months became serious. Operations were per-

come within the last rule, there can be found an independent efficient, probable cause, the law will ascribe the injury to this probable cause rather than to the negligence which was not its likely and probable cause, but only to be held so in the absence of any other.<sup>1</sup> *Third.* When the negligent person knew, or had means of knowing, that consequences not usually resulting from the negligence of which he was guilty would be likely to flow from and be caused by such negligence by reason of some existing cause or condition that would increase and aggravate the effects of the negligence.<sup>2</sup> This last rule is, after all, but an extension of the first one, because the possession by the negligent person of knowledge or means of knowledge that the unusual consequences are likely to ensue, makes them the direct and immediate results of his negligence—makes them proximate; that is, such as ought to have been foreseen in the light of the circumstances.<sup>3</sup>

formed, but it was at last pronounced that her affliction was incurable. The railroad company was held liable for all the damages suffered by plaintiff, the court holding that although the consequences were not such as could have been foreseen or ought to have been anticipated, yet since they flowed directly and immediately from defendant's negligence, they must be considered as the proximate results of such negligence. The case of *Terre Haute etc. R. Co. v. Buck*, 96 Ind. 346; 18 Am. & Eng. R. Cas. 234, is very similar and reaches similar conclusions.

"When it has once been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences whether he could have foreseen them or not." CHANNELL, B., in *Smith v. London etc. R. Co.*, L. R., 6 C. P. 14; Beven on Neg. 81.

"The question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury . . . When there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it." *Milwaukee etc. R. Co. v. Kellogg*, 94 U. S. 469, 475.

1. *Scheffer v. Washington City etc. R. Co.*, 105 U. S. 249; 8 Am. & Eng. R. Cas. 59; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 44; *Hoyt v. Jeffers*, 30 Mich. 200; *Toledo etc. R. Co. v. Mathersbaugh*, 71 Ill. 572; *Wharton*

on Neg., §§ 154, 155; *Patterson's R. Ac. Law*, p. 28, par. 29. "This case (*Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 44) went to the verge of sound doctrine in holding the explosive to be the proximate cause of the loss of the Alabama warehouse; but it rested on the ground that no other proximate cause was found." MILLER, J., in *Scheffer v. Washington City etc. R. Co.*, 105 U. S. 249; 8 Am. & Eng. R. Cas. 59.

"We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or non-feasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect and proximate to it." *Milwaukee etc. R. Co. v. Kellogg*, 94 U. S. 469, 475.

2. *Pollock on Torts* 28; *Oil City Gas Co. v. Robinson* (Pa. 1881), 42 Am. Rep. 391, note; *Shepherd v. Midland R. Co.*, 25 L. T. R., N. S. 879; *Bigelow on Torts* 313; *Scott v. Hunter*, 46 Pa. St. 192; s. c., 84 Am. Dec. 542.

"That which a man actually foresees is to him, at all events, natural and probable." *Pollock on Torts*, p. 28.

3. "Facts which were known to him, or by the use of appropriate diligence would have been known to a prudent man in his place, come into account as a part of the circumstances . . . A man's responsibility may be increased

The correct rule of law, then, is that in cases of negligence the law stops at the immediate cause and direct consequences of the injury, and it is only in cases where the injury was *wilful* or *malum in se*, that it goes back to the wilful act or omission, and *presumes* that all existing conditions were known by the wrongdoer, and all consequences, however improbable, foreseen and intended, and that he is liable for all.<sup>1</sup> In a number of cases cited to the foregoing paragraph acts *malum in se* were done, and the courts spoke of them as *grossly* negligent acts, failing to make the accurate and profound distinction that has been clearly made in a number of recent cases between wilfulness and negligence.<sup>2</sup> Where this error was made, the courts frequently held the guilty person responsible for *all* the consequences of his act, mediate and immediate, thus tracing the chain of causation backward to the original wrongful act: but in doing so they treated the wilful wrong as mere negligence, which they term "gross," and tried to show that such decisions conformed to the maxim, "*Causa proxima, non remota spectatur.*" The application of this maxim to such cases is erroneous and injurious; for such decisions have been used as authorities to sustain a recovery in cases of mere negligent injury when the negligence was remote in the chain of causation and the consequences unusual and incapable of having been foreseen by the most prudent person. The true principle is that, where an act is *malum in se* or *wilful*, the person guilty of it is liable for all the consequences, *however remote*, because the act is *quasi* criminal in its character, and the law conclusively presumes that all the consequences were foreseen and intended. And in many cases the character of the act and the circumstances under which it was done raise a conclusive presumption that it was wilful.<sup>3</sup>

by his happening to be in possession of some material information beyond what he might be expected to have." Pollock on Torts, p. 356.

1. *Carklin v. Thompson*, 29 Barb. (N. Y.) 221; *Loop v. Litchfield*, 42 N. Y. 358 (druggist selling medicine wrongly labelled); *Broom's Leg. Maxims* (7th ed.) 267; *Scheffer v. Washington City etc. R. Co.*, 105 U. S. 249; 8 Am. & Eng. R. Cas. 59; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16; s. c., 50 Am. Rep. 71; *Billman v. Indianapolis R. Co.*, 76 Ind. 178; s. c., 40 Am. Rep. 230; *Forney v. Geldmacher*, 75 Mo. 113; s. c., 42 Am. Rep. 388; *Indiana etc. R. Co. v. Birney*, 71 Ill. 391; *Lewis v. Flint etc. R. Co.*, 54 Mich. 55; 18 Am. & Eng. R. Cas. 263-265; *Kistner v. Indianapolis etc. R. Co.*, 100 Ind. 220, 221; *Henry v. St. Louis etc. R. Co.*, 76 Mo. 288; 12 Am. & Eng. R. Cas. 136; s. c., 43 Am. Rep. 762; *Marble v. Worcester*, 4 Gray (Mass.) 397, 405; *Carter v. Louisville*

*etc. R. Co.*, 98 Ind. 555; 8 Am. & Eng. R. Cas. 347; 22 Am. & Eng. R. Cas. 360; s. c., 49 Am. Rep. 780; *Sherman v. Stage Co.*, 24 Iowa 563; *Reynolds v. Clark*, 1 Ld. Raym. 1401; s. c., 1 Stra. 635; *Weick v. Lauder*, 75 Ill. 93; *Holmes on Com. Law* 92; *Bigelow on Torts* 312, 313; *Terre Haute etc. R. Co. v. Graham*, 95 Ind. 293; 12 Am. & Eng. R. Cas. 77.

2. *Ante*, subtit. III, 1, INADVERTENCE, etc.; *Terre Haute etc. R. Co. v. Graham*, 95 Ind. 298; 12 Am. & Eng. R. Cas. 77; s. c., 48 Am. Rep. 719; *Pennsylvania Co. v. Smith*, 98 Ind. 42; *Ivens v. Cincinnati etc. R. Co.*, 103 Ind. 27; *Louisville etc. R. Co. v. Schmidt*, 106 Ind. 73; *Louisville etc. R. Co. v. Bryan*, 107 Ind. 51.

3. *Bigelow on Torts* 313; *Reg. v. Hicklin*, L. R., 3 Q. B. D. 360; 1 *Bishop's Crim. Law* (7th ed.), §§ 244, 314, 345, 328, 334, 335, 343; 2 *Id.*, §§ 637, 639, 693; 2 *Bish. Cr. Procedure* (2nd ed.), §

Cases where acts or omissions, wilful or *malum in se*, have been treated as negligent, and a mistaken attempt made to bring them within the maxim above quoted, are numerous.<sup>1</sup> But other cases seem to recognize the principle that it was because the original act was *malum in se* that there was a liability for *all* the consequences, remote as well as proximate.<sup>2</sup> And it is in such cases that negligence on the part of the plaintiff which is a proximate cause of injury is held not to bar his right of recovery.<sup>3</sup> A cause of confusion in these doctrines just discussed is found in cases, of which there are a few in the books, where there was a long chain of *apparent* causes, only one of which, and that the first in order of time, was efficient and proximate, and where the original act or omission constituting such cause was also *malum in se*, or capable of being presumed in law to have been wilful.<sup>4</sup> In still other cases, what seems a remote cause is held proximate, because on examining the chain of causation no other proximate cause

801; 2 Bish. Cr. Law, §§ 680, 681, 688, 922, 1279; Bish. on Non-Contract Law, §§ 16, 501.

"So far mischief was originally intended; not any particular mischief, but mischief indiscriminate and *wanton*. Whatever mischief, therefore, follows, he is the author of it; *egreditur personam*, as the phrase in criminal cases. And though criminal cases are no rules for civil ones, yet in trespass I think there is an analogy." DE GREY, J., in *Scott v. Shepherd*, 2 W. Bl. 892; 1 Sm. Lea. Cas. (7th ed.) 872.

1 *Jefferson etc. R. Co. v. Riley*, 39 Ind. 568; *Drake v. Kiely*, 93 Pa. St. 495; *Indianapolis etc. R. Co. v. McBrown*, 46 Ind. 232, 233; *Clark v. Chambers*, 7 Cent. L. J. 11. It is unnecessary to cite all the cases of this character. The books are full of them, and many of them have already been referred to.

2 *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478; s. c., 49 Am. Rep. 469; *Billman v. Indianapolis etc. R. Co.*, 76 Ind. 166, 178; s. c., 40 Am. Rep. 230; *Binford v. Johnson*, 82 Ind. 426; s. c., 42 Am. Rep. 508; *Forney v. Geldmacher*, 75 Mo. 113; s. c., 42 Am. Rep. 388; *Weick v. Lauder*, 75 Ill. 93; *Claxton v. Lexington etc. R. Co.*, 13 Bush (Ky.) 636.

3 *Carter v. Louisville etc. R. Co.*, 98 Ind. 555; 8 Am. & Eng. R. Cas. 347; 22 Am. & Eng. R. Cas. 360; s. c., 49 Am. Rep. 780; *Cook v. Central R. Co. etc.*, 67 Ala. 533.

4 Foremost among cases of this character is the famous "squib case." *Scott v. Shepherd*, 3 Wils. 403; 2 Wm. Bl. 892; 1 Smith's L. Cas. (7th ed.) 755.

Others are *Ricker v. Freeman*, 50 N. H. 420; s. c., 9 Am. Rep. 267; *Thomas v. Winchester* (drug dealer case), 6 N. Y. 397, 405; *Henry v. Dennis*, 93 Ind. 452; s. c., 47 Am. Rep. 379; *Hughes v. McDonough*, 43 N. J. L. 459; s. c., 39 Am. Rep. 653.

The best illustration of the principle maintained in the text is that afforded by the case of *Scheffer v. Washington City etc. R. Co.*, 105 U. S. 249; 8 Am. & Eng. R. Cas. 59 (suicide case), *i. e.*, that if the original act had been wilful or *malum in se*, it would have been proper to hold defendant liable; and this very thing was done in the *Riley* case (*Jeffersonville etc. R. Co. v. Riley*, 39 Ind. 568), where a brakeman threw a burning brand from the train towards the spot where passengers were accustomed to get on and alight from the train, because the act of W, the brakeman, in throwing the burning stick, was of such a character that it was conclusively presumed that all the consequences were foreseen and intended. Upon no other ground can the decision be sustained, although this reason may not have been the one given by the court.

The case of *Forney v. Geldmacher*, 75 Mo. 113; s. c., 42 Am. Rep. 388, is also a conspicuous example of this doctrine; defendant's original act having been *wilful*, he was held liable even for *remote* consequences. And in an Illinois case a similar state of facts was the basis of a decision similar to the Missouri case. *Rockford v. Tripp*, 83 Ill. 247; s. c., 25 Am. Rep. 381. So also in the old case of *Durham v. Musselman*, 2 Blackf. (Ind.) 96; s. c., 18 Am.

appears, supposed intervening causes being found merely conditions or occasions and not efficient causes.<sup>1</sup> In this class of cases conditions and occasions are often, but erroneously, insisted on as proximate causes.<sup>2</sup>

**1. Proximate Cause Defined.**—In the light of this discussion a proximate cause may be defined as that cause which in natural and continuous sequence, unbroken by any efficient, intervening cause, produced the result complained of, and without which that result would not have occurred.<sup>3</sup> And it is laid down in many cases, and by leading text writers, that "in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it was such as might or ought to have been foreseen in the light of the attending circumstances."<sup>4</sup> But this latter rule, although one often applied,

Dec. 133, where this principle was at least partially recognized. See also *Henry v. Dennis*, 93 Ind. 453; s. c., 47 Am. Rep. 381.

1. *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 65; *Ehrgott v. Mayor etc. of N. Y.*, 96 N. Y. 264; s. c., 48 Am. Rep. 622; *Sauter v. New York Cent. R. Co.*, 66 N. Y. 50; s. c., 23 Am. Rep. 18; *Griggs v. Fleckenstein*, 14 Minn. 81; *Brown v. Chicago etc. R. Co.*, 54 Wis. 342; 3 Am. & Eng. R. Cas. 444; s. c., 41 Am. Rep. 41; *Terre Haute etc. R. Co. v. Buck*, 96 Ind. 346; 18 Am. & Eng. R. Cas. 234; *Beven on Neg.* 82.

2. *Sherman v. Stage Co.*, 24 Iowa 563; *Story on Bailments*, § 241, 242.

3. This is substantially the same as that given by *Shearman and Redfield* in their excellent work on negligence (§ 26) except that, instead of saying with them, " . . . unbroken by any *new* cause," etc., we consider it more correct to say, "unbroken by any efficient intervening cause," etc. See also *Wharton on Neg.*, § 97; *Oil Creek etc. R. Co. v. Keighorn*, 74 Pa. St. 320; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 44; *Milwaukee etc. R. Co. v. Kellogg*, 94 U. S. 469; *Scheffer v. Washington City etc. R. Co.*, 105 U. S. 249; 8 Am. & Eng. R. Cas. 59; *Hoag v. Lake Shore R. Co.*, 85 Pa. St. 293, 298; s. c., 27 Am. Rep. 653; *Pollock on Torts* 36, 37; and numerous cases cited throughout this discussion. And see especially the discussion of this question in *Beven on Negligence*, pp. 80, 81, 90.

On this subject MR. BISHOP has to say: "Nor yet is it possible there should be any such enunciation of this doc-

trine as will furnish alone the practical guide needed for every sort of case. But with proximate accuracy we may define the immediate cause, which is adequate to charge the party putting it forth, to be any wrong sufficient in magnitude for the law to take cognizance of it, wherefrom, operating either alone or in conjunction with anything else, the injury comes as a first, final, or intermediate consequence. And the inadequate, remote cause, which is not sufficient to charge the party, we may define to be one which has so far expended itself, that its influence in producing the injury is too minute for the law's notice; or a cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof. *Bishop on Non-Contract Law*, § 41.

4. Notice the language of the United States supreme court in the leading case of *Milwaukee etc. R. Co. v. Kellogg* (94 U. S. 469, 475): "It is admitted that the rule is difficult of application, but it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the *natural and probable consequence* of the negligence or wrongful act and that it ought to have been foreseen in the light of the attending circumstances."

So in another leading case, *Hoag v. Lake Shore etc. R. Co.* (85 Pa. St. 293, 298; s. c., 27 Am. Rep. 653; Am. R. Rep. 405), the court in passing upon the question of proximate cause observes: "A man's re-

sponsibility for his negligence and that of his servants must end somewhere. There is a possibility of carrying an admittedly correct principle too far . . . . The true rule is that the injury must be the natural and probable consequence of the [defendant's] negligence—such a consequence, as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act. This is not a limitation of the maxim *causa proxima, non remota spectatur*; it only affects its application." See also *Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373; s. c., 21 Am. Rep. 100; *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353; s. c., 1 Am. Rep. 431.

In 2 Thompson on Neg. 1085, § 2, in criticising a definition which defined a proximate cause thus, "He who is chargeable with the first wrongful act or neglect which occasions, through a connected series of causes and effects, an injury to another, without his fault, is responsible for the injury, provided there is no intermediate responsible cause" (*Goshen Turnpike Co. v. Sears*, 7 Conn. 86, 94)—the learned author observes that the definition is faulty "in that it omits the element that the result for which the actor is responsible must be *one that he might reasonably have foreseen*."

Shearman and Redfield (Neg., § 739) say that the defendant is liable only for such damages as were proximately caused by his default, the extent of which is defined "as being such as a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would, at the time of the negligent act, have thought reasonably possible to follow, if they had been suggested to his mind."

In *Phillips v. Dickerson*, 85 Ill. 11; s. c., 28 Am. Rep. 607, 609, the court concludes its opinion: "The injury in question, not being one which the defendant could reasonably be expected to anticipate as likely to flow from his conduct, we cannot regard it as the natural consequence thereof for which defendant is legally responsible." The court there also quotes and approves the doctrine in *Mayne on Damages* 15; viz, that the injury must be the natural and probable consequence of defendant's negligence.

In *Pollock on Torts* (36, 37), after a

clear statement of the general principles as to proximate cause, the author states: "This being the standard it follows that if in a particular case the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability."

And this principle as uniformly laid down by the foregoing authorities is supported by a long array of cases of high authority. *Greenland v. Chaplin*, 5 Exch. 248; *Clark v. Chambers*, 3 Q. B. Div. 327; *Sharp v. Powell*, L. R., 7 Ch. 253; *Illidge v. Goodwin*, 5 Carr. & P. 190; *Borradaile v. Brunton*, 8 Taunt. 535; *Ward v. Weeks*, 7 Bing. 211 (consequences must be *natural* as well as proximate); *Kelly v. Partington*, 5 B. & Ad. 645 (same principle); *Harrison v. Berkley*, 1 Strobh. L. (S. Car.) 525; s. c., 47 Am. Dec. 578; *Pittsburgh etc. R. Co. v. Taylor*, 104 Pa. St. 306; s. c., 49 Am. Rep. 580; *Scheffer v. Washington City etc. R. Co.*, 105 U. S. 249, 252; 8 Am. & Eng. R. Cas. 59 (where leading case of *Milwaukee etc. R. Co. v. Kellogg* was cited and approved); *McDonald v. Snelling*, 14 Allen (Mass.) 290 (cited and approved in *Scheffer v. Washington City etc. R. Co.*); s. c., 92 Am. Dec. 768, 771; *Morrison v. Davis*, 20 Pa. St. 171, 175; *Campbell v. Stillwater*, 32 Minn. 308; s. c., 50 Am. Rep. 567-569, note (In the note numerous authorities are collected sustaining the principle in question); *Lane v. Atlantic Works*, 111 Mass. 136; *Hill v. Winsor*, 118 Mass. 251; *Atchison v. Goodrich Transp. Co.*, 60 Wis. 141; *Toledo etc. R. Co. v. Muthersbaugh*, 71 Ill. 572; *Tutein v. Hurley*, 98 Mass. 211; *Wabash etc. R. Co. v. Locke*, 112 Ind. 404 (tall brakeman on tall car); *McClary v. Sioux City etc. R. Co.*, 3 Neb. 44; *Township of West Mahoney v. Watson*, 112 Pa. St. 574; *Cooley on Torts* 69-71; *Bishop on Non-Contract Law*, § 43; *Louisville etc. R. Co. v. Guthrie*, 10 Lea (Tenn.) 432; 11 Am. & Eng. R. Cas. 478; *Glover v. London etc. R. Co.*, L. R., 3 Q. B. 25. Each of these cases sustains directly, and not merely by insinuation, the principle announced.

Also MCKINSTRY, J., in *Henry v. Southern Pac. R. Co.*, 50 Cal. 183, has to say: "A long series of judicial decisions has defined proximate or immediate and direct damages to be *ordinary and natural results* of the negligence, such as are *usual*, and therefore as *might have been expected*." 2



is no test in cases where no intervening efficient cause is found between the original wrongful act and the injurious consequence complained of, and in which such consequences, although not probable, have actually followed in unbroken sequence from the original wrong doing.<sup>1</sup> Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original

Thomp. on Neg. 1083, note; Rigby v. Hewitt, 5 Exch. 240; Doggett v. Richmond etc. R. Co., 78 N. Car. 305; Lake v. Mulliken, 62 Me. 240; Pullman Palace Car Co. v. Barker, 4 Colo. 344. See also Patterson's R. Acc. Law, 11 *et seq.*, § 14; Chicago v. Starr, 42 Ill. 174; s. c., 89 Am. Dec. 422 (this case cited and approved in Bellefontaine etc. R. Co. v. Snyder, 18 Ohio St. 399; s. c., 98 Am. Dec. 181); McGrew v. Stone, 53 Pa. St. 436; Shear. & Red. on Neg., § 21.

The case *supra* (Chicago v. Starr, 42 Ill. 174; s. c., 89 Am. Dec. 422) was where a child had been killed by a counter, which had been allowed to remain on the sidewalk, falling on him in an unexpected manner. The court said: "While the counter was an obstruction, it was a very slight one. . . . During the two or three weeks it remained there it probably never occurred to anyone who saw it that human life or limb would be jeopardized by its presence there. . . . The most prudent and cautious persons would never have anticipated such an accident. . . . The question is, what would have been the course of a prudent person prior to the accident?" Therefore it was held that the child's administrator could not recover damages from the city.

1. To every effect there must, be a proximate cause, and therefore, when it appears that defendant's negligence might have caused the injury and an unbroken natural sequence of cause and effect runs back to the negligence as the cause, no efficient intervening cause appearing, the negligence is held the proximate cause of the injury.

This rule has been approved in *Mississippi and Wisconsin* cases, where it is said: "That the maxim *causa proxima*, etc., includes not only liability for all natural and probable injuries having origin in the wrongful act or omission, but such injuries as are likely in ordinary circumstances to ensue from the act or omission in question; and it has been ruled in *England* that it is not necessary to a defendant's liabil-

ity, after you have established negligence, to show in addition thereto that the consequences of the negligence could have been foreseen." SHERWOOD, J., in Miller v. St. Louis etc. R., 90 Mo. 389; 29 Am. & Eng. R. Cas. 254, 257, citing Kellogg v. Chicago etc. R. Co., 26 Wis. 223; Smith v. London etc. R. Co., L. R., 6 C. P. 21; Higgins v. Dewey, 107 Mass. 494; Wharton on Neg., § 20; Smith on Law of Neg. \*16.

"The wrong of the appellant put in motion the destructive agency, and the result is directly attributable to that wrong. In this instance cause and effect are interlinked. There is no break. The chain is perfect and complete." ELLIOTT, J., in Louisville etc. R. Co. v. Nitsche (Ind. 1890), 45 Am. & Eng. R. Cas. 532.

"When it has once been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences whether he could have foreseen them or not." Smith v. London etc. R. Co., L. R., 6 C. P. 14; L. R., 5 C. P. 98; Beven on Neg. 80, 81.

"It is insisted that the act of the defendant was only the remote cause of the injury. When the cow was thrown by the engine, it struck the ground, bounced and fell against plaintiff. The bounce and fall of the cow was the immediate cause, but it was merely incidental, and was not an independent agency, which had no connection with the act of the defendant. The direct cause was put in operation by the force of the engine, which continued until the injury; and injuries directly produced by instrumentalities thus put in operation and continued are proximate consequences of the primary act, though they may not have been contemplated or foreseen. The relation of cause and effect between the primary cause and the injury is established by the connection and succession of the intervening circumstances. If the cow was thrown from the track by the negligence of defendant, the injury cannot be regarded as a purely accidental occurrence for which no action lies." Ala.

wrong, are natural;<sup>1</sup> and for such consequences the original wrongdoer must be held responsible, even though he could not have foreseen the particular results, provided that by the exercise of ordinary care he might have foreseen that *some* injury would result from his negligence.<sup>2</sup> No other proximate cause being found the original wrong is held proximate,<sup>3</sup> and no wrong-doer ought to be allowed to apportion or qualify his own wrong; and as a loss (or injury) has actually happened while his own wrongful act was in force and operation, he ought not to be permitted to set up as a defence that there was a more immediate cause of loss, if that cause was put in operation by his own wrongful act.<sup>4</sup> But of course, if the original act of the defendant, although it was the proximate cause of an injury in this latter sense, was not negligent, the fact that it was the proximate cause of such injury will not warrant a recovery.<sup>5</sup> And it cannot be held negligent, unless the defendant by the use of ordinary care under the circumstances, could have foreseen that it might result in some injury to some person.<sup>6</sup> The

bama etc. R. Co. v. Chapman, 80 Ala. 615; 31 Am. & Eng. R. Cas. 394. See also Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. (U. S.) 44; Ehrgott v. Mayor etc. of N. Y., 96 N. Y. 264; s. c., 48 Am. Rep. 622; Cincinnati R. Co. v. Eaton, 94 Ind. 474; 18 Am. & Eng. R. Cas. 254; s. c., 48 Am. Rep. 179; Terre Haute etc. R. Co. v. Buck, 96 Ind. 346; 18 Am. & Eng. R. Cas. 226; Sauter v. New York Cent. etc. R. Co., 66 N. Y. 50; Brown v. Chicago etc. R. Co., 54 Wis. 342; 3 Am. & Eng. R. Cas. 444; s. c., 41 Am. Rep. 41.

The case of Delaware etc. R. Co. v. Salmon, 38 N. J. L. 5; s. c., 39 N. J. L. 299, discusses this whole question and presents an admirable review of the authorities.

1. See CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 42, where a great number of cases are collected to prove that *natural consequences are always proximate*. See also Baltimore etc. R. Co. v. Kemp, 61 Md. 74; 18 Am. & Eng. R. Cas. 220; Terre Haute etc. R. Co. v. Buck, 96 Ind. 346; 18 Am. & Eng. R. Cas. 234; 49 Am. Rep. 168; Milwaukee etc. R. Co. v. Kellogg, 94 U. S. 469; Webster's Int. Dict., Natural.

2. Baltimore etc. R. Co. v. Kemp, 61 Md. 74, 619; 18 Am. & Eng. R. Cas. 220; s. c., 48 Am. Rep. 134; Terre Haute etc. R. Co. v. Buck, 96 Ind. 346; 18 Am. & Eng. R. Cas. 234; s. c., 49 Am. Rep. 168; Liming v. Illinois Cent. R. Co. (Iowa 1890), 47 N. W. Rep. 67; Milwaukee etc. R. Co. v. Kellogg, 94 U. S. 469; 1 Suth. Dam. 47; Lowery v. Man-

hattan R. Co., 99 N. Y. 158; 23 Am. & Eng. R. Cas. 276; Louisville etc. R. Co. v. Krinning, 87 Ind. 351; Hill v. Winsor, 118 Mass. 251; Bishop on Non-Contract Law, § 457.

"Where there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." Beven on Neg. 83, 90; Smith v. London & S. W. R. Co., L. R., 5 C. P. 98; L. R., 6 C. P. 14.

3. Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. (U. S.) 44; Ehrgott v. Mayor etc. of N. Y., 96 N. Y. 264; s. c., 48 Am. Rep. 622; Brown v. Chicago etc. R. Co., 54 Wis. 342; 3 Am. & Eng. R. Cas. 444; Terre Haute etc. R. Co. v. Buck, 96 Ind. 346; 18 Am. & Eng. R. Cas. 226.

4. Beauchamp v. Saginaw Min. Co., 50 Mich. 163, 172; Liming v. Illinois etc. R. Co. (Iowa 1890), 47 N. W. Rep. 67; Doris v. Garrett, 6 Bing. 716; Lilley v. Doubleday, 7 Q. B. Div. 511; Beven on Neg. 76.

5. It is evident that there can be no recovery for an injury where there is no fault on the part of the party causing the injury. See, *ante*, the various DEFINITIONS OF ACTIONABLE NEGLIGENCE. See also Shear. & Red. on Neg., § 15 (no actionable negligence where there is no breach of duty); Brown v. Kendall, 6 Cush. (Mass.) 292 (defendant accidentally wounded plaintiff in attempting to separate fighting dogs); Morris v. Platt, 32 Conn. 75; Bizzel v. Booker, 16 Ark. 308; ACCIDENT, 1 Am. & Eng. Encyc. of Law 83, *et seq.*

6. Pollock on Torts 36, 37; Shear. &

fallacy in the usual rule consists in the attempt to apply the test of *ordinary care* as a test of *proximate cause*.<sup>1</sup> A defendant may have proximately caused an injury without having been guilty of any want of ordinary care, in which event he is not chargeable with negligence, and therefore is not liable for the injury inflicted by him; and in such case the injury must be held to be the result of an inevitable accident.<sup>2</sup>

**VII. COMBINED AND CONCURRENT CAUSES.**—It is no defence in an action for a negligent injury that the negligence of a third person,

Red. on Neg., § 10; *ante*, subtit. III, 3, ORDINARY CARE; Beauchamp v. Saginaw Min. Co., 50 Mich. 163.

For example, where defendant used a common article for dyeing clothes, not known at the time to be injurious, a purchaser of the cloth injured by handling it cannot recover. Since no one could be expected to foresee such a result it was no want of ordinary care to fail to provide against it. Gould v. Slater Woolen Co., 147 Mass. 315.

1. Beven on Neg. 80, 81; Smith v. London etc. R. Co., L. R., 5 C. P. 98; L. R., 6 C. P. 14; 39 L. J., C. P. 68; Patterson's R. Acc. Law 13, *et seq.*; Pollock on Torts 36, 37.

This mistake will be seen by a close examination of the reasoning pursued in many cases; for example, in Mr. POLLOCK'S exposition upon this immediate point, *i. e.*, the test of proximate cause, it is said, after stating the definition of negligence: "Now, a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others, which might by ingenious conjunction be conceived as possible, human affairs could not be carried on at all. A reasonable man, then, to whose ideal behavior we are to look as a standard of duty, will neither neglect what he can forecast as probable nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things." Pollock on Torts 36, 37.

In the case of *Greenland v. Chapman*, so much relied on, it is laid down that "a person is expected to anticipate and guard against all reasonable consequences, but that he is not expected to anticipate and guard against that which no reasonable man would expect to occur." *Greenland v. Chapman*, 5 Exch. 248. In the case of *Chicago v. Starr*, 42 Ill. 174; s. c., 89 Am. Dec. 422,

where a child was killed by a counter falling on him in a very unusual manner, the counter having been left on the sidewalk, the court observed: "During the two or three weeks that it remained there, it probably never occurred to anyone who saw it that human life or limb would be jeopardized by its presence there . . . . The most prudent and cautious person would never anticipate such an accident . . . . The question is, What would have been the course of a prudent person prior to the accident?" It will be seen, therefore, that, in the three authorities just cited, which are greatly relied on, the idea that negligence is the proximate cause only of such damage as might and ought to have been foreseen, arises from an attempt to apply as a test of proximate cause what is really only the test of ordinary care. The confusion of these two tests leads to mistake, and has in many cases produced an erroneous exposition of the doctrine of proximate cause.

MR. SMITH sets forth the distinction between the two tests very clearly: "The word 'proximately' is to be distinguished from the word 'culpably.' An act, to be culpable, that is, to be a breach of legal duty, must, as we have seen, be such as a reasonably careful man would foresee would be productive of injury, and the person is not liable for an injury which he could not foresee; but a breach of duty to be proximately producing injury must be such that whether defendant could foresee the injury to be probable or not, the breach of duty is in fact the probable cause of the injury." Smith on Law of Negligence \*16. See also *Blythe v. Birmingham Water Works*, 11 Exch. 781.

2. *Brown v. Kendall*, 6 Cush. (Mass.) 292 (dog and cane case); *Morris v. Platt*, 32 Conn. 75; s. c., *INEVITABLE ACCIDENT*, 10 Am. & Eng. Encyc. of Law.

or an inevitable accident, or an inanimate thing, contributed to cause the injury of the plaintiff, if the negligence of the defendant was an efficient cause of the injury.<sup>1</sup> In such cases the fact that some other cause operates with the negligence of the defendant in producing the injury does not relieve the defendant from liability.<sup>2</sup> His original wrong, concurring with some other cause, and both operating proximately at the same time in the production of the injury, he is liable to respond in damages

1. 2 Thomp. on Neg. 1085, § 3; Bishop on Non-Contract Law, §§ 39, 450-452; Shear. & Red. on Neg., § 31, *et seq.*; *Eaton v. Boston etc. R. Co.*, 11 Allen (Mass.) 500; s. c., 87 Am. Dec. 730; *McDonald v. Snelling*, 14 Allen (Mass.) 292; *Ætna Ins. Co. v. Boon*, 95 U. S. 117; *Carterville v. Cook*, 129 Ill. 152; s. c., 16 Am. St. Rep. 248; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141; s. c., 50 Am. Rep. 352; *Lake v. Milliken*, 62 Me. 240; s. c., 16 Am. Rep. 456; *Small v. Chicago etc. R. Co.*, 55 Iowa 582; *Johnson v. Chicago etc. R. Co.*, 31 Minn. 57; 13 Am. & Eng. R. Cas. 460; *Galveston v. Posnainsky*, 62 Tex. 118; s. c., 50 Am. Rep. 517, 518; *Campbell v. Stillwater*, 32 Minn. 308; s. c., 50 Am. Dec. 567.

**Negligence of Surgeon Following Injury by Defendant.**—Where a party has been injured by the negligence of the defendant and uses ordinary care in endeavoring to be healed and in his selection of his surgeons, but owing to the negligence of the latter the injury is increased, the defendant (*i. e.*, the original wrongdoer) will be held responsible even for the increase of the injury. *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20; 18 Am. & Eng. R. Cas. 87; s. c., 50 Am. Rep. 601, note; *Loeser v. Humphrey*, 41 Ohio St. 378; *Lyons v. Erie etc. R. Co.*, 57 N. Y. 489; *Rice v. Des Moines*, 40 Iowa 638; *Collins v. Council Bluffs*, 32 Iowa 324; s. c., 7 Am. Rep. 200; *Stover v. Inhabitants of Bluehill*, 51 Me. 439; *Eastman v. Sanborn*, 3 Allen (Mass.) 594; *Lawrence v. Housatonic etc. R. Co.*, 29 Conn. 390; *Schmidt v. Mitchell*, 84 Ill. 195; s. c., 23 Am. Rep. 18.

The fact that plaintiff was himself a physician and surgeon does not alter the rule as to the degree of care he is required to exercise. *Boynton v. Somersworth*, 58 N. H. 321.

**2. Combined and Concurrent Causes.**—In case of injury caused by accident and defendant's negligence concurring, the defendant is liable if without his

negligence the injury would not have been caused by the accident alone. And this same rule applies in all cases where the negligence of the party defendant is one of two or more concurrent causes. *Eaton v. Boston etc. R. Co.*, 11 Allen (Mass.) 500; s. c., 87 Am. Dec. 730; *ante*, subtit. **INEVITABLE ACCIDENT**; **CONTRIBUTORY NEGLIGENCE**, 4 Am. & Eng. Encyc. of Law 41, and cases cited; **ACCIDENT**, vol. 1, 82; **ACT OF GOD**, vol. 1, 178; *Baltimore etc. R. Co. v. School Dist.*, 96 Pa. St. 65; 2 Am. & Eng. R. Cas. 106; *Ellett v. St. Louis etc. R. Co.*, 76 Mo. 518; 12 Am. & Eng. R. Cas. 183; 2 Thomp. on Neg. 1085, § 3; *Carterville v. Cook*, 129 Ill. 152; s. c., 16 Am. St. Rep. 248.

"Where an injury is the combined result of the negligence of the defendant and an accident (*i. e.*, a cause), for which neither the plaintiff nor defendant is responsible, the defendant must pay damages, unless the injury would have happened if he had not been negligent." 2 Thomp. on Neg. 1085, § 3; *Palmer v. Inhabitants of Andover*, 2 Cush. (Mass.) 600; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75; s. c., 3 Am. Rep. 663 ("a party cannot avail himself of the defence of 'inevitable accident,' who by his own negligence gets into a position which renders the accident inevitable"); *Hey v. Philadelphia*, 81 Pa. St. 44; s. c., 22 Am. Rep. 733; *Pitcomb v. Fitchburg R. Co.*, 12 Allen (Mass.) 254; *Clark v. Barrington*, 41 N. H. 44; *Kelsey v. Glover*, 15 Vt. 708; *Morse v. Richmond*, 41 Vt. 435; *Woodward v. Aborn*, 35 Me. 271; *Mauley v. Mayor etc. of N. Y.*, 67 N. Y. 602; *Hull v. Kansas City*, 54 Mo. 598; *Aurora v. Pulser*, 56 Ill. 270.

Plaintiff was about to enter a street car, having mounted the platform, when the driver suddenly whipped up to avoid a collision with a runaway team. The sudden jolt threw plaintiff to the ground and he was run over and injured by the runaway team. In an action against the railway company, it was

whether the other cause was a guilty or an innocent one.<sup>1</sup> In

held, that, admitting the railway company to have been guilty of negligence, it could not be held liable since it was not the proximate cause of the injury. The action of the defendant was not a concurrent cause, but a mere condition of the injury. *South Side etc. R. Co. v. Trich*, 117 Pa. St. 390; 34 Am. & Eng. R. Cas. 549.

Plaintiff's injury resulted from being pushed or jostled off a sidewalk which was more than six feet from the ground, and not protected by railing or guard. It was held that he might recover of the city, since his injury resulted from its failure to provide proper walks; and the fact that some third party was guilty of negligence in pushing him off does not relieve the city from liability. *Carterville v. Cook*, 129 Ill. 152; s. c., 16 Am. St. Rep. 248.

**Does Not Apply in Case of Contributory Negligence.**—But where the two concurring causes are the defendant's negligence and plaintiff's negligence, this rule does not apply. In that case, the rule is that defendant is not liable unless his negligence would alone have produced the injury. CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 17, § 4.

Thus, in a certain case, P fastened his horse with a stout rope by the side of a public street; a steam whistle upon the top of U's factory, about 15 rods distant, was blown, as a notice to the operatives, producing a sound shrill and calculated to frighten ordinary horses; the horse pulled violently at his rope, which gave way, and he was killed. It was found that if the whistle had not been sounded, the horse would not have pulled; and that if the horse had been free from the habit of pulling, he would not have been killed. *Held*, that the death of the horse could not be regarded as caused by the negligence of U, and that he was not liable. *Parker v. Union Woollen Co.*, 42 Conn. 399.

**Exception.**—But this rule laid down at the head of this note must be taken in connection with the rule already fixed—that a person is liable only when his act is the proximate cause of the injury—therefore, where although the two causes seem to concur, yet the injury is clearly the proximate result of a cause other than defendant's negligence, he is not liable. *Ante*, subtit. PROXIMATE CAUSE.

Thus, a train wrongfully obstructed a street crossing. Animals were thus prevented from crossing, and while they stood waiting on the other track, another train came along and injured them. It was held that the obstruction was not the proximate cause of the injury. *Brown v. Wabash etc. R. Co.*, 20 Mo. App. 222.

The illegal obstruction of a highway by a freight train standing across it is not the proximate cause of the injury which a driver, who is waiting to get across the track, may suffer from having his horses frightened by a passing train while he is detained there. *Selleck v. Lake Shore etc. R. Co.*, 58 Mich. 195; 23 Am. & Eng. R. Cas. 338.

So, where goods are injured or destroyed by a cause for which defendant is not liable, but such goods would not have been so injured if defendant had not been negligent, so that he failed to carry them away when he should, it is generally held, that defendant is not liable for such damage. Here, although his negligence concurs with the other cause, yet the second cause is the proximate cause and his negligence a remote one; therefore, he is not liable. See *Shear. & Red. on Neg.*, § 40, where the cases are all collected. See also *ante*, subtit. PROXIMATE CAUSE; *Denny v. New York Cent. R. Co.*, 13 Gray (Mass.) 481; *McClary v. Sioux City etc. R. Co.*, 3 Neb. 44; *Dubuque Wood etc. Assoc. v. Dubuque*, 30 Iowa 176; *Morrison v. Davis*, 20 Pa. St. 171; *Memphis etc. R. Co. v. Reeves*, 10 Wall. (U. S.) 176; *Daniels v. Ballantine*, 23 Ohio St. 532. Compare, however, *Condict v. Grand Trunk etc. R. Co.*, 54 N. Y. 500, and cases cited; *Michaels v. New York etc. R. Co.*, 30 N. Y. 564; *Denning v. Grand Trunk R. Co.*, 48 N. H. 455; s. c., 2 Am. Rep. 267; *Pruitt v. Hannibal etc. R. Co.*, 62 Mo. 527.

1. 2 *Thomp. on Neg.* 1084, § 3; ACCIDENT, 1 Am. & Eng. Encyc. of Law 82, 83; INEVITABLE ACCIDENT, vol. 10, 601, 602; *Goshen etc. Turnpike Co. v. Sears*, 7 Conn. 86, 94; *Clark v. Barrington*, 41 N. H. 44; *Atchison v. King*, 9 Kan. 550; *Aurora v. Pulfer*, 56 Ill. 270; *Ricker v. Freeman*, 50 N. H. 420; *Eaton v. Boston etc. R. Co.*, 11 Allen (Mass.) 500; s. c., 87 Am. Dec. 730; *Simmons v. New Bedford etc. Steamboat Co.*, 97 Mass. 368; *Transfer Co. v. Kelly*, 36 Ohio St. 92; *Mann v.*

cases of this character the negligence of two independent persons may concurrently result in injury to a third, in which event the injured party may maintain his action against either or both of the negligent parties.<sup>1</sup> And so the action may be maintained when a predisposition to disease concurs with the negligence of the defendant in producing the injury,<sup>2</sup> but the disease under such circumstances is rather a condition than a cause.<sup>3</sup> And where an existing disease is simply aggravated by the negligence of a defendant the recovery must be limited to compensation for

Weiland, 81½ Pa. St. 256; Otten v. Cohen, 1 N. Y. Supp. 430.

"It is no defence for a person against whom negligence, which caused the injury, is proved, to prove that without fault on his part the same damages would have resulted from the act of another." Slater v. Mersereau, 64 N. Y. 138, citing Webster v. Hudson River R. Co., 38 N. Y. 260; Van Steenburg v. Tobias, 17 Wend. (N. Y.) 562.

1. Carterville v. Cook, 129 Ill. 152; s. c., 16 Am. St. Rep. 248, 250, note (in the note a great number of cases is collected); Grand Trunk R. Co. v. Cummings, 106 U. S. 700; 11 Am. & Eng. R. Cas. 254; Bishop on Non-Contract Law, §§ 39, 450; Slater v. Mersereau, 64 N. Y. 138.

E. g., two independent contractors, were negligent in performing their respective portions of a certain work whereby plaintiff's goods were injured; it could not be ascertained as to the exact degree in which the negligence each contributed to the injury. In all such cases the plaintiff may recover of either or of both of the wrongdoers. The reason of the rule lies in the fact that it is impossible to separate the effects produced by the two concurring causes, and it is unreasonable that plaintiff should be refused redress because he was injured by two or more wrongdoers instead of one. The law considers each of the defendant actors as causing the whole injury. Slater v. Mersereau, 64 N. Y. 138; 2 Thompson on Neg. 1088, § 5; Wabash etc. R. Co. v. Shacklet, 105 Ill. 364; 12 Am. & Eng. R. Cas. 166; s. c., 44 Am. Rep. 791; Cooley on Torts 824; North etc. R. Co. v. Mahoney, 57 Pa. St. 187; Cleveland etc. R. Co. v. Terry, 8 Ohio St. 570; Pittsburgh etc. R. Co. v. Spencer, 98 Ind. 186; 21 Am. & Eng. R. Cas. 478.

But here again confusion must be avoided whereby a remote cause might

be held liable. Thus in the "squib case" many persons participated in the injury, but only the original actor was the real cause. Scott v. Shepherd, 3 Wils. 403; s. c., 1 Smith's L. Cas. 417; Sharpe v. Powell, L. R., 7 C. P. 253.

The principle is as old as the law that in case of joint tortfeasors either or all must be liable, since it is unjust to throw upon plaintiff the burden of showing the separate damage caused by each. If this were true, a party might by uniting others with him commit any degree of wrong and remain free from liability. Cooley on Torts (2nd ed.) [133], 153; Miller v. Fenton, 11 Paige (N. Y.) 18; Turner v. Hitchcock, 20 Iowa 310; Woodbridge v. Conner, 49 Me. 353; Brown v. Perkins, 1 Allen (Mass.) 89; Barden v. Felch, 109 Mass. 154; Page v. Freeman, 19 Mo. 421; Wright v. Lathrop, 2 Ohio 33; Du Bose v. Marx, 52 Ala. 506; Power v. Baker, 27 Fed. Rep. 396. See also, *post*, subtit. PARTIES TO ACTION FOR NEGLIGENCE.

2. McNamara v. Clintonville, 62 Wis. 207; s. c., 51 Am. Rep. 722; Baltimore etc. R. Co. v. Kemp, 61 Md. 74; 18 Am. & Eng. R. Cas. 220; s. c., 48 Am. Rep. 134 (plaintiff had predisposition to cancer); Com. v. Warner, 4 McLean (U. S.) 464; Com. v. Fox, 7 Gray (Mass.) 585; Kitteringham v. Sioux City etc. R. Co., 62 Iowa 285; 18 Am. & Eng. R. Cas. 14; Heirn v. McCaughan, 32 Miss. 17; Mobile etc. R. Co. v. McArthur, 43 Miss. 180; Stewart v. Ripon, 38 Wis. 584; McAllister v. State, 17 Ala. 434; Jewell v. Grand Trunk R. Co., 55 N. H. 84. Compare Pullman Palace Car Co. v. Barker, 4 Colo. 344. This last case, however, has been repudiated in many cases, and never accepted anywhere.

3. McNamara v. Clintonville, 62 Wis. 207; s. c., 51 Am. Rep. 722; Baltimore etc. R. Co. v. Kemp, 61 Md. 74; 18 Am. & Eng. R. Cas. 220; s. c., 48 Am. Rep. 134.

the aggravation, and cannot extend to damages for the existence of the disease itself;<sup>1</sup> while on the other hand the disease cannot be treated as an intervening efficient cause that will make defendant's negligence remote in the chain of causation.<sup>2</sup> This brings us to the consideration of

**VIII. INTERVENING EFFICIENT CAUSES.**—An intervening efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury and itself becomes the direct and immediate—that is, the *proximate* cause of an injury.<sup>3</sup> A mere condition or occasion cannot be considered such a cause—indeed, it is not a cause at all.<sup>4</sup> There may be, as we have just seen, concurrent causes, both of which are proximate, or perhaps more correctly, there may be concurrent causes, both of which in combination are *the* proximate cause of

1. Louisville etc. R. Co. v. Falvey, 104 Ind. 409; 23 Am. & Eng. R. Cas. 522; Louisville etc. R. Co. v. Snyder, 117 Ind. 435; 37 Am. & Eng. R. Cas. 137; Louisville etc. R. Co. v. Jones, 108 Ind. 551; 28 Am. & Eng. R. Cas. 170; Allison v. Chicago etc. R. Co., 42 Iowa 274; Northern etc. R. Co. v. State, 29 Md. 420; CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 31.

2. McNamara v. Clintonville, 62 Wis. 207; s. c., 51 Am. Rep. 722; Heirn v. McCaughan, 32 Miss. 17; Williams v. Vanderbilt, 28 N. Y. 217; Terre Haute etc. R. Co. v. Buck, 96 Ind. 346; 18 Am. & Eng. R. Cas. 234.

3. Bishop on Non-Contract Law, §§ 42, 835, 836; Pennsylvania Co. v. Whitlock, 99 Ind. 16; s. c., 50 Am. Rep. 71; Fairbanks v. Kerr, 70 Pa. St. 86; s. c., 10 Am. Rep. 664. See also Shear. & Red. on Neg., § 31, *et seq.*; Scheffer v. Washington City etc. R. Co., 105 U. S. 249; 8 Am. & Eng. R. Cas. 59; Read v. Nichols, 118 N. Y. 224 (wind an intervening cause, just as in Pa. Co. v. Whitlock, *supra*); Beall v. Township of Athens, 81 Mich. 536; cases in note following.

Thus, in the case of Louisville etc. R. Co. v. Kelsey (Ala. 1890), 7 So. Rep. 648, the plaintiff shipped a stallion in a freight car of the defendant, and to insure ventilation left the door open and nailed strips of plank across the opening. The horse kicked off the strips, escaped uninjured and wandered off some distance, then strayed upon the track and was killed. It was held that the plaintiff's negligence in allowing the horse to escape was not the proximate cause of the injury, the negligence of the railroad company being an inde-

pendent intervening cause fully breaking the connection between the original wrong doing and the injury complained of.

4. Dr. Wharton draws well the distinction between *conditions* and *causes*. See Wharton on Neg., §§ 85, 86. See also Moore v. Abbot, 32 Me. 46; Moulton v. Sanford, 51 Me. 127; Atchison v. King, 9 Kan. 550 (negligent construction of road was the *cause*; the snow and ice there a *condition*); Murdock v. Inhabitants of Warwick, 4 Gray (Mass.) 178; Beven on Neg. 53, 72, 73; Lane v. Atlantic Works, 111 Mass. 140; Lake v. Milliken, 62 Me. 240; Marble v. Worcester, 4 Gray (Mass.) 395; Bishop on Non-Contract Law, §§ 453, 463, 527, 528.

Thus, where a driver left his horse standing unhitched and unattended in the street, he is liable for the injuries caused by the running away of the horse, although the runaway might not have occurred but for the malicious act of a stranger in frightening the animal, and even though the driver did his best to stop the animal after it had started. McCahill v. Kipp, 2 E. D. Smith (N. Y.) 413; Lynch v. Murdin, 1 Ad. & El., N. S. (1 Q. B.) 29; Illidge v. Goodwin, 5 Carr. & P. (Eng.) 192. Similar cases arose. Powell v. Deveny, 3 Cush. (Mass.) 300; s. c., 50 Am. Dec. 738.

**Squib Case.**—The well known squib case is also illustrative of this. There the defendant threw a lighted squib into a crowded market place, and it fell upon the stand of a person having wares exposed for sale. The owner of the wares instantly, in order to save his goods, tossed it away and it fell on a second party, who did likewise, and after repeated similar throwings it fell

the injury,<sup>1</sup> and then, upon familiar principles, the negligent author of one of such causes may be held responsible for the consequences of the causes in combination.<sup>2</sup> But, on the other hand, when an injury may have come from *either* one of two causes, *either* of which may have been the *sole* proximate cause, it devolves on the plaintiff to prove by a preponderance of the evidence that the cause for which the defendant was liable was culpable and *the* proximate cause.<sup>3</sup> An intervening efficient cause sufficient to break the causal connection between the original wrong complained of and the injury may be either culpable or not culpable; accidental or intentional, animate or inanimate.<sup>4</sup> The test is: Was it a new and independent force, acting in and of itself in causing the injury and superseding the original wrong complained of so as to make it remote in the chain of causation; although it may have remotely contributed to the injury as an occasion or condition thereof.<sup>5</sup>

on plaintiff and injured him. Here were many intervening causes yet none broke the continuity of the sequence, since they were all such as a man of ordinary foresight might have anticipated. *Scott v. Sheppard*, 1 Wm. Bl. 892; s. c., 1 Smith's L. C. 417, commented upon in *Cooley on Torts* 71.

Hence it matters not how many causes have intervened, if the defendant's act is still the efficient cause, he is liable for the injury. *McMahon v. Davidson*, 12 Minn. 357; *Nagel v. Missouri etc. R. Co.*, 75 Mo. 653.

1. *Ante*, subtit. COMBINED AND CONCURRENT CAUSES; 2 *Thompson on Neg.* 1085, § 3; *Palmer v. Andover*, 2 Cush. (Mass.) 600; *Austin v. New Jersey etc. Steamboat Co.*, 43 N. Y. 75; s. c., 3 Am. Rep. 663; *Baltimore etc. R. Co. v. School Dist.*, 96 Pa. St. 65; 2 Am. & Eng. R. Cas. 106; *Ellett v. St. Louis etc. R. Co.*, 76 Mo. 518; 12 Am. & Eng. R. Cas. 183; *Slater v. Mersereau*, 64 N. Y. 138 (leading case); *Carterville v. Cook*, 129 Ill. 152; 16 Am. St. Rep. 248, and note; *Wabash etc. R. Co. v. Shacklet*, 105 Ill. 364; 12 Am. & Eng. R. Cas. 166; 44 Am. Rep. 791; *Union etc. R. Co. v. Shacklet*, 119 Ill. 232; 28 Am. & Eng. R. Cas. 193; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700; 11 Am. & Eng. R. Cas. 254; *Webster v. Hudson River R. Co.*, 38 N. Y. 260; *Learned v. Castle*, 78 Cal. 454; *Flaherty v. Minneapolis etc. R. Co.*, 39 Minn. 328; 12 Am. St. Rep. 654; *Pittsburgh etc. R. Co. v. Spencer*, 98 Ind. 186; 21 Am. & Eng. R. Cas. 478.

2. *Slater v. Mersereau*, 64 N. Y. 138; *Ricker v. Freeman*, 50 N. H. 420; s. c.,

9 Am. Rep. 267; *Lane v. Atlantic Works*, 107 Mass. 104; *Weick v. Larder*, 75 Ill. 93; *Bishop on Non-Contract Law*, § 39.

Where two causes of an injury exist, without both of which the accident would not have occurred, and both are due to negligence, one party guilty of negligence cannot render the excuse that he is not liable to plaintiff for damages caused thereby because a third party was also in fault. *Township of Burrell v. Uncapher*, 117 Pa. St. 353.

3. *Patterson's R. Acc. Law* 435; *Searles v. New York Cent. R. Co.*, 101 N. Y. 661, 662; 25 Am. & Eng. R. Cas. 358.

4. *Bishop on Non-Contract Law*, § 453; *Wharton on Neg.*, §§ 114, 155; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16; *Scheffer v. Washington City R. Co.*, 105 U. S. 249; 8 Am. & Eng. R. Cas. 59; *McClary v. Sioux City etc. R. Co.*, 3 Neb. 44; *Louisville etc. R. Co. v. Guthrie*, 10 Lea (Tenn.) 432; 11 Am. & Eng. R. Cas. 478; *West Mahaney Township v. Watson*, 116 Pa. St. 344; 2 Am. St. Rep. 604; *Kitteringham v. Sioux City etc. R. Co.*, 62 Iowa 285; 18 Am. & Eng. R. Cas. 14; *Otten v. Cohen*, 1 N. Y. Supp. 430 (intervening cause an infant under age of discretion).

5. *Milwaukee etc. R. Co. v. Kellogg*, 94 U. S. 469; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 44. In this latter case JUSTICE MILLER observes: "One of the most valuable *criteria* furnished us by these authorities (*i. e.*, cause cited by counsel) is to ascertain whether any new cause has intervened between the fact accomplished and the



**IX. CAUSAL CONNECTION—REMOTE CAUSE.**—From the foregoing sections the distinction between remote and proximate causes may be clearly seen, and it is sufficient here to define a remote cause in the language of Mr. Bishop, as, "one which has so far expended itself that its influence in producing the injury is too minute for the law's notice; or a cause which some independent force merely took advantage of to accomplish something not the probable or natural affect thereof."<sup>1</sup> Hence negligence cannot ordinarily be said to be the proximate cause of an injury when the negligence of another independent human agency has intervened and directly inflicted the injury.<sup>2</sup> But there are circum-

alleged cause. If a new force or power has intervened, of itself, sufficient to stand as the cause of the misfortune, the other must be considered as too remote." *Lewis v. Flint* etc. R. Co., 54 Mich. 55; 18 Am. & Eng. R. Cas. 263; *Seale v. Gulf City* etc. R. Co., 65 Tex. 274; 57 Am. Rep. 602; *Scheffer v. Washington City* R. Co., 105 U. S. 249; 8 Am. & Eng. R. Cas. 59; Bishop on Non-Contract Law, §§ 41-48.

The cause of an injury is in contemplation of law that which immediately produces it as its natural consequence; and therefore if a party be guilty of an act of negligence which would naturally produce an injury to another, but before such injury actually results, a third person does some act which is the immediate cause of the injury, such third person is alone responsible therefor, and the original party is not responsible even though the injury would not have occurred but for his negligence. *Washington v. Baltimore* etc. R. Co., 17 W. Va. 190; 10 Am. & Eng. R. Cas. 749.

1. Bishop on Non-Contract Law, § 41.

The policy of the law in refusing to trace effects back to remote causes is plain. We may trace consequences back to the proximate cause with some degree of certainty, but in going beyond that we enter a field of conjecture and confound the almost certain impossibility of tracing the successive steps backward correctly. Cooley on Torts 69. A pertinent example of a case where the cause was declared remote from having so far expended itself as to become too minute for the law's notice is seen in the case of *Scheffer v. Washington* etc. R. Co.

For example, where by the negligence of a railway company a passenger sustained an injury resulting in insanity, and eight months afterward he

committed suicide, the company could not be made responsible for his death, because the effect was too remote from the alleged cause. Said JUSTICE MILLER: "The argument is not sound which seeks to trace this immediate cause of the death, *i. e.*, the suicide, through the previous stages of mental aberration, physical suffering and eight months' disease . . . to the original accident on the road. Such a course of possible, or even logical, argument would lead back to that great first cause least understood in which the train of all causation ends." *Scheffer v. Washington City* etc. R. Co., 105 U. S. 249, 252; 8 Am. & Eng. R. Cas. 59.

In another case a train was forty-five minutes late; there came a gust of wind which threw it from the track and injured a passenger. The railroad was not liable, because the train's being late was not the proximate cause, but only a remote cause which an independent force took advantage of. *McClary v. Sioux City* etc. R. Co., 3 Neb. 44; *Bodkin v. Western Union Tel. Co.*, 31 Fed. Rep. 134; Bishop on Non-Contract Law, § 43.

Other instances of cases in which the cause was too remote abound. A few may be cited: *Fairbanks v. Kerr*, 70 Pa. St. 86; *Seale v. Gulf City* etc. R. Co., 65 Tex. 274; *Glover v. London* etc. R. Co., L. R., 3 Q. B. 25; *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198; *Pittsburgh* etc. R. Co. v. *Staley*, 41 Ohio St. 118; 19 Am. & Eng. R. Cas. 381; *Louisville* etc. R. Co. v. *Guthrie*, 10 Lea (Tenn.) 432; 11 Am. & Eng. R. Cas. 478; *White v. Conly*, 14 Lea (Tenn.) 51; *Selleck v. Lake Shore* etc. R. Co., 58 Mich. 195; 23 Am. & Eng. R. Cas. 338.

2. Beven on Neg. 53; *Washington v. Baltimore* etc. R. Co., 17 W. Va. 190;

stances under which one negligent person ought to foresee the negligence of another, and in such cases the negligence of the person who might have foreseen the negligence of the other is held proximate and not remote.<sup>1</sup> But mere conditions and occasions that intervene between the original negligence and the injury, although these may be nearest to it in point of time, are remote in the chain of causation.<sup>2</sup>

**X. CONTRIBUTORY NEGLIGENCE.**—This division of the subject has been already fully treated in a previous article.<sup>3</sup>

**XI. COMPARATIVE NEGLIGENCE.**—The doctrine of comparative negligence originated in the courts of Illinois, and has been accepted with various modifications by the courts of three or four other States. It also applies to some extent in Admiralty.<sup>4</sup>

**XII. IMPUTABLE NEGLIGENCE.**—There can be no such thing as imputable negligence, except in cases where that privacy which exists in law between master and servant and principal and agent is found.<sup>5</sup> In order for the negligence of one person to be properly imputable to another, the one to whom it is imputed must

10 Am. & Eng. R. Cas. 749; Hofnagle v. New York etc. R. Co., 55 N. Y. 608; Vicars v. Wilcox, 8 East 1; Cuff v. Newark etc. R. Co., 35 N. J. L. 32; Ashley v. Harrison, 1 Esp. 48.

Where defendant sold gunpowder to a child but the child gave all the powder to its parents, who afterwards allowed the child to take some of it, by the explosion of which he was injured, the defendant was held not liable, since the act of the parents in negligently allowing the child to have the powder was such an intervening act as to break the causal connection between defendant's original act and the injury caused. Carter v. Towne, 98 Mass. 567; s. c., 96 Am. Dec. 682.

In the case of Cuff v. Newark etc. R. Co., 35 N. J. L. 32, it is said: "In other cases the intervention of an independent act of a third person between the wrong complained of and the injury sustained, which was the immediate cause of the injury, is properly made a test of that remoteness of damages which forbids a recovery."

1. Wharton on Neg., § 154; Delaware etc. R. Co. v. Salmon, 39 N. J. L. 299; Carterville v. Cook, 129 Ill. 152; 16 Am. St. Rep. 248, and note.

2. The causes that are merely incidental, or instruments of a superior and controlling agency are not the proximate and controlling ones although they may be nearer in time or place to the result. *Ætna Ins. Co. v. Boon*, 95 U. S. 130; *Shear. & Red. on Neg.*, § 26.

For example, while the immediate cause of an accident may have been the breaking of a chain, an act, the unnecessary doing of which would probably cause the chain to break, may be regarded as the proximate cause of the accident. *King v. Ohio etc. R. Co.*, 25 Fed. Rep. 799; *Shear. & Red. on Neg.*, § 34; *Clark v. Chambers, L. R.*, 3 Q. B. 327; 47 L. J. 427; 38 L. J. 454 (practically overruling *Maugan v. Atterton, L. R.*, 1 Exch. 239; *Lynch v. Murdin*, 1 Q. B. 29; *Beven on Neg.* 88, 89; *Illidge v. Goodwin*, 5 Carr. & P. 190 (horse and cart left in street unattended; third person negligently caused the horse to run; defendant having left the horse unattended was held liable since he might have anticipated just such a result); *Carter v. Towne*, 98 Mass. 567; s. c., 96 Am. Dec. 682.

3. See CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 15, *et seq.* See also *Beach on Contributory Neg.*; *Shear. & Red. on Neg.*, §§ 61-107; *Wharton on Neg.*, § 300, *et seq.*

4. COMPARATIVE NEGLIGENCE, 3 Am. & Eng. Encyc. of Law 367, *et seq.*

5. CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 67-82, § 38; MASTER AND SERVANT, vol. 14, 804, *et seq.* See also PARENT AND CHILD; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615; s. c., 34 Am. Rep. 273 (leading case, but long since overruled); *Shear. & Red. on Neg.*, § 74; *Little v. Hackett*, 116 U. S. 652; *The Bernina (sub nom. Mills v. Armstrong)*,

stand in such a relation of privity to the negligent person that the maxim *qui facit per alium facit per se* is directly applicable.<sup>1</sup> It follows that all the cases in which the negligence of one person has been imputed to another in the absence of just this relation of privity are wrongly decided, and such is the effect of overwhelming recent cases.<sup>2</sup>

**XIII. PRESUMPTIONS AS TO NEGLIGENCE.**—As a rule negligence is not presumed.<sup>3</sup> But there are cases where the maxim *res ipsa*

13 App. Cas. 1; 57 L. J. P. 65; 58 L. T. 423.

1. The subject of imputable negligence, where contributory negligence is imputed, is exhaustively discussed in CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 82-89, and it suffices to refer to that article.

As to imputable negligence, where the negligence imputed is pure negligence, that has also been thoroughly treated in MASTER AND SERVANT, 14 Am. & Eng. Encyc. of Law 804, *et seq.*

2. The leading case on this point is *Thorogood v. Bryan*, which is now repudiated everywhere. See this discussed in CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 82-89.

3. **Negligence Not Presumed.**—The presumption of proper performance of duty which arises in favor of every man, being of universal application, applies in cases of alleged negligence. *Mynning v. Detroit etc. R. Co.*, 59 Mich. 257; 23 Am. & Eng. R. Cas. 317; *Brown v. Congress etc. R. Co.*, 49 Mich. 153; 8 Am. & Eng. R. Cas. 383 (fall from street car platform); *Delaware etc. R. Co. v. Napheys*, 90 Pa. St. 135; 1 Am. & Eng. R. Cas. 52; *Carter v. Columbia etc. R. Co.*, 19 S. Car. 20; 15 Am. & Eng. R. Cas. 414; *Jackson v. Kansas City R. Co.*, 31 Kan. 761; 15 Am. & Eng. R. Cas. 178; *Buesching v. St. Louis Gas Light Co.*, 6 Mo. App. 85; *Heath v. Whitebreast etc. Co.*, 65 Iowa 737; *Kelsey v. Jewett*, 28 Hun (N. Y.) 51; *Federal St. etc. R. Co. v. Gibson*, 66 Pa. St. 83; *Toomey v. Brighton etc. R. Co.*, 3 C. B., N. S. 146, 150; *Button v. Frink*, 51 Conn. 342; 2 Thompson on Neg. 1227, § 3; *Cooley on Torts* (2nd ed.) [664] 797; *Missouri Pac. R. Co. v. Freeman*, 73 Tex. 311; *Parrott v. Wells*, 15 Wall. (U. S.) 524 (nitro-glycerine case).

"It is a rule of the law of evidence, of the first importance, that where the evidence is equally consistent with either the existence or nonexistence of the de-

fendant, it is not competent to the judge to leave the matter to the jury. There must be some affirmative proof of negligence." *Williams, J.*, in *Cotton v. Wood*, 8 C. B., N. S. 568. See also views of *Martin, B.*, in *Briggs v. Oliver*, 4 Hurl. & Colt. 403; s. c., 35 L. J. (Exch.) 163.

A blind man, wishing to go through a certain door on defendant's premises, mistook the door intended and fell down an open hatchway. It was held that he must affirmatively establish defendant's negligence. *Oysterbank v. Gardner*, 49 N. Y. Super. Ct. 263.

A horse ran away on a highway whereby plaintiff was injured. In order to recover it was held that negligence must be affirmatively proven. *Button v. Frink*, 51 Conn. 342; s. c., 50 Am. Rep. 24.

The law will not presume that a plaintiff has been negligent, but when his own evidence tends to create the presumption, the burden is on him to rebut it. *Missouri etc. R. Co. v. Foreman*, 73 Tex. 311.

**Fact of Damage Does Not Raise Presumption of Negligence.**—*East Tennessee etc. R. Co. v. Stewart*, 13 Lea (Tenn.) 432; 21 Am. & Eng. R. Cas. 614; *Philadelphia etc. R. Co. v. Stebbing*, 62 Md. 504; 19 Am. & Eng. R. Cas. 36; *Case v. Chicago etc. R. Co.*, 64 Iowa 762; 19 Am. & Eng. R. Cas. 142; *Louisville etc. R. Co. v. Allen*, 78 Ala. 494; 28 Am. & Eng. R. Cas. 514; *Blanchette v. Border City Mfg. Co.*, 143 Mass. 21; *Barnard v. Philadelphia etc. R. Co.*, 60 Md. 555; 15 Am. & Eng. R. Cas. 484; *Higgs v. Maynard*, 12 Jur., N. S. 707; s. c., *Harr. & Ruth*, 581; 14 Week. Rep. 610; *Huff v. Austin*, 46 Ohio St. 386; *Holbrook v. Utica etc. R. Co.*, 12 N. Y. 236; s. c., 64 Am. Dec. 502, note; 2 Thompson on Neg. 1227, § 3. See also this question discussed in *Wharton on Ev.*, § 359; *post*, *RES IPSA LOQUITUR*.

For example, in one case the body of a person, not an employee of the rail-

*loquitur* is directly applicable, and from the thing done or omitted negligence or care is presumed.<sup>1</sup> So by statute in some States it

road, was found mangled under freight cars that were being switched on to a side track. From finger prints upon the car it looked as if the person had slipped, but no one saw the accident. *Held*, that there was no evidence upon which to hold the railroad company liable. *State v. Baltimore etc. R. Co.*, 58 Md. 221.

A very similar case was where the plaintiff's intestate, an employee of the defendant, was found bruised and dead in a hole which had been cut in the floor of defendant's mill, and in which was water about six feet deep. Upon all the evidence (stated in the opinion), it is held that there are no facts from which the question of the negligence of the deceased can be determined. How he came into the whole and was killed is left wholly to conjecture. So far as appears it was an unaccountable accident and calamity. A nonsuit was, therefore, properly granted. *Sorenson v. Menasha Paper etc. Co.*, 56 Wis. 338.

The true rule is well stated in *Cleveland etc. R. Co. v. Crawford*, 24 Ohio St. 631; s. c., 15 Am. Rep. 633: "*There is no presumption of negligence as against either party except such as arises from the facts proved. Indeed, the presumption of law is that neither party was guilty of negligence, and such presumption must prevail until overcome by proof.*" See also *Mentzer v. Armour*, 18 Fed. Rep. 373; *Smith v. Memphis etc. R. Co.*, 18 Fed. Rep. 304.

1. *Res Ipsa Loquitur*.—This is a favorite phrase in the law concerning presumptions of negligence, and is intended to mean that while negligence is not generally to be presumed from the fact of damage, yet the circumstances under which the injury occurred may be such as to create the presumption. 2 *Thompson on Neg.* 1227-1235. § 3; *Cooley on Torts* 796, *et seq.*; *Shear. & Red. on Neg.*, § 59; *Wharton on Neg.*, §§ 421, 422; *Addison on Torts* 17, 366; *Bigelow on Torts* 596; *Kearney v. London etc. R. Co.*, L. R., 6 Q. B. 759; *Holbrook v. Utica etc. R. Co.*, 12 N. Y. 236; s. c., 64 Am. Dec. 502, note.

In the case of *Scott v. London etc. Docks Co.*, 3 Hurl. & Colt. 596, the doctrine was thus laid down: "There must be some reasonable evidence of negligence. But where the thing is shown to be under the management of the de-

fendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care." See also *Priggs v. Oliver*, 4 Hurl. & Colt. 403; s. c., 35 L. J. (Exch.) 163.

As was well said by POLLOCK, C. B., in *Byrne v. Boadle*, 2 Hurl. & Colt. 722, "A barrel cannot roll out of a warehouse window without some negligence." And "it is not a matter of common occurrence for bricks to come loose and of themselves to fall from the fabric to which they belong." *Cockburn, C. J.*, in *Kearney v. London etc. R. Co.*, L. R., 5 Q. B. 411; 6 Q. B. 759.

Illustrations of the application of this maxim might be multiplied. Thus, negligence may be inferred from the fact of the explosion of a steam boiler on a vessel, even where the owners of the vessel are under no contract obligation to the person injured by the explosion. *Rose v. Stephens & Condit Transp. Co.*, 20 Blatchf. (U. S.) 411; s. c., 11 Fed. Rep. 438; *The Reliance*, 4 Woods (U. S.) 420; s. c., 2 Fed. Rep. 249; *Posey v. Scoville*, 10 Fed. Rep. 140.

But this presumption may be overcome by proof of the application of every test recognized as necessary by experts. It need not be shown that every test known to experts was applied. *Robinson v. New York Cent. etc. R. Co.*, 20 Blatchf. (U. S.) 338.

The fact that the wall of a cistern which was being constructed by a city fell by its own weight, or by the pressure of gravel and earth behind it, placed there by the city, raises a presumption of negligence. *Mulcairns v. Janesville*, 67 Wis. 24.

In an action against a railroad corporation for personal injuries sustained by the plaintiff, while a passenger in the defendant's car, by the fall of a shade of a lamp affixed to the upper part of the car, the only evidence that the fall was occasioned by the defendant's negligence was the fact of the fall while the lamp was not lighted—*held*, that, in the absence of evidence of any other cause of the accident, the jury were authorized to infer that the fall was caused by the insufficiency of the

fixture. *White v. Boston etc. R. Co.*, 144 Mass. 404; 30 Am. & Eng. R. Cas. 615.

Where a passenger on a street railway car is injured by a sudden jerk of the car, in transit, there is a presumption of negligence on the part of the carrier. *Dougherty v. Missouri R. Co.*, 81 Mo. 325; 21 Am. & Eng. R. Cas. 497; s. c., 51 Am. Rep. 239.

*Prima facie*, the fact that a bridge gives way when a train is passing over it shows negligence. *Bedford etc. R. Co. v. Rainbolt*, 99 Ind. 551; 21 Am. & Eng. R. Cas. 466.

An accident may be of such a character as of itself to show negligence; as, for instance, where, in removing a cargo of ore from a vessel in a large bucket, the bucket tips over. *Cummings v. National Furnace Co.*, 60 Wis. 603.

And where a railroad accident, caused by the cars leaving the track, occurs the presumption of negligence arises by virtue of this maxim. *Seybolt v. New York etc. R. Co.*, 95 N. Y. 562; 18 Am. & Eng. R. Cas. 162.

Where a person is in the proper exercise of a right and is injured by the action of another, the maxim applies, and the presumption arises that the injurer was guilty of negligence. Thus, in the famous case of *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, a traveller in the highway is injured by a hot cinder falling from defendant's locomotive, negligence on the part of defendant was to be presumed since plaintiff was interfered with in the proper exercise of a natural right. See also *Wiedmer v. New York Elevated R. Co.*, 41 Hun (N. Y.) 284.

A very similar case was *Kinney v. London etc. R. Co.*, L. R., 5 Q. B. 411. There the plaintiff was passing along the highway under a bridge which it was the duty of the defendants to maintain and keep in repair. A brick becoming loose in some way fell and injured plaintiff. It was considered that the falling of the brick was *prima facie* evidence of negligence on the part of the defendants.

Again, where plaintiff is passing along a street and an adjoining building falls down and injures him, it being the duty of the owner of the building to prevent such falling, and since buildings do not fall of themselves ordinarily, the clear presumption to every fair mind is that the building was either negligently built or that it

was not properly kept up. *Mullen v. St. John*, 57 N. Y. 567; *Vincent v. Cook*, 4 Hun (N. Y.) 318.

And where experience has demonstrated that a certain business may be carried on and certain machinery used without causing damage, if reasonable care is exercised, then the fact of damage may be sufficient under such circumstances to show negligence according to the maxim stated. *Mulcairns v. Janesville*, 67 Wis. 24; *Piggott v. Eastern etc. R. Co.*, 3 C. B. 229; *Cooley on Torts* (2nd ed.) [592] 703, [662] 794.

Thus the fact that a car, within a short distance, was twice derailed, shows *prima facie* negligence. *Texas etc. R. Co. v. Suggs*, 62 Tex. 323.

**Fires from Railroad Engines.**—This last principle is most often applied in case of damage by fire caused by sparks from steam engines. The rule is established that where property is damaged by fire having escaped from a passing engine, the fact of damage under the circumstances is *prima facie* evidence of defendant's negligence, even where there is no statute concerning such cases. *Louisville etc. R. Co. v. Reese*, 85 Ala. 497; 38 Am. & Eng. R. Cas. 342, 345, note; *Galveston etc. R. Co. v. Horne*, 69 Tex. 643; s. c., 35 Am. & Eng. R. Cas. 238, 242, note; *Tilley v. St. Louis etc. R. Co.*, 49 Ark. 535; 32 Am. & Eng. R. Cas. 324; *Spaulding v. Chicago etc. R. Co.*, 30 Wis. 110; s. c., 11 Am. Rep. 550; *Clevelands v. Grand Trunk R. Co.*, 42 Vt. 449. Compare *Ruffner v. Cincinnati etc. R. Co.*, 34 Ohio St. 96.

The cases on this point are all collected and classified in **FIRES BY RAILWAYS**, 8 Am. & Eng. Encyc. of Law 10, 11, which see. See also **RAILWAY COMPANIES**. The later cases may be found in notes to *Galveston etc. R. Co. v. Horne*, 69 Tex. 643; 35 Am. & Eng. R. Cas. 242.

**Engines Burning Wood.**—Where it is shown that the use of wood for fuel in an engine materially increases the danger of setting fire to adjacent premises, an instruction that such use of wood is negligence is not error. *Chicago etc. R. Co. v. Ostrander*, 115 Ind. 266; s. c., 38 Am. & Eng. R. Cas. 346, 348, note.

**Presumption Must Arise from Fact.**—A presumption from a presumption is contrary to law; the law permits inferences from other facts, but never from presumptions; therefore in all cases where a presumption is claimed to arise it must arise from an established

is provided that in certain cases proof of injury shall raise a presumption of negligence which it devolves upon the defendant to rebut.<sup>1</sup> And, as we have already seen, the violation of a statutory

fact. See *Douglass v. Mitchell*, 35 Pa. St. 443; *Philadelphia etc. R. Co. v. Henrice*, 92 Pa. St. 434; s. c., 37 Am. Rep. 699; 4 Am. & Eng. R. Cas. 544; *Sorenson v. Menasha Paper etc. Co.*, 56 Wis. 338; *Manning v. John Hancock Mut. L. Ins. Co.*, 100 U. S. 693; *Cleveland etc. R. Co. v. Wynant*, 114 Ind. 525; 35 Am. & Eng. R. Cas. 328.

1. **Presumption Created by Statute.**—In *Mississippi* and *Georgia*, and to a limited extent in other States, it is provided by statute that upon proof of injury by a railway company the presumption shall be that the company was guilty of negligence, and that the fact of such injury shall constitute *prima facie* evidence of defendant's want of care. In *Mississippi* (Code of Miss. 1880, § 1059), it is provided that "in actions against railroad companies for damage done to persons or property, proof of injury inflicted by the running of the cars or locomotives of such company shall be *prima facie* evidence of want of reasonable skill and care." This has been held not to apply to suits arising *ex contractu*, as by shippers or passengers. *Chicago etc. R. Co. v. Trotter*, 60 Miss. 442.

The presumption is not overcome by simply proving that the whistle was heard blowing at the time of the accident. *Mobile etc. R. Co. v. Dale*, 61 Miss. 206; s. c., 20 Am. & Eng. R. Cas. 651. Compare *Jones v. Bond*, 40 Fed. Rep. 281.

And the fact that a precedent wrong on the part of the injured person produced the conditions which resulted in the injury does not prevent the application of the statute. *Vicksburg etc. R. Co. v. Phillips*, 64 Miss. 693; s. c., 30 Am. & Eng. R. Cas. 587.

In *Georgia* it is provided by section 3033 of the code that the presumption of a railway company's negligence shall arise in case of *any* injury to persons or property. *Columbus etc. R. Co. v. Kennedy*, 78 Ga. 646; s. c., 31 Am. & Eng. R. Cas. 92; *Central R. Co. v. Brinson*, 64 Ga. 475; 8 Am. & Eng. R. Cas. 343; *Vickers v. Atlanta etc. R. Co.*, 64 Ga. 306; 8 Am. & Eng. R. Cas. 337; *East Tennessee etc. R. Co. v. Hartley*, 73 Ga. 5; *Brunswick etc. R. Co. v. Hoover*, 74 Ga. 426.

And in *Columbus etc. R. Co. v. Ken-*

*nedy*, 78 Ga. 646; 31 Am. & Eng. R. Cas. 92, this statutory presumption was held strengthened by the presumption of fact arising from a failure of company to produce material witnesses.

This statutory presumption is not rebutted by proof that a locomotive engineer blew the whistle through a spirit of revenge towards a traveller, to frighten his horse. *Georgia R. Co. v. Newsome*, 60 Ga. 492.

It will be noticed that in *Mississippi* and *Georgia* the presumption against the railway company arises in *all cases of injury* by such company. In other States the presumption arises only in case of injury to property by fire.

In *Minnesota*, by Gen. Stat. 1878, ch. 34, § 60, the presumption of negligence is against the defendant where injury to *property* is caused by fire thrown out from the engine. *Karsen v. Milwaukee etc. R. Co.*, 29 Minn. 12; s. c., 7 Am. & Eng. R. Cas. 501; *Siblerud v. Minneapolis etc. R. Co.*, 29 Minn. 58; 7 Am. & Eng. R. Cas. 499; *Johnson v. Chicago etc. R. Co.*, 31 Minn. 57; s. c., 13 Am. & Eng. R. Cas. 460. See also FIRES BY RAILWAYS, 8 Am. & Eng. Encyc. of Law 10, *et seq.*

The statute provides in words, "All railroad companies . . . operating . . . steam engines over roads in this State shall be liable to any party aggrieved for all damages caused by fire . . . thrown from such engine, without the owner or owners of the property so damaged being required to show defects in their engines or negligence on the part of their employees; but the fact of such fire being scattered or thrown shall be construed . . . as *prima facie* evidence of such negligence or defect." Gen. Stat. (1878), ch. 34, § 60.

In *Iowa* by the code (§ 1289), when damage has been occasioned by a fire set in operating a railroad, the presumption is that the railroad company is guilty of negligence, and an allegation of negligence in a petition to recover damage therefor is therefore redundant. See *Engle v. Chicago etc. R. Co.* (Iowa, 1888), 37 N. W. Rep. 6; *Smith v. Hummeston etc. R. Co.* (Iowa, 1889), 43 N. W. Rep. 545.

It is held that this statute makes the fact of an injury so occurring only

duty is in itself evidence of negligence,<sup>1</sup> and sometimes raises a presumption of negligence which the defendant must overcome by proof.<sup>2</sup> Although in such cases it should always appear to create liability that the violation of the statute was the proximate cause of injury,<sup>3</sup> except when the statute is penal in its character, and provides that when it is violated and an injury happens during the violation, which such violation *might* have caused, it shall be conclusively presumed to have been the cause.<sup>4</sup> Presumptions in cases of contributory negligence have been treated elsewhere.<sup>5</sup>

*prima facie* evidence of negligence, which may be rebutted by proof of due care. *Small v. Chicago etc. R. Co.*, 50 Iowa 338; *Slosson v. Burlington etc. R. Co.*, 51 Iowa 294.

In Other States.—A statute similar to, if not exactly like, that in *Minnesota* is found in *Illinois*, *Missouri*, *Wisconsin*, *Nebraska*, *Nevada*, *Maryland* and *Utah*, applying to fires started by locomotives. See *Chicago etc. R. Co. v. Clampt*, 63 Ill. 95; *Pittsburgh etc. R. Co. v. Campbell*, 86 Ill. 443; *Annapolis etc. R. Co. v. Gantt*, 39 Md. 115; *Baltimore etc. R. Co. v. Shipley*, 39 Md. 251; *Anderson v. Wasatch etc. R. Co.*, 2 Utah 518; *Fitch v. Pacific R. Co.*, 45 Mo. 325; *Bedford v. Hannibal etc. R. Co.*, 46 Mo. 456; *Spaulding v. Chicago etc. R. Co.*, 30 Wis. 110; *Burlington etc. R. Co. v. Westover*, 4 Neb. 268; *Lougaugh v. Virginia City etc. R. Co.*, 9 Nev. 271; 1 *Thomp. on Neg.* 153, (3).

In *Tennessee* it is held that the provision of the Tenn. Code, §§ 1166, 1169, that when it is established that stock has been killed or injured by a railroad company, the *onus* is upon the company of showing that the injury was the result of unavoidable accident, is simply the announcement of a common law principle. *Horne v. Memphis etc. R. Co.*, 1 *Coldw. (Tenn.)* 72; *East Tennessee etc. R. Co. v. Pratt*, 85 Tenn. 9.

But this may well be questioned. See 1 *Thomp. on Neg.* 153, § 8, (3).

In *England* and in *Federal Courts*.—It is provided by statute in *England* that in case of fires by locomotives, injury by such fires shall constitute *prima facie* evidence of negligence. See 1 *Thompson on Neg.* 155, (3).

In the *United States* it is provided (§ 13, act of July 7th, 1838; 5 U. S. Stat. at Large 306) that "in all suits and actions against proprietors of steamboats, for injuries arising to person or prop-

erty from the bursting of the boiler of any steamboat, or the collapse of a flue, or other injurious escape of steam, the fact of such bursting, collapse, or injurious escape of steam, shall be taken as full *prima facie* evidence, sufficient to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment." See also *Bradley v. Northern Transp. etc. Co.*, 15 Ohio St. 553.

1. *Ante*, subtit. III, 8, (b), CREATED BY STATUTE; 2 *Thomp. on Neg.* 904; *Shear. & Red. on Neg.*, § 13; *Faber v. St. Paul etc. R. Co.*, 29 Minn. 465; s. c., 8 Am. & Eng. R. Cas. 277; *Philadelphia etc. R. Co. v. Stebbing*, 62 Md. 504; s. c., 19 Am. & Eng. R. Cas. 36.

2. *Shear. & Red. on Neg.*, §§ 11, 13, 27; 2 *Thompson on Neg.* 1231, § 5; *Cooley on Torts* [664] (2nd ed.) 798; *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Worcester v. Proprietors of Canal Bridge*, 16 Pick. (Mass.) 541; *Karle v. Kansas City etc. R. Co.*, 55 Mo. 476.

3. *Pennsylvania R. Co. v. Hensil*, 70 Ind. 569; s. c., 36 Am. Rep. 188; 6 Am. & Eng. R. Cas. 79; *Billing v. Breinig*, 45 Mich. 65; *Philadelphia etc. R. Co. v. Stebbing*, 62 Md. 504; s. c., 19 Am. & Eng. R. Cas. 36; *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 240; 13 Am. & Eng. R. Cas. 394; *Quincy etc. R. Co. v. Wellhoener*, 72 Ill. 60.

4. It is believed that the construction of a statute holding that proof of a violation of the statute at the time of the injury is conclusive evidence of defendant's liability, is found only in *Tennessee R. Co. v. Walker*, 11 Heisk. (Tenn.) 383; *Nashville etc. R. Co. v. Thomas*, 5 Heisk. (Tenn.) 262; *Collins v. East Tenn. etc. R. Co.*, 9 Heisk. (Tenn.) 841; *CROSSINGS*, 4 Am. & Eng. Encyc. of Law 922, note.

5. CONTRIBUTORY NEGLIGENCE, 4

**XIV. BURDEN OF PROOF.**—Apart from the discussion of presumptions regarding negligence, the doctrines in relation to the burden of proof are not difficult.<sup>1</sup>

In the absence of any presumption of defendant's negligence the plaintiff must prove by a fair preponderance of the evidence facts which establish the negligence of the defendant as the proximate cause of his injury,<sup>2</sup> and having done this he is entitled to

Am. & Eng. Encyc. of Law 76, *et seq.*

1. See BURDEN OF PROOF, 2 Am. & Eng. Encyc. of Law; OPEN AND CLOSE, vol. 17. See also 2 Thompson on Neg. 1232-35; Shear. & Red. on Neg., § 57, *et seq.*

**Burden Upon Plaintiff Usually.**—See authorities in note immediately *supra*. See also Wharton on Ev., § 359, and cases cited; Brown v. Congress etc. R. Co., 49 Mich. 153; s. c., 8 Am. & Eng. R. Cas. 383; Oysterbank v. Gardner, 49 N. Y. Super. Ct. 263; Button v. Frink, 51 Conn. 342; Hershberger v. Lynch (Pa. 1887), 11 Atl. Rep. 642; Mymning v. Detroit etc. R. Co., 67 Mich. 67; Deikman v. Morgan etc. Steamship Co., 40 La. An. 787; McCully v. Clarke, 40 Pa. St. 399; s. c., 80 Am. Dec. 584.

**Remains Throughout the Trial.**—The burden of sustaining the affirmative of the issue remains with plaintiff throughout the trial, generally, and the jury must be satisfied from the whole case that the allegation is established. Heine-man v. Heard, 62 N. Y. 448; Dowell v. Guthrie, 99 Mo. 653.

**2. Plaintiff Must Establish His Case by a Preponderance of Evidence.**—Seybolt v. New York etc. R. Co., 95 N. Y. 562; s. c., 47 Am. Rep. 75; 18 Am. & Eng. R. Cas. 162; Crandall v. Goodrich Transp. Co., 16 Fed. Rep. 75; Allen v. Willard, 57 Pa. St. 374; McCaig v. Erie R. Co., 8 Hun (N. Y.) 599; Searles v. Manhattan R. Co., 101 N. Y. 661; 25 Am. & Eng. R. Cas. 358; Holbrook v. Utica etc. R. Co., 12 N. Y. 236; s. c., 64 Am. Dec. 502.

Therefore, an instruction that, if all the evidence satisfied the jury that there had been negligence on the part of the defendants, although they might not be able to satisfy themselves in what the negligence consisted, they would be authorized to find a verdict for the plaintiff, is erroneous. If there appear to the jury no reasonable ground upon which to impute negligence to defendant, they should return a verdict in his favor. McCaig v. Erie R. Co., 8

Hun (N. Y.) 599; Searles v. Manhattan R. Co., 101 N. Y. 661; 25 Am. & Eng. R. Cas. 358; Crandall v. Goodrich Transp. Co., 16 Fed. Rep. 75.

When the plaintiff has shown such a situation as could not have been produced except by the operation of abnormal causes, he has sufficiently established his case, and the burden then rests upon defendant to prove that the injury was caused without his fault. Seybolt v. New York etc. R. Co., 95 N. Y. 562; s. c., 47 Am. Rep. 75; 18 Am. & Eng. R. Cas. 162; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 291; Edgerton v. New York etc. R. Co., 39 N. Y. 227.

In the case of Daniel v. Metropolitan R. Co., L. R., 3 C. P. 216, 591; 5 H. L. 45, WILLES, J., observes: "It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is a reasonable probability that the accident resulted from the want of some precaution which defendant might and ought to have resorted to; and I go further and say that the plaintiff should also show with reasonable certainty what particular precaution should have been taken." And this opinion has been approved in several cases. Hayes v. Michigan Cent. R. Co., 111 U. S. 228, 241; 15 Am. & Eng. R. Cas. 394; Philadelphia etc. R. Co. v. Stibbing, 62 Md. 504; 19 Am. & Eng. R. Cas. 36; Williams v. Great Western R. Co., L. R., 9 Exch. 157.

In short, the fact shown must be more consistent with the negligence of the defendant than with the absence of it. Toomey v. Brighton etc. R. Co., 3 C. B., N. S. 146, 150.

Where the facts proved make it probable that defendant violated his duty, it is for the jury to say whether he did or no. To maintain otherwise would be to deny the value of circumstantial evidence. Shear. & Red. on Neg., § 58.

**Not Bound to Establish It Beyond a Reasonable Doubt.**—Plaintiff is not bound, however, to establish his case



beyond a reasonable doubt, or so as to exclude every other possible theory. *Whitney v. Clifford*, 57 Wis. 156; *Seybolt v. New York etc. R. Co.*, 95 N. Y. 562; s. c., 47 Am. Rep. 75; 18 Am. & Eng. R. Cas. 162; *Welch v. Jugenheimer*, 56 Iowa 11; s. c., 41 Am. Rep. 77; *Ellis v. Buzzell*, 60 Me. 209; s. c., 11 Am. Rep. 204; *Elliot v. Van Buren*, 33 Mich. 49; s. c., 20 Am. Rep. 668; *Cooley on Torts* (2nd ed.) [288] 243.

Therefore, an instruction that every material fact alleged by the plaintiff must appear from the evidence "to the satisfaction of the jury," is erroneous; they need only be satisfied with a preponderance of the evidence. *Stratton v. Central City Horse R. Co.*, 95 Ill. 25; s. c., 1 Am. & Eng. R. Cas. 115.

The universal rule of civil cases in this regard applies to the cases under consideration here, and the rule is not changed because of the fact that the act upon which the action for negligence is based is one which will render the actor liable to a criminal indictment.

Thus, in the case of *Barton v. Thompson*, 46 Iowa 30; s. c., 26 Am. Rep. 131, it was asserted that in a civil action for damages for an act which was also indictable as a crime, the same degree of proof is required to establish the cause of action as would be required to warrant a conviction upon an indictment for the same offence. But in a later case in the same court (*Welch v. Jugenheimer*, 56 Iowa 11; s. c., 41 Am. Rep. 77) the case of *Barton v. Thompson* (*supra*) was distinctly declared to be wrongly decided and was, therefore, overruled, and the principle stated above was established. The court, in this case, reviewed at length all the authorities upon the subject, and the opinion constitutes a valuable dissertation upon this principle of the law.

The doctrine stated is also sustained by the cases following: *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697; s. c., 23 Am. Rep. 239; *Ellis v. Buzzell*, 60 Me. 209; s. c., 11 Am. Rep. 204; *Elliot v. Van Buren*, 33 Mich. 49; s. c., 20 Am. Rep. 668; *Blaeser v. Milwaukee Ins. Co.*, 37 Wis. 31; s. c., 19 Am. Rep. 747; *Bradish v. Bliss*, 35 Vt. 326; *Munson v. Atwood*, 30 Conn. 102; *Jones v. Graves*, 26 Ohio St. 2; 20 Am. Rep. 752; *Etna Ins. Co. v. Johnson*, 11 Bush (Ky.) 587; s. c., 21 Am. Rep. 223; *Young v. Edwards*, 72 Pa. St. 267; *Hoffman v. Western M. & F. Ins. Co.*, 1 La. An. 216; *Schmidt v. New York etc. Mut. F. Ins.*

*Co.*, 1 Gray (Mass.) 529; *Bissell v. Wert*, 35 Ind. 54; 2 Whart. on Ev., § 1246; *Cooley on Torts* 208; *Proffatt on Jury Trial*, § 335.

The doctrine opposed to this, and supported by *Barton v. Thompson*, was first set forth in *Thurtell v. Beaumont*, 1 Bing. (8 E. C. L. 531) 339. This case is cited and approved in 2 *Greenleaf on Ev.*, § 408; *Taylor on Ev.* 97; *Bishop on Mar. & Div.*, § 644. A few cases have also approved it, viz: *Thayer v. Boyle*, 30 Me. 475; *Butman v. Hobbs*, 35 Me. 228; *McConnell v. Delaware etc. Mut. Ins. Co.*, 18 Ill. 228; *Price v. Security Ins. Co.*, 29 Wis. 270.

But as seen from the authorities cited previously, the doctrine can no longer be maintained. Indeed, of the original case it has been said: "The decision on this point in *Thurtell v. Beaumont* was made on application for a rule and without much consideration. It has never received approbation in the English courts, although . . . repeated occasions have arisen for its adoption and application." *DEPREW, J.*, in *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697; s. c., 23 Am. Rep. 239.

**Amount of Proof—Must Establish Every Element.**—By reference to the first sections of this article it will be noted that negligence is defined as consisting of certain elements, each one essential to constitute an act a ground for actionable negligence. As to the amount of proof which the plaintiff must adduce, the rule may be stated that he must establish the existence of every element.

Plaintiff must establish, (1) Want of ordinary care on part of defendant; (2) Defendant's duty to him (plaintiff) to use such care; (3) Damage to himself; (4) That the failure to observe ordinary care was the cause, the *proximate* cause, of such damage.

Thus, where there was evidence of want of care and other elements, the plaintiff lost his case in failing to show that the act was the *proximate* cause of his injury. *Pennsylvania Co. v. Hensail*, 70 Ind. 569; s. c., 36 Am. Rep. 188; 6 Am. & Eng. R. Cas. 79; *Philadelphia etc. R. Co. v. Boyer*, 97 Pa. St. 91; 2 Am. & Eng. R. Cas. 172; *Crandall v. Goodrich Transp. Co.*, 16 Fed. Rep. 75.

So, mere evidence that the chain used by a ferry boat to prevent the premature egress of passengers had been removed, but not by the servant in charge, is not sufficient to prove negligence on the part of the ferry company. *Joy v. Winnisimmet Co.*, 114 Mass. 63.

recover except in those jurisdictions which hold that he must also take the burden of negating contributory negligence on his own part.<sup>1</sup> Even in such jurisdictions, however, it is sufficient, if having alleged in his declaration or complaint that he was without fault himself he is able to establish the negligence of defendant by evidence which at the same time shows no default on his own part and *prima facie* proves him to have been in the exercise of due care.<sup>2</sup> Questions relating to the burden of proof in cases of contributory negligence have been fully treated elsewhere.<sup>3</sup> When the plaintiff has introduced evidence of negligence sufficient as a matter of law to charge defendant with liability, or has shown such a state of facts as creates a presumption of negligence, the burden of proof shifts to defendant.<sup>4</sup>

**XV. EVIDENCE OF NEGLIGENCE—GENERAL RULES.**—To state the numberless decisions which have been made as to the relevancy

Where the evidence discloses that goods were injured by two different causes, for only one of which defendant is responsible, the burden of proof is on the plaintiff to show the damage occasioned by the latter cause. *Priest v. Nichols*, 116 Mass. 401.

But the plaintiff is not required to show the precise cause; if he shows that the injury is attributable to one or another of several causes, for each of which defendant is responsible, he is entitled to recover. *Bevier v. Delaware etc. Canal Co.*, 13 Hun (N. Y.) 254.

Such an instance frequently arises where fire is caused from the sparks from several engines. Plaintiff need not show what particular engine emitted the sparks. *Sheldon v. Hudson River etc. R. Co.*, 14 N. Y. 218; s. c., 29 Barb. (N. Y.) 226; s. c., 67 Am. Dec. 155.

Where a presumption against the defendant exists plaintiff need only establish those elements to which no presumption attaches. Thus, a violation of an ordinance or statute constitutes evidence of a want of ordinary care, and where such is the case, proof of the element of want of ordinary care may be omitted. See, *ante*, subtit. **CREATED BY STATUTE.** See also *Briggs v. New York Cent. R. Co.*, 72 N. Y. 26; *Augusta etc. R. Co. v. McElmurry*, 24 Ga. 75; *Pennsylvania Co. v. Hensil*, 70 Ind. 569; s. c., 36 Am. Rep. 188; 6 Am. & Eng. R. Cas. 79.

Thus in some jurisdictions the mere happening of an injury raises a presumption against a carrier of passengers of want of care; yet an action for such injury will not be sustained by evi-

dence of carelessness or negligence which does not conduce to the injury itself. *Tennery v. Pippinger*, 1 Phila. (Pa.) 543.

1. Burden of negating contributory negligence on his own part is cast upon the plaintiff in a number of jurisdictions. *Cincinnati etc. R. Co. v. Butler*, 103 Ind. 31; s. c., 23 Am. & Eng. R. Cas. 262; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *State v. Maine Cent. R. Co.*, 76 Me. 357; s. c., 49 Am. Rep. 622; s. c., 19 Am. & Eng. R. Cas. 312; *Vicksburg v. Hennessy*, 54 Miss. 391; *Moore v. Mayor etc. of Shreveport*, 3 La. An. 645; *Button v. Frink*, 51 Conn. 342; *Greenleaf v. Illinois etc. R. Co.*, 29 Iowa 14; s. c., 4 Am. Rep. 181; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; s. c., 47 Am. Rep. 425. See many other cases cited in **CONTRIBUTORY NEGLIGENCE**, 4 Am. & Eng. Encyc. of Law 91. Compare *Hough v. Texas etc. R. Co.*, 100 U. S. 213, and numerous other cases cited in 4 Am. & Eng. Encyc. of Law, note 5, p. 91.

2. *Cleveland etc. R. Co. v. Crawford*, 24 Ohio St. 631; s. c., 15 Am. Rep. 633; *Adams v. Young*, 44 Ohio St. 80; s. c., 58 Am. Rep. 789; *Pierce on Railroads* 320; *Cooley on Torts* 673.

3. **CONTRIBUTORY NEGLIGENCE**, 4 Am. & Eng. Encyc. of Law 91, 92. See also *Shear. & Red. on Neg.*, §§ 107, 110.

4. **Burden of Proof Shifts.**—*Pennsylvania Canal Co. v. Bentley*, 66 Pa. St. 30; 2 *Thompson on Neg.* 1235, § 8; *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311; *Bischoff v. Schulz*, 5 N. Y. Super. 757; *Giles v. Diamond State Iron Co.* (Del. 1887), 8 Atl. Rep. 368;

or admissibility of certain evidence in negligence cases would be an almost impossible task; the general rules governing the admission of evidence in civil cases apply as well to the subject under consideration as elsewhere.<sup>1</sup> Ordinarily it is not allowable in an action for negligence to introduce evidence of other disconnected, though similar, acts of negligence by the same party;<sup>2</sup> therefore, where the negligence of an employee on a particular occasion is in question, it is irrelevant to prove that he had been

Shear. & Red. on Neg., §§ 57, 58. Compare *Atkinson v. Goodrich Transp. Co.*, 69 Wis. 5.

By "such a state of facts as creates," etc., as used in the text, is meant this: An individual is run over and seriously injured by a train running through the city at a rate much faster than is allowed by statute. Proof of this too-fast speed and of damage to himself is sufficient in law to establish plaintiff's claim, and therefore the burden is shifted to defendant to show his want of negligence. See, *ante*, subtit. CREATED BY STATUTE. See also Shear. & Red. on Neg., § 58.

1. See 1 Wharton on Ev., §§ 40-44; 1 Greenleaf on Ev., § 49, note c, p. 72, of 14th ed.

2. Evidence of Similar Disconnected Acts Inadmissible.—1 Wharton on Ev., §§ 29-40; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 279 (bailees-banker); *Gahagan v. Boston etc. R. Co.*, 1 Allen (Mass.) 187; s. c., 79 Am. Dec. 724 (injury by R. Co. on highway); *Baltimore Elevator Co. v. Neal*, 65 Md. 438; *Wentworth v. Smith*, 44 N. H. 419 (negligent postmaster); *Louisville R. Co. v. Fox*, 11 Bush (Ky.) 493.

Compare *Parkinson v. Nashua etc. R. Co.*, 61 N. H. 416, where it is held that it is competent to show that the party charged with negligence had performed or omitted the same act in the same way before, as tending to show that he did or omitted the act at the time in question. Also *Wentworth v. Smith*, 44 N. H. 419; *Ford v. Parker*, 4 Ohio St. 576; *State v. Railroad*, 52 N. H. 528.

And even where the "negligent habit" of a railroad corporation is to be shown as bearing on the question of its negligence in a particular instance, the evidence in support of the "habit" should be limited to near the time of the act. *Davidson v. St. Paul etc. R. Co.*, 34 Minn. 51; 23 Am. & Eng. R. Cas. 352.

Character of the precise act or omis-

sion of defendant and not his character for care, etc., determines whether there has been actionable negligence on his part. *McDonald v. Savoy*, 110 Mass. 50; *Robinson v. Fitchburg etc. R. Co.*, 7 Gray (Mass.) 92.

Careless Driving—Previous Habits—Skill.—In an action for injuries caused by defendant's careless driving, it is not competent, on cross-examination of the plaintiff, to ask him as to his own habits of running horses on the highway, or of being intoxicated while driving, if it is not claimed that he was indulging either of the habits at the time of the injury. *Hill v. Snyder*, 44 Mich. 318.

Where an injury is caused by the alleged negligence of the driver, it is competent to introduce evidence of the driver's want of skill before and after the accident. *Sanderson v. Frazier*, 8 Colo. 79; s. c., 54 Am. Rep. 544. Compare *Dunham v. Rackliffe*, 71 Me. 345 (reputation of driver).

Where reckless driving of defendant's team is alleged, the disposition of the team as to racing may be shown. *Schaefer v. Osterbrink*, 67 Wis. 495.

In the case of *Robinson v. Fitchburg etc. R. Co.*, 7 Gray (Mass.) 92, the court has to say: "Evidence of specific acts of negligence and carelessness on the part of the engineer in running the train on other occasions than the one in question was clearly incompetent. It would not only lead to collateral enquiries, and so distract and mislead the jury from the true issue before them, but it had no legal or logical tendency to prove the point in issue. Because a man was careless or negligent of his duty in one or two specific instances, it does not follow that he was so at another time and under different circumstances. *Collins v. Inhabitants of Dorchester*, 6 Cush. (Mass.) 396. The plaintiff did not offer to prove the general character of the engineer for care and skill in business. Such testimony would have certainly been less objec-

negligent on other previous occasions.<sup>1</sup> But this, like all other rules, is subject to a seeming exception; thus, in order to show culpable negligence on the part of a railroad company in the employment of its servants it may be shown that such employees have been guilty of specific acts of carelessness, unskilfulness and incompetency, and that such acts were known to the officers of the company prior to the employment of such agents, or that such agents or employees had been retained in service after notice of such acts.<sup>2</sup> Evidence that after the occurrence of the injury the defendant repaired the place where the injury occurred, or discharged a negligent servant, is inadmissible, since to admit such evidence would be to place a premium upon the continuance of negligence.<sup>3</sup>

It is no proof of the exercise of proper care by the defendant, on the particular occasion, that other persons had passed over or by the same place safely, and evidence to establish such fact is

tionable though not perhaps competent."

1. *Wharton on Ev.*, § 40; *Gahagan v. Boston etc. R. Co.*, 1 Allen (Mass.) 187; s. c., 79 Am. Dec. 724 (injury by R. Co. on highway); *Robinson v. Fitchburg etc. R. Co.*, 7 Gray (Mass.) 92. Compare *Peterson v. Adamson*, 67 Iowa 739 (skill of defendant's agent attacked).

This rule is but reasonable, since defendant cannot be allowed to show his previous general carefulness as an excuse for his conduct at the time in question. *Tenney v. Tuttle*, 1 Allen (Mass.) 185.

Where the question is as to the negligence of an engineer at the time of a collision of two trains, evidence of general incapacity of the engineer, or of his being subject to fits, is immaterial. The question is as to his conduct upon this special occasion. *Central R. etc. Co. v. Roach*, 64 Ga. 635; 8 Am. & Eng. R. Cas. 79.

So also evidence of the general reputation of the servant as a reckless driver, or that he had been careless on other occasions, is inadmissible. *Jacobs v. Duke*, 1 E. D. Smith (N. Y.) 271; *Dunham v. Rackliffe*, 71 Me. 345.

2. *Pittsburgh etc. R. Co. v. Ruby*, 38 Ind. 318; s. c., 10 Am. Rep. 111; *Delphi v. Lowery*, 74 Ind. 525; *Vicksburg etc. R. Co. v. Patton*, 31 Miss. 156; s. c., 66 Am. Dec. 552, 574, note (cattle run over by engine); *Louisville etc. R. Co. v. Collins*, 2 Duv. (Ky.) 114.

This doctrine is impliedly maintained in the case of *Baltimore etc. Elevator Co. v. Neal*, 65 Md. 438.

In the case of *Pittsburgh etc. R. Co. v. Ruby* (38 Ind. 294; s. c., 10 Am. Rep. 111), the court observes: "We entertain no doubt that the evidence (*i. e.*, evidence of previous particular acts of carelessness on part of the servant) was admissible for the purpose of proving that the company had retained in its service and employment David Kieser, after it knew or ought to have known that he was careless and negligent. It was held by the court of appeals of the State of Kentucky in the recent case of *Louisville etc. Co. v. Collins*, 2 Duv. (Ky.) 114, that a railroad corporation is to be regarded as constructively present in all acts performed by its general agents within the scope of their authority—*i. e.*, within the range of their ordinary employment."

3. **Repairing Place After Injury.**—Where the negligence consisted in not providing safeguards at a point of danger, evidence that such guards were placed there after the accident is inadmissible. *Nalley v. Hartford etc. Co.*, 51 Conn. 524; s. c., 50 Am. Rep. 47 (leading case).

So, where the injury was caused by the breaking of an elevator chain, it is not competent to show that immediately after the accident the broken chain was replaced by a larger and stronger one. *Delaney v. Hilton*, 50 N. Y. Super. 341; s. c., 44 Am. Rep. 649.

And this principle of the text is sustained in other cases. *Henkel v. Murr*, 31 Hun (N. Y.) 28 (new oilcloth on stairway after the injury); *Martin v. Towle*, 59 N. H. 31; *Tyler v. Todd*, 36 Conn. 220; *Dougan v. Champlain*

Transp. Co., 56 N. Y. 1; *Wooley v. Grand St. etc. R. Co.*, 83 N. Y. 121; 3 Am. & Eng. R. Cas. 398; *Sewell v. Cohoes*, 75 N. Y. 45; s. c., 31 Am. Rep. 418; *Hudson v. Chicago etc. R. Co.*, 59 Iowa 581; s. c., 44 Am. Rep. 692, 694, note; 8 Am. & Eng. R. Cas. 464; *Cramer v. Burlington*, 45 Iowa 627; *Morrell v. Peck*, 24 Hun (N. Y.) 37; *Terre Haute etc. R. Co. v. Clem*, 123 Ind. 15; 42 Am. & Eng. R. Cas. 229; *Ely v. St. Louis etc. R. Co.*, 77 Mo. 34; *Dale v. Delaware etc. R. Co.*, 73 N. Y. 471, 472; 1 Wharton on Ev., § 40; *Pierce on Railroads* 294; *Morse v. Minneapolis etc. R. Co.*, 30 Minn. 465; s. c., 11 Am. & Eng. R. Cas. 168-170; *Baird v. Daily*, 68 N. Y. 551; s. c., 15 Am. Rep. 488; *Evansville etc. R. Co. v. Crist*, 116 Ind. 446; *Evansville etc. R. Co. v. Carvener*, 113 Ind. 51; 32 Am. & Eng. R. Cas. 134.

"A person may have exercised all the care the law required and yet in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think that such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence. . . . The fact that the accident has happened and some person has been injured immediately puts a party on a higher plane of diligence and duty from which he acts with a view of preventing the possibility of a similar accident, which should operate to commend rather than condemn the person so acting." *LOOMIS, J.*, in *Nalley v. Hartford etc. Co.*, 51 Conn. 524; s. c., 50 Am. Rep. 47.

But there are cases in which it is held that such evidence is admissible as an admission that the defendant was negligent in not having made the repairs sooner. In *Pennsylvania* this doctrine is still maintained. *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *West Chester etc. R. Co. v. McElwee*, 67 Pa. St. 311; *McKee v. Bidwell*, 74 Pa. St. 218. In *Minnesota* the admission of such evidence was once held proper. *O'Leary v. Mankato*, 21 Minn. 65; *Phelps v. Mankato*, 23 Minn. 276; *Kelly v. Southern Minn. R. Co.*, 28

Minn. 98; 6 Am. & Eng. R. Cas. 264. But in a later case these cases have all been overruled. See *Morse v. Minneapolis etc. R. Co.*, 30 Minn. 465; s. c., 11 Am. & Eng. R. Cas. 168.

In the case of *St. Louis etc. R. Co. v. Weaver*, 35 Kan. 412; s. c., 57 Am. Rep. 176; 28 Am. & Eng. R. Cas. 341, an alleged negligent injury was caused by the alleged incapacity of a waterway. The waterway was subsequently enlarged and evidence of this subsequent enlargement was held admissible to show an admission that the way was originally too small. This is the leading case opposing the doctrine of the text; a large number of cases are collected both in the opinion of the court and in the reporter's note; but all of these cases are either from the *Pennsylvania*, *New York*; or *Kansas* courts and as we have seen the *New York* courts have repudiated the doctrine maintained in the *Pennsylvania* cases.

In *Readman v. Conway*, 126 Mass. 374, evidence of subsequent repairs was admitted, the court observing that "These acts of the defendants were in the nature of admissions that it was their duty to keep the platform in repair." This it will be observed by no means supports the *Kansas* case. The evidence here was admitted not as an admission of a previous want of care but as proof of a duty owing from the company in regard to such platform.

**Evidence of Repairs Admissible to Show Duty.**—In the case just cited, *Readman v. Conway*, 126 Mass. 374, is found an illustration of this principle. That the defendants repaired the place was an admission that it was *their* duty to keep it in repair.

A similar case is that of *Sewell v. Cohoes*, 11 Hun (N. Y.) 626, where the question was whether the city had authority over the *locus in quo* and a resolution of the city council passed subsequently to the accident was offered as evidence. It was held that such evidence was properly admissible, the court saying, "Was it not proper to repel such inference (*i. e.*, that the city had no authority) by showing the exercise of the necessary power with success, after the accident? Does it not tend to show the existence of the necessary power before the act? and does it not show the existence of power and authority over the street and bridge creating a responsibility in respect thereto?" The case of *Dougan v.*

therefore inadmissible.<sup>1</sup> Likewise evidence by the plaintiff to prove that other persons had been injured at the same place and in the same manner that he was cannot be admitted.<sup>2</sup> But the latter of these two rules just stated has been criticised by many and rejected by other authorities, seemingly with much reason, so that the tendency now is to admit evidence by the plaintiff of

Champlain Transp. Co., 56 N. Y. 1, was distinguished.

**Evidence of Discharge of Negligent Servant.**—That evidence of the discharge of a negligent servant after the injury is committed is inadmissible, see 1 Wharton on Ev., § 40; § 1139; Couch v. Watson Coal Co., 46 Iowa 17; Campbell v. Chicago etc. R. Co., 45 Iowa 76.

Such evidence cannot even be used as an admission of such servant's negligence. Authorities, *supra*.

1. Branch v. Libbey, 78 Me. 321; s. c., 57 Am. Rep. 810 (obstruction in highway); Hudson v. Chicago etc. R. Co., 59 Iowa 581; s. c., 44 Am. Rep. 692, 694, note; 8 Am. & Eng. R. Cas. 464; Aldrich v. Inhabitants of Pelham, 1 Gray (Mass.) 511; Temperance Hall Assoc. v. Giles, 33 N. J. L. 260 (falling in of a hall floor); Shoonmaker v. Inhabitants of Wilbraham, 110 Mass. 134; Hubbard v. Concord, 35 N. H. 52, s. c., 69 Am. Dec. 520.

In an action for injuries caused by the alleged negligent construction and management of an elevator, whereby it fell, evidence that no accident had ever before happened to the elevator, during its use for more than four years, cannot be admitted. Hodges v. Bearse, 129 Ill. 87.

The reason for this doctrine is well presented in Aldrich v. Inhabitants of Pelham, 1 Gray (Mass.) 511, where SHAW, C. J., has to say: "If it were competent for the defendants to prove that other persons, with carriages and vehicles of a certain width, had passed there without collision, it would be competent for the plaintiff to rebut it by proving that other persons with equal care, and with carriages of equal width, had met with accidents by collision. Each of these circumstances would present a distinct issue, with all its attendant circumstances, and involve consequences repugnant to well known rules of law." See also Collins v. Inhabitants of Dorchester, 6 Cush. (Mass.) 396, and C. J. SHAW's views endorsed and applied in Temperance Hall Assoc. v. Giles, 33 N. J. L. 260.

In a particular case this rule has been modified where the question was as to the proximate cause. Thus, where the plaintiff was injured by his horses becoming unmanageable and backing off the inclined plane leading to the defendant's elevator—*held*, no error to introduce evidence showing that no similar accident had happened for five years, though sixty or seventy teams had been unloaded there daily. Field v. Davis, 27 Kan. 400.

2. It is considered that such testimony is testimony as to a collateral fact which furnished no legal presumption as to the principal facts in dispute. Collins v. Inhabitants of Dorchester, 6 Cush. (Mass.) 397; Aldrich v. Inhabitants of Pelham, 1 Gray (Mass.) 510; Sherman v. Kortright, 52 Barb. (N. Y.) 267; Hubbard v. Concord, 35 N. H. 52; s. c., 69 Am. Dec. 520, note; Standish v. Washburn, 21 Pick. (Mass.) 237; Kidder v. Inhabitants of Dunstable, 11 Gray (Mass.) 342; Piollet v. Simmers, 106 Pa. St. 95; s. c., 51 Am. Rep. 496.

Thus, in an action against a railway company for injuries sustained from falling over the railing of the stairs of defendant's elevated station, it is error to admit evidence of similar accidents occurring after the one in question. Johnson v. Manhattan R. Co., 52 Hun (N. Y.) 111. See also 2 Starkey on Ev. 381; 1 Greenleaf on Ev., §§ 52, 448; 1 Thomp. on Neg. 801; Wharton on Ev., § 359.

The principle, however, is by no means universally accepted, indeed the tendency is directly to the contrary; we have, however, followed the opinions of the text writers. See discussion, *post*.

In *Indiana* the doctrine is in a peculiar state. See Cleveland etc. R. Co. v. Wynant, 114 Ind. 525; 35 Am. & Eng. R. Cas. 328; Pittsburgh etc. R. Co. v. Ruby, 38 Ind. 204; Cleveland etc. R. Co. v. Newell, 104 Ind. 264; Delphi v. Lowery, 74 Ind. 520; Fort Wayne v. Coombs, 107 Ind. 75; Louisville etc. R. Co. v. Wright, 115 Ind. 378; 33 Am. & Eng. R. Cas. 370.

In the first case the doctrine was laid

the fact of other persons having suffered similar injuries at the same place.<sup>1</sup> And though evidence of similar disconnected acts of negligence by the defendant is usually irrelevant, yet such evidence may be admitted when it was defendant's duty to be cognizant of them, and they would have advised him of danger to be apprehended; for when a party is dealing with a dangerous agency it becomes material to know whether he ought to

down that where it is necessary to affect those charged with the duty of keeping highways, bridges or other structures in a safe condition, or of keeping only competent persons in their service, with notice of defects or unfitness, or where the question is as to the safety or availability of a machine or contrivance designed for a particular purpose, or for practical use, evidence is admissible to show how the thing served when put to the use for which it was designed, in the one case, or that occurrences of a character to make the defect or incompetency notorious had taken place in the other. The cases above are all cited as sustaining the doctrine as laid down. But in other cases (it is said in the same case, *i. e.*, *Cleveland R. Co. v. Wynant*) the rule is different. Evidence of other similar occurrences on other occasions is not admissible for the purpose of raising a presumption that the particular accident in question happened, or that the place was defective or dangerous, or that the situation was of such a character that the occurrences resulting in the injury complained of might well have taken place. The facts are the only legitimate evidence of the injury and of the manner and cause of the occurrence. Citing to support this, *Ramsey v. Rushville Road Co.*, 81 Ind. 394; *Maguire v. Middlesex R. Co.*, 115 Mass. 239; *Hawks v. Charlemont*, 110 Mass. 110, and cases cited at heading of this note (5); also *Patt. R. Acc. Law*, 420. Therefore on the trial of an action against a railroad company to recover for injuries caused by plaintiff's horse shying at a box-car in the highway, it cannot be shown that other horses shied after a similar fashion at other times. *Cleveland etc. R. Co. v. Wynant*, 114 Ind. 525; 35 Am. & Eng. R. Cas. 328.

**1. Evidence of Similar Injuries at Same Place.**—Thus, in an action for injuries sustained by the upsetting of plaintiff's sleigh, by striking against a street railroad switch, evidence of other accidents happening at the same place held admissible. *Wooley v. Grand*

*Street etc. R. Co.*, 83 N. Y. 121; 3 Am. & Eng. R. Cas. 398.

So in an action for injuries sustained from the negligence of a railroad company in obstructing a highway with snow thrown from the track, evidence of the difficulties experienced by other travellers at the place is admissible. *Phelps v. Winona etc. R. Co.*, 37 Minn. 485; 32 Am. & Eng. R. Cas. 56.

In an action to recover for injuries occasioned by the upsetting of the defendant's coach, evidence of former accidents occurring under the same driver is admissible to prove a bad condition of the road, or a want of familiarity with it, but not as proof of his negligence at the time of the accident. *Higley v. Gilmer*, 3 Mont. 90.

Such evidence was admitted in the following cases: *Lewis v. Eastern R. Co.*, 60 N. H. 187; *Crocker v. McGregor*, 76 Me. 282 (horse frightened by noise of mill near highway. The evidence was admitted in these two cases to show that the object or sound was dangerous to public travel, being more likely to produce the effect complained of than not); *Darling v. Westmoreland*, 52 N. H. 401; *s. c.*, 13 Am. Rep. 55 (this case contains an elaborate review of authorities; plaintiff permitted to show that other horses had been frightened at the same pile of lumber); *Kent v. Lincoln*, 32 Vt. 591 (to show that carriages like plaintiff's, driven as his was, were injured on same road); *Quinlan v. Utica*, 11 Hun (N. Y.) 217; affirmed, 74 N. Y. 603 (to show that sidewalk tested by actual use was in unsafe condition since several other people fell on it before plaintiff); *District of Columbia v. Armes*, 107 U. S. 519 (same as case immediately preceding); *Chicago v. Powers*, 42 Ill. 169 (plaintiff stepped off approach to a bridge owing to its being improperly lighted; evidence admitted to show similar accidents to other persons); *Augusta v. Hafers*, 61 Ga. 48; *s. c.*, 34 Am. Rep. 95; *House v. Metcalf*, 27 Conn. 631; *Calkins v. Hartford*, 33 Conn. 57; *Hill v. Portland etc.*

have known the extent of the danger.<sup>1</sup> The rules just stated as to the exclusion of certain evidence are based upon the well established rule of the law of evidence which excludes evidence tending to raise too great a multitude of issues, thereby confusing the jury, and forbids the admission of testimony to a collateral fact which furnishes no legal presumption as to the principal fact in dispute.<sup>2</sup>

When the speed of a train is in question, evidence of the speed at which the same train ran at the same place on other days is admissible;<sup>3</sup> no rate of speed of a train constitutes negligence *per se*, but proof of a certain rate of speed may in certain cases

R. Co., 55 Me. 439; *Delphi v. Lowery*, 74 Ind. 520; s. c., 39 Am. Rep. 98; *Pittsburgh R. Co. v. Ruby*, 38 Ind. 294; *Clapp v. Minneapolis etc. R. Co.*, 36 Minn. 6 (evidence that engines had previously run off the track at the same place, both before and after the time in question, when it is shown that at the time the accident in question occurred the switch was in substantially the same condition as respects the particular defects complained of). See also *Thompson on Neg.* 801.

1. *1 Wharton on Ev.*, § 41; *Cleveland R. Co. v. Wynant*, 114 Ind. 525; 35 Am. & Eng. R. Cas. 328; *St. Louis etc. R. Co. v. Weaver*, 35 Kan. 412; s. c., 57 Am. Rep. 176, note; 28 Am. & Eng. R. Cas. 341, *ante*; *Randall v. Northwestern Tel. Co.*, 54 Wis. 140. Thus, in an action against a railway company for an injury caused by the car running off the track, evidence is admissible to show that the same line of cars ran off the track on the same road; since such runnings off ought to have advised defendant of the bad condition of the track. *Mobile R. Co. v. Ashcraft*, 48 Ala. 15; *Texas etc. R. Co. v. Suggs*, 62 Tex. 323; 21 Am. & Eng. R. Cas. 475. See also *Simson v. London etc. Co.*, L. R., 8 C. P. 390 (case of horse kicking while hitched to omnibus). Similarly, the fact that a particular chimney in a mill has been in the habit of emitting sparks which have set fire to materials in the neighborhood, is admissible in a suit for damage caused by a particular fire. *Hoyt v. Jeffers*, 30 Mich. 181; *Hinds v. Barton*, 25 N. Y. 544.

**Fires by Railways**—The doctrine in case of fires caused by railway engines is an excellent example of the application of this rule. If plaintiff can show that a certain engine has in a series of former occasions emitted

sparks so as to fire property along the road, such proof would be admissible to show that defendant's engine was not properly equipped and that he ought to have known it. See *1 Whart. on Ev.*, §§ 421 and 43, where the subject is discussed at length. See also **FIRES BY RAILWAYS**, 8 Am. & Eng. Encyc. of Law; **RAILROAD COMPANIES**.

2. *1 Whart. on Ev.*, §§ 29, 40; *Collins v. Inhabitants of Dorchester*, 6 Cush. (Mass.) 397; *Aldrich v. Inhabitants of Pelham*, 1 Gray (Mass.) 510.

3. *State v. Railroad Co.*, 52 N. H. 528; *State v. Hoyt*, 46 Conn. 330; *Hall v. Brown*, 58 N. H. 93; *1 Whart. on Ev.*, § 41; *Shaber v. St. Paul etc. R. Co.*, 28 Minn. 103.

**Speed of Train**.—That evidence of the rate of speed at which a train is running at a crossing may be considered by the jury as an element in determining the question of negligence, see *Martin v. New York Cent. etc. R. Co.*, 27 Hun (N. Y.) 532; *Palmer v. Platt*, 27 Hun (N. Y.) 534; *Shaber v. St. Paul etc. R. Co.*, 28 Minn. 103; 2 Am. & Eng. R. Cas. 185; *Louisville etc. R. Co. v. Pedigo*, 108 Ind. 481; 27 Am. & Eng. R. Cas. 310 (fall of a railroad bridge); *Nutter v. Boston etc. R. Co.*, 60 N. H. 483.

On the question, in a negligence case, as to whether defendant's train went too fast within city limits, a city ordinance regulating the speed of trains is admissible, as well as the company's rules on the subject. Nor need the ordinance have been specially pleaded. *Riley v. Wabash etc. R. Co.*, 18 Mo. App. 385; *Robertson v. Wabash etc. Co.*, 84 Mo. 119.

So also evidence of defendant's running time over the whole road is admissible to show the rate of speed. *Nutter v. Boston etc. R. Co.*, 60 N. H. 483.



be evidence of the want of due care.<sup>1</sup> Evidence of the fact that a certain character of locomotive had been abandoned by railroads generally may be admitted to prove defendant's knowledge of the dangerous character of such engine.<sup>2</sup> When it is desired to show negligence in the keeping up of a road bed, evidence cannot be admitted to show the condition of the structure at some time long before or after the injury occurred;<sup>3</sup> the evidence must be confined to the condition at or about the time of the accident.<sup>4</sup> Absence of intent to commit the injury being an essential element of negligence, evidence of actual intent is entirely irrelevant in an action for negligence.<sup>5</sup>

1. **Evidence of Usage.**—As a general rule an act of negligence can never be excused by evidence that it was done in conformity with a custom or usage long established among those of a similar occupation;<sup>6</sup> though it is said to be admissible in certain cases to prove what constitutes a want of ordinary care, particularly in case of actions against common carriers.<sup>7</sup>

2. **Opinion Evidence.**—The opinion of an ordinary witness that

Estimates by witnesses living near the road and habitually observing the trains are admissible. *Ib.*

1. Patterson's R. Acc. Law, p. 276, § 267; Cleveland etc. R. Co. v. Newell, 75 Ind. 542; s. c., 3 Am. & Eng. R. Cas. 483; White v. Milwaukee City R. Co., 61 Wis. 536; s. c., 18 Am. & Eng. R. Cas. 213.

2. Crane v. Missouri Pac. R. Co., 87 Mo. 588; 25 Am. & Eng. R. Cas. 440; 1 Wharton on Ev., § 41.

3. A fireman was killed by the derailment of the train after a storm. There was evidence, although conflicting, tending to show negligence on the part of the railroad company in maintaining its road bed, a culvert, etc. *Held*, that evidence of the condition of the road-bed one, two and three years after the accident was improperly admitted, it being too remote in point of time; and that an instruction which, in effect, assumed defendant's negligence was erroneous. *Stoher v. St. Louis etc. R. Co.*, 91 Mo. 509; 31 Am. & Eng. R. Cas. 229.

Where one was charged with negligence in not sufficiently lighting the hall and passage-way to his place of business, and in leaving open the doors to his elevator-way, it was held that evidence, embracing a period of two years, tending to show at different times the condition of the hall and entrance-way as to light—whether more or less, or none—the position of the elevator gates and doors, of what had happened

to others at different times, and their escape from peril, was not admissible. *Parker v. Portland Publishing Co.*, 69 Me. 173; *Little Rock etc. R. Co. v. Eubanks*, 48 Ark. 460; 31 Am. & Eng. R. Cas. 176.

4. *Little Rock etc. R. Co. v. Eubanks*, 48 Ark. 460; 31 Am. & Eng. R. Cas. 176.

5. *Pennsylvania etc. R. Co. v. Smyth*, 98 Ind. 42; *Indiana etc. R. Co. v. Burdge*, 94 Ind. 46; *Shear. & Red. on Neg.*, § 19. *Anle*, subtit. III, 1, INADVERTENCE, etc.

6. **Evidence of Usage.**—*Hill v. Portland etc. R. Co.*, 55 Me. 438; s. c., 92 Am. Dec. 601, 606, note; *Hibler v. McCartney*, 31 Ala. 501; *Hinckley v. Inhabitants of Barnstable*, 109 Mass. 126; *Lawrence v. Hudson*, 12 Heisk. (Tenn.) 671 (driver getting off his seat and giving reins to little negro who usually accompanied him); *Deering on Neg.*, § 9, and cases cited; *Cleveland v. New Jersey Steamboat Co.*, 5 Hun (N. Y.) 523; *Sewalls Falls Bridge Co. v. Fisk*, 23 N. H. 171.

7. *Maxwell v. Eason*, 1 Stew. (Ala.) 514; *Stimson v. Jackson*, 58 N. H. 138; *Deering on Neg.*, § 9, and cases. See this subject discussed in CARRIERS OF PASSENGERS, 2 Am. & Eng. Encyc. of Law 891; USAGES AND CUSTOMS; *Clarke's Brown on Usages and Customs*, § 107, *et seq.*; *Governor v. Withers*, 5 Gratt. (Va.) 24; s. c., 50 Am. Dec. 99, note; *Born v. Belfast*, 40 Ala. 184; s. c., 88 Am. Dec. 761.

certain acts do or do not amount to negligence is inadmissible;<sup>1</sup> it violates that rule of evidence which excludes the opinion of an ordinary witness on a question which it is for the jury to decide on the facts.<sup>2</sup>

**XVI. QUESTIONS OF LAW AND FACT.**—By reference to the analytical description at the beginning of this article it will be noticed that actionable negligence arises essentially from (1) a legal duty; (2) a breach of duty by failure to observe due care; and (3) such breach proximately causing damage. Negligence is therefore usually a mixed question of law and fact.<sup>3</sup> The ques-

1. The rule is taken from *Lawson on Expert and Opinion Evidence*, 507; *Montgomery v. Scott*, 34 Wis. 339; *Benedict v. Fond du Lac*, 44 Wis. 495; *Veerhusen v. Chicago etc. R. Co.*, 53 Wis. 689; 6 Am. & Eng. R. Cas. 583; *Bliss v. Inhabitants of Wilbraham*, 8 Allen (Mass.) 564. Thus the opinion of a witness as to whether a certain excavation in the highway was dangerous is incompetent. *Stillwater Turnpike Co. v. Coover*, 26 Ohio St. 520.

A street car company was sued for negligently running over a child who was attempting to get on the platform. Driver was not in his place. Opinion of a witness that the absence of the driver would induce children to jump on the car inadmissible. *Largan v. Cent. R. Co.*, 40 Cal. 272. Other cases, see *Simmons v. New Bedford etc. Steamboat Co.*, 97 Mass. 361; *Teall v. Barton*, 40 Barb. (N. Y.) 137; *Tuttle v. Lawrence*, 119 Mass. 276; *Eastham v. Riedell*, 125 Mass. 585; *Winters v. Hannibal etc. R. Co.*, 39 Mo. 468; *Hoener v. Koch*, 84 Ill. 408; *Monroe v. Lattin*, 25 Kan. 35; *Leighton v. Sargent*, 31 N. H. 119; *Morris v. East Haven*, 41 Conn. 252; *Carpenter v. Eastern Transp. Co.*, 71 N. Y. 574; *Lawson on Expert and Opinion Evidence*, 507, *et seq.*, whence the above instances are taken. Compare *Moreland v. Mitchell Co.*, 40 Iowa 394; *Clin-ton v. Howard*, 42 Conn. 295.

Plaintiff was injured by a defective street crossing; opinions of witnesses that the crossing was dangerous inadmissible. *Parsons v. Lindsay*, 26 Kan. 426; *Village of Fairbury v. Rogers*, 98 Ill. 555.

A child was injured by being run over in a street while walking home alone; opinion of her schoolteacher that the child was capable of exercising care in crossing street inadmissible. *Lynch v. Smith*, 104 Mass. 53.

Opinion of an ordinary witness as to

whether a bridge was safe inadmissible. *Kelly v. Fond du Lac*, 31 Wis. 179.

Injury by locomotive at a crossing—opinion of a county commissioner that no flagman was needed at the crossing inadmissible. *Shaw v. Boston etc. R. Co.*, 8 Gray (Mass.) 45.

Opinion of driver of coach, whether it was negligent in another driver to leave the coach box, entrusting the reins to the small boy who usually accompanied him, inadmissible. *Lawrence v. Hudson*, 12 Heisk. (Tenn.) 672.

2. In *Crane v. Northfield*, 33 Vt. 124, the question was as to the sufficiency of a bridge if the dirt had not been washed away from the boards by rain. Opinion of an ordinary witness was held inadmissible, the court observing: "This was the very question the jury were to try and decide, and there does not appear to us that there could be any difficulty in having the condition of the culvert so described to the jury by the witness that they would be just as capable of exercising their judgment and forming a correct opinion as the witness himself." See also *Oleson v. Tolford*, 37 Wis. 327; *Stillwater Turnpike Co. v. Coover*, 26 Ohio St. 520; *Barnes v. Newton*, 46 Iowa 567; *Lawson on Expert and Opinion Evidence*, 507, *et seq.*

3. **Mixed Question of Law and Fact.**—*Nolan v. New York etc. R. Co.*, 53 Conn. 461; 25 Am. & Eng. R. Cas. 342; *Purvis v. Coleman*, 1 Bosw. (N. Y.) 321; *Catawissa etc. R. Co. v. Armstrong*, 52 Pa. St. 282; *Shear. & Red. on Neg.*, § 52; *ante*, subtt. II, ANALYTICAL DESCRIPTION.

Therefore, the unqualified statement is rather broad that "negligence is a question of fact, to be determined upon the circumstances." *Fiske v. Forsyth Dyeing etc. Co.*, 57 Conn. 118.

That negligence is a question of law and fact means nothing more than that it is a question for the jury, under the instructions of the court. *Baltimore*

tion as to whether a legal duty existed to the party injured is one of law, and therefore for the court to pass upon;<sup>1</sup> whether there has been a breach of that duty, and whether it proximately caused damage to plaintiff, are questions which depend upon circumstances, and therefore are usually to be determined by the jury.<sup>2</sup> Upon these principles every question arising as to the province of the court or jury may generally be determined; but no absolute rule can be stated which will apply under the many combinations of circumstances which arise in the law of negligence, and the strong tendency is to submit all cases, in which there is room for doubt, to the jury.<sup>3</sup> Yet, though the province

etc. R. Co. v. State, 36 Md. 366; Detroit etc. R. Co. v. Van Steinburg, 17 Mich. 118.

The question of negligence is a mixed question of law and fact. Where the court requires of a defendant some act which the law did not require, it is an error of law and can be reviewed. Where the court finds that the defendant failed to do some required act, it is a finding of fact and cannot be reviewed. Nolan v. New York etc. R. Co., 53 Conn. 461; 25 Am. & Eng. R. Cas. 342.

1. Sutton v. New York etc. R. Co., 66 N. Y. 243; Tarwater v. Hannibal R. Co., 42 Mo. 193; Nolan v. New York etc. R. Co., 53 Conn. 461; 25 Am. & Eng. R. Cas. 342; Chicago etc. R. Co. v. McLallen, 84 Ill. 109; Shear. & Red. on Neg., § 52, 3; Philadelphia etc. R. Co. v. Fronk, 67 Md. 339.

In Sutton v. New York etc. R. Co., 66 N. Y. 243, the question was whether it was the duty of the railroad company to have the brake "on" while the cars were standing in their yard. It was considered a question for the court, not the jury.

Similarly, in an action by a brakeman against the railroad company employing him, it appeared that, had the company used a certain safety switch, the accident would not have happened. Held, that the court erred in leaving it to the jury to say whether the company should have used this switch. Coppins v. New York Cent. etc. R. Co., 43 Hun (N. Y.) 26.

But even this principle is not always applicable. Thus it is said that as a matter of law it cannot be ruled that it is the duty of the conductor of a passenger train to assist passengers to alight. Whether, in a given case, his failure to do so is negligence imputable to the company, is a question of fact for the jury. Simms v. South Caro-

lina R. Co., 27 S. Car. 268; 30 Am. & Eng. R. Cas. 571. See also Chicago etc. R. Co. v. Robinson, 106 Ill. 142; 19 Am. & Eng. R. Cas. 396.

2. McCully v. Clarke, 40 Pa. St. 399; s. c., 80 Am. Dec. 584 (the opinion in this case is an admirable presentation of this portion of the subject, and is well worthy of study); Osborne v. Detroit, 32 Fed. Rep. 36; Pearce v. Humphreys, 34 Fed. Rep. 282; Yeaw v. Williams, 15 R. I. 20; Lilly v. New York etc. R. Co., 107 N. Y. 566; Tabler v. Hannibal etc. R. Co., 93 Mo. 79; 31 Am. & Eng. R. Cas. 185; Bolinger v. St. Paul etc. R. Co., 36 Minn. 418; 29 Am. & Eng. R. Cas. 408; Gulf etc. R. Co. v. Gasscamp, 69 Tex. 545; 34 Am. & Eng. R. Cas. 6; Ferren v. Old Colony etc. R. Co., 143 Mass. 197; Jamison v. Illinois C. etc. R. Co., 63 Miss. 33; Crabell v. Wapello Coal Co., 68 Iowa 751. The authorities on this point are almost innumerable.

**Proximate Cause.**—"It is undoubtedly true, as a general proposition, that the question of proximate cause is one for the jury; yet it has been repeatedly held that where there are no disputed facts the court must determine it." West Mahoney v. Watson, 112 Pa. St. 574; s. c. (on second appeal), 116 Pa. St. 344.

3. An examination of the digest under the heading negligence will exhibit the truth of this opinion. See also Shear. & Red. on Neg., § 55, where it is considered that such a course is advisable, since, if the jury err, it at least does not affect the rights of any future litigant, while one wrong decision of the court may throw a whole department of law into confusion and injuriously affect many hundreds before it is corrected.

As is said by Mr. COOLEY, in his work on torts, many cases might be clear if they were not complicated with

of the jury is broad, few cases ought to be submitted to them to decide according to their ideas alone. The general rules applicable to the case ought always to be stated as a matter of law by the court to guide them, while they are to determine whether or not the case comes within the rules.<sup>1</sup>

**1. Province of the Jury.**—The general rule is well known that questions of fact are to be submitted to the jury;<sup>2</sup> and this includes not only cases where the facts are in dispute, but also where the question is as to the inference to be drawn from such facts after they have been determined.<sup>3</sup> It will be readily observed that few cases will arise in which there is no question as to the facts involved; the element of ordinary care must from its very character always require the decision of a jury, except where there is a violation of statutory duty, or where the facts are undisputed and but one inference can reasonably be drawn from them.<sup>4</sup> And the same is equally true as to the determination of the question of proximate cause,<sup>5</sup> so that the following rules may be stated as applicable to every case. The issue of negligence should go to the jury:

questions of contributory negligence. Such are the cases of a disregard of a law expressly devised to prevent the like injuries . . . In the great majority of cases, however, the question of negligence on any given state of facts must be one of fact. Cooley on Torts (2nd ed.) [670] 804. See also CONTRIBUTORY NEGLIGENCE, 4 Am. & Eng. Encyc. of Law 94.

**1. Pennsylvania Co. v. Conlan**, 101 Ill. 93; **Deering on Neg.**, § 403; **Wharton on Neg.**, § 420; **Shear. & Red. on Neg.**, § 11.

**2. This was the first great object of jury trial—to determine disputed facts.** See CHARGE TO JURY, 3 Am. & Eng. Encyc. of Law 121; INSTRUCTIONS, 11 Am. & Eng. Encyc. of Law 240, *et seq.*

**3. Inference from Conceded Facts.**—**Lincoln v. Gillilan**, 18 Neb. 114; **Johnson v. Missouri Pac. R. Co.**, 18 Neb. 690; **Hathaway v. East Tennessee etc. R. Co.**, 29 Fed. Rep. 489; **Ohio etc. R. Co. v. Collarn**, 73 Ind. 261; 5 Am. & Eng. R. Cas. 554.

**4. Question of Ordinary Care One for the Jury.**—That whether in a certain act or action the defendant exercised ordinary care under the circumstances is always one for the jury where there is any evidence produced. This principle is sustained by an innumerable number of decisions; to attempt to cite them all would be useless; only a few are here presented. **Griffin v. Auburn**, 58 N. H. 121; **East Tennessee etc. R. Co. v.**

**Bayless**, 74 Ala. 150; 19 Am. & Eng. R. Cas. 480; **Atkinson v. Goodrich Transp. Co.**, 60 Wis. 141; **Kenney v. Hannibal etc. R. Co.**, 80 Mo. 573; **White v. Missouri Pac. R. Co.**, 31 Kan. 280; 13 Am. & Eng. R. Cas. 473; **Texas etc. R. Co. v. Levi**, 59 Tex. 674; 13 Am. & Eng. R. Cas. 464; **Sloan v. Cent. Iowa R. Co.**, 62 Iowa 728; 11 Am. & Eng. R. Cas. 145 (brakeman injured by failing to catch hold of brakeroad); **Pennsylvania Co. v. Frana**, 112 Ill. 398; **Schmidt v. Sinnott**, 103 Ill. 160.

Even though the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence. **Ohio etc. R. Co. v. Collarn**, 73 Ind. 261; 5 Am. & Eng. R. Cas. 554; **Vinton v. Schwab**, 32 Vt. 612.

**5. Proximate Cause—Question for Jury.**

—The question as to whether the plaintiff's negligence is the proximate cause of the injury to plaintiff owing to its character, and the test to be applied as previously stated, are for the jury. *Anie*, subtit. CAUSAL CONNECTION; PROXIMATE CAUSE; **Milwaukee etc. R. Co. v. Kellogg**, 94 U. S. 469; **Shear. & Red. on Neg.**, § 55; **Webb v. Rome etc. R. Co.**, 49 N. Y. 420; **Hoyt v. Jeffers**, 30 Mich. 181; **Chicago etc. R. Co. v. Pennel**, 110 Ill. 435; **Henry v. Southern Pac. R. Co.**, 50 Cal. 176; **Poeppers v. Missouri etc. R. Co.**, 67 Mo. 715; **Smith v. London etc. R. Co.**, L. R., 5 C. P. 98; **West Mahoney v. Watson**, 112 Pa. St. 574;

1. When the facts which, if true, would constitute evidence of negligence, are controverted.

2. When such facts are not disputed, but there may be a fair difference of opinion as to whether the inference of negligence should be drawn.

3. When the facts are in dispute, and the inferences to be drawn therefrom are doubtful.<sup>1</sup>

**2. Province of the Court.**—While in almost every case that arises there exists some element which makes the question one for the jury, such is not true invariably. When there is no evidence of negligence,<sup>2</sup> or so little that no reasonable man could from it find the fact of negligence, it is error to submit the matter to the jury, but a nonsuit should be ordered by the court.<sup>3</sup> So where the facts in the case are undisputed or conclusively established, and there is no reasonable chance for drawing different conclusions from them, the question becomes one of law for the

s. c., 116 Pa. St. 344; *Haverly v. State Line etc. R. Co.*, 26 W. N. C. (Pa.) 321; *Cosulich v. Standard Oil Co.*, 55 N. Y. Super. Ct. 384; *Wright v. Chicago etc. R. Co.*, 27 Ill. App. 200; *Southside etc. R. Co. v. Trich*, 117 Pa. St. 390; *Schroth v. Prescott*, 68 Wis. 678; *Kreuziger v. Chicago etc. R. Co.*, 73 Wis. 158; *Lake v. Milliken*, 62 Me. 240; s. c., 16 Am. Rep. 456; *Fairbanks v. Kerr*, 70 Pa. St. 90; s. c., 10 Am. Rep. 664.

But where the facts are undisputed, it is a question for the court usually. *Pike v. Grand Trunk etc. R. Co.*, 39 Fed. Rep. 255.

1. *Hathaway v. East Tennessee etc. R. Co.*, 29 Fed. Rep. 489.

**Jury to Decide Whenever There Is a Conflict of Evidence.**—Where the question of negligence is not wholly free from doubt, or the evidence is conflicting, the jury, not the court, must decide the case. *Orange etc. R. Co. v. Ward*, 47 N. J. L. 560; *Leavitt v. Chicago etc. R. Co.*, 64 Wis. 228; *Mezum v. Pittsburgh etc. R. Co.*, 30 W. Va. 228; *Ferry v. Manhattan R. Co.*, 54 N. Y. Super. Ct. 325; *Drevis v. Woods*, 71 Wis. 329; *Baldwin v. St. Louis etc. R. Co.*, 72 Iowa 45; *O'Hare v. Chicago etc. R. Co.*, 95 Mo. 662; *Crabell v. Wapello Coal Co.*, 68 Iowa 751; *Tyler v. New York etc. R. Co.*, 137 Mass. 238; 19 Am. & Eng. R. Cas. 296; *Stoker v. Minneapolis*, 32 Minn. 478; *Texas etc. R. Co. v. Levi*, 59 Tex. 674; 13 Am. & Eng. R. Cas. 464.

2. This is a well settled rule of law. See INSTRUCTIONS, 11 Am. & Eng. Encyc. of Law 243; *Boland v. Missouri R. Co.*, 36 Mo. 484, 491; *Thompson's*

*Charging Jury* 44; *Brower v. Edson*, 47 Mich. 91; *Barton v. St. Louis etc. R. Co.*, 52 Mo. 353; *New Jersey Express Co. v. Nichols*, 33 N. J. L. 434; *Pennsylvania R. Co. v. Righter*, 42 N. J. L. 180; 2 Am. & Eng. R. Cas. 220; *Hoth v. Peters*, 55 Wis. 405; *Hoyt v. Hudson*, 41 Wis. 105; *New York etc. R. Co. v. Shinner*, 19 Pa. St. 298.

3. "Negligence is ordinarily a question for the jury, but only when the facts would authorize the jury to infer it." *ANDREWS, J.*, in *Sutton v. New York etc. R. Co.*, 66 N. Y. 243.

The principle as to very little evidence is established in *Frazier v. Lloyd*, 23 W. N. C. (Pa.) 178; *Ryder v. Wombwell, L. R.*, 4 Exch. 32, 39; *Philadelphia etc. R. Co. v. Schertle*, 97 Pa. St. 450; 2 Am. & Eng. R. Cas. 158.

**Scintilla of Evidence.**—The doctrine that a mere *scintilla* of evidence is sufficient to send the case to the jury is now virtually discarded in American courts, and wholly so in the English courts. See a full discussion of this whole matter in INSTRUCTIONS, 11 Am. & Eng. Encyc. of Law 243. See also *Shear & Red. on Neg.*, § 56; *Schuyllkill etc. Imp. Co. v. Munson*, 14 Wall. (U. S.) 442, 448; *Smith v. Sioux City etc. R. Co.*, 15 Neb. 583; 17 Am. & Eng. R. Cas. 561; *Hathaway v. East Tennessee etc. R. Co.*, 29 Fed. Rep. 491; *Parks v. Rose*, 11 How. (U. S.) 373; *Pleasants v. Fant*, 22 Wall. (U. S.) 116, 121.

Where the doctrine happens to prevail, however, the court cannot take the matter from the jury when there is *any* evidence tending to prove the issue. *Robinson v. Louisville etc. R. Co.*, 2

court.<sup>1</sup> In every case there is a preliminary question for the court as to whether there is any evidence upon which a jury could properly find a verdict for the party producing it, and upon whom the burden of proof is imposed. If the evidence is such that the court would consider it proper to set aside a ver-

Lea (Tenn.) 594; INSTRUCTIONS, 11 Am. & Eng. Encyc. of Law 243, *et seq.*; Dick v. Indianapolis etc. R. Co., 38 Ohio St. 389; 8 Am. & Eng. R. Cas. 101; Shear. & Red. on Neg., § 56; Mercier v. Mercier, 43 Ga. 323.

1. Hathaway v. East Tennessee etc. R. Co., 29 Fed. Rep. 489; Abbett v. Chicago etc. R. Co., 30 Minn. 482; Sutton v. New York etc. R. Co., 66 N. Y. 243; Chicago etc. R. Co. v. O'Connor, 119 Ill. 586; O'Neill v. Chicago etc. R. Co., 1 McCrary (U. S.) 505; Keller v. New York etc. R. Co., 24 How. Pr. (N. Y.) 177; s. c., 79 N. Y. 72; Beven on Neg. 11; Reading etc. R. Co. v. Ritchie, 102 Pa. St. 425; 19 Am. & Eng. R. Cas. 267; Dahl v. Milwaukee City etc. R. Co., 62 Wis. 652; 19 Am. & Eng. R. Cas. 121; Ernst v. Hudson River R. Co., 35 N. Y. 9; Bernhardt v. Rensselaer etc. R. Co., 32 Barb. (N. Y.) 165; Moore v. Westervelt, 21 N. Y. 103; Detroit etc. R. Co. v. Van Steinburg, 17 Mich. 99.

This principle is true, whether the evidence is such as to establish or disprove plaintiff's case. See Shear. & Red. on Neg., § 56; Williams v. O'Keefe, 24 How. Pr. (N. Y.) 16.

For where there is no dispute as to the facts, or the inferences to be drawn from them, the only point is whether the law attaches the legal consequences of negligence; if it does, it is for the court to say. Beven on Neg. 11. Thus the court may properly order the jury to find for the defendant, a railroad company, where plaintiff's evidence shows that his intestate, killed by a train, disregarded its signal, and recklessly went upon a crossing in front of the approaching train. Fox v. Missouri Pac. R. Co., 85 Mo. 679.

Likewise where the plaintiff's case in an action against a railroad company shows that plaintiff's intestate, a brakeman, was killed on top of a box car by a bridge which he had passed daily for three months, and that the company had not erected danger signal cords, a nonsuit is properly ordered. Hooper v. Columbia etc. R. Co., 21 S. Car. 541; s. c., 53 Am. Rep. 691; 28 Am. & Eng. R. Cas. 433.

The question of negligence, however,

is not always a matter of law, where there is no conflict of testimony as to the particular facts. If it still rests upon discretion, experience and judgment to determine whether the acts complained of are inconsistent with ordinary care and prudence, it is for the jury. Vinton v. Schwab, 32 Vt. 612; Ohio etc. R. Co. v. Collarn, 73 Ind. 261; 5 Am. & Eng. R. Cas. 554.

The rule is stated by Shear. & Red. on Neg. (§ 56), that "when the facts are clearly settled, and the course which common prudence dictated can be clearly discerned, the court should decide the question as a matter of law." Citing Beisiegel v. New York Cent. R. Co., 40 N. Y. 9; Stubley v. N. W. R. Co., L. R., 1 Exch. 13; Crafter v. Metropolitan R. Co., L. R., 1 C. P. 300.

Where, by the plaintiff's own evidence, it appears that his negligence contributed to the injury, he is properly nonsuited. This principle applied to a particular state of facts in Brown v. Wood (Pa. 1888), 16 Atl. Rep. 42.

For example, in an action against a carrier for compelling plaintiff to leave its train some distance from the depot, and to walk along a track having an open culvert, into which plaintiff fell, receiving the injuries complained of, where there is some evidence tending to show that plaintiff fell into the culvert while attempting to help a companion out, it is error to refuse to submit such question to the jury. Kreuziger v. Chicago etc. R. Co., 73 Wis. 158.

"It has never been held that when the facts of the case have been ascertained, the court may not apply the law to the facts. This is done daily upon special verdicts and reserved points." PAXSON, J., in Hoag v. Lake Shore etc. R. Co., 85 Pa. St. 293; s. c., 27 Am. Rep. 653; Pennsylvania R. Co. v. Kerr, 62 Pa. St. 353; 1 Am. Rep. 431.

MR. COOLEY states the rule thus: "If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there

dict based upon it, the case should not be submitted to the jury, but a nonsuit should be ordered.<sup>1</sup>

**XVII. PARTIES TO THE ACTION—1. Plaintiff.**—The party injured is always a proper party plaintiff. But the plaintiff is not necessarily the party *directly* injured. Thus where a child is injured, it, as plaintiff, may recover damages for the injury, and the parent may be plaintiff in another action for damages caused from the loss of the child's services. The same is true of a master and his servant.<sup>2</sup> Similarly, where the common law remains in force, the

is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute. On the contrary he should say to them, 'In the judgment of the law this conduct was negligent,' or, as the case might be, 'There is nothing in the evidence here which tends to show a want of due care.' In either case he draws the conclusion of negligence or the want of it as one of law." Cooley on Torts (2nd ed.) 804.

1. *Pleasants v. Fant*, 22 Wall. (U. S.) 116, 120. In that case the court, speaking through JUSTICE MILLER, observes: "In the discharge of his duty it is in the province of the court, either before or after verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor; not whether, on all the evidence, the preponderating weight is in his favor. That is for the jury; but conceding to all the evidence the greatest probative force to which, according to the law of evidence, it is justly entitled, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict, to set it aside." But it is not necessary (it was further said) to wait until after verdict to pass upon the evidence; it should be done *before*, by means of instructions. See also *Beaulieu v. Portland Co.*, 48 Me. 291; *Cagger v. Lansing*, 64 N. Y. 417; *Bagley v. Cleveland Rolling Mill*, 21 Fed. Rep. 159; *Abbott's Trial Brief*, p. 117; *INSTRUCTIONS*, 11 Am. & Eng. Encyc. of Law 250, *et seq.*; *Flier v. New York Cent. R. Co.*, 49 N. Y. 47.

It may be stated as a proper test to consider whether the verdict of the jury on the point, if in favor of the moving party, would have to be set aside as contrary to the weight of evidence. *Cagger v. Lansing*, 64 N. Y. 417; *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. Rep. 159; *Pleasants v. Fant*, 22 Wall. (U. S.) 116, 120; *Smith v. O'Connor*,

48 Pa. St. 218; *Flier v. New York Cent. R. Co.*, 49 N. Y. 47.

Where, in an action for personal injuries, the court does not feel justified in sustaining a verdict for the plaintiff, it should direct a verdict for the defendant, even though there be evidence which would raise a possibility that plaintiff was entitled to recover. *Sullivan v. Chrysolyte Min. Co.*, 21 Fed. Rep. 892.

2. The recovery by a parent of the value of his child's services, lost by reason of the injury, is based upon the relation of master and servant, so that what is true of one relation in this respect is true of the other. 2 *Thompson on Neg.* 1242, § 16; *Karr v. Parks*, 44 Cal. 46; *Oakland R. Co. v. Fielding*, 48 Pa. St. 320.

Therefore, where the relation of master and servant does not exist, *e. g.*, when the child is so young that his services are worthless, or where the parent has relinquished his right to his services, there can be no recovery by the parent, or rather he cannot be a proper party plaintiff. *Hall v. Hollander*, 4 B. & Cr. (Eng.) 660; *s. c.*, 7 Dow. & Ry. 133; *Grinnell v. Well*, 8 Scott N. R. 741.

But it seems to be allowed now that the parent recover damages for the prospective value of the child's services when it is too young to be of any service when injured. *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49; *Franklin v. Southeastern R. Co.*, 3 Hurl. & N. 211; 2 *Thompson on Neg.* 1242, § 6.

In the case of *Abeles v. Bransfield*, 19 Kan. 16, it was held that by the commencement and prosecution of an action by the parent as next friend of his child, it is conclusively presumed that the parent has relinquished to the infant all compensation for loss of time and expenses incurred by reason of an injury, and in such an action the infant may recover damages therefor.

**Injuries Causing Death.**—It is generally said that at common law no action

husband may sue for damages sustained by him in the loss of the services and society of his wife, where she is injured by a third party,<sup>1</sup> while husband and wife must join in the action for dam-

for the death of a human being could be sustained. Such actions were not absolutely forbidden, but were prevented by two common law principles viz:

(1) The death of the person injured produced an abatement of the right of action, which would prevent the representatives of the deceased from bringing it. (2) The civil remedy for felonious death was necessarily suspended until the criminal punishment had been enforced, and, as this deprived the wrongdoer both of life and property, there was little opportunity for such a suit in such case by those who had suffered from his act. But both these rules taken together fail to show any reason why relatives of a deceased person could not maintain an action for damage suffered where the death was not felonious. This is the view presented in Hammond's Blackstone 194-7. See also *Cross v. Guthery*, 2 Root (Conn.) 90; *Ford v. Monroe*, 20 Wend. (N. Y.) 210; 1 Cent. L. J. 590, 614, 622; 2 Cent. L. J. 13, 47, 128, 165; *Reeves on Domestic Rel.* (4th ed.) 486; *DILLON, J.*, in *Sullivan v. Union Pac. R. Co.*, 3 Dill. (U. S.) 334. But whether the action existed at common law or not is of small importance now. In *England* an act was first passed, known as Lord Campbell's act, giving a right of action in such cases against the injurer (9 and 10 Victoria, ch. 92). This act has been imitated in almost every State of the Union. The statutes of the various States differ somewhat in their minute particulars, but are principally the same in their principal provisions.

It would seem that in the absence of an express provision in the statute otherwise, that the action would lie whether the death were instantaneous or delayed. *Brown v. Buffalo etc. R. Co.*, 22 N. Y. 91; *Murphy v. New York etc. R. Co.*, 30 Conn. 184; Hammond's Blackstone 197.

But in *Massachusetts* the action is held not to lie where the death is instantaneous. *Kearney v. Boston etc. R. Co.*, 9 Cush. (Mass.) 108. However, any perceptible interval is held sufficient. *Bancroft v. Boston etc. R. Co.*, 11 Allen (Mass.) 34.

See this subject treated in *DEATH*, 5 Am. & Eng. Encyc. of Law 125-130;

Beven on Neg. 162, *et seq.*; *Shear. & Red. on Neg.*, § 124, *et seq.*; *Deering on Neg.*, § 387; Hammond's Blackstone 194-197.

1. *Loss of Wife's Services.*—The damages to be recovered for loss of wife's services are entirely distinct from those recovered for actual injury to wife. In an action for loss of such services, nothing can be recovered except the value of the loss of her services to her husband, or for the expense of her cure. *Brooks v. Schwerin*, 54 N. Y. 343; *Smith v. St. Joseph*, 55 Mo. 456; *Fuller v. Naugatuck R. Co.*, 21 Conn. 557; *Barnes v. Martin*, 15 Wis. 240; *Lewis v. Babcock*, 18 Johns. (N. Y.) 443; *Heirn v. McCaughan*, 32 Miss. 17; *Barnes v. Hurd*, 11 Mass. 59; 2 Thompson on Neg. 1241; *Shear. & Red. on Neg.*, § 115. See also *HUSBAND AND WIFE*, 9 Am. & Eng. Encyc. of Law 832, 833.

Where defendant from day to day secretly sold to plaintiff's wife large quantities of laudanum to be used as a beverage, knowing the use to be made of it, and her (the wife's) health was greatly injured, so that plaintiff was deprived of her services and society, he was allowed to recover damages for such loss. *Hoard v. Peck*, 56 Barb. (N. Y.) 202.

If a voluntary separation has taken place between husband and wife, which by agreement is to be permanent, the husband can have no cause of action for injuries sustained by her; for, having parted with her by his full consent, he could not maintain an action for the loss of her services. *Fry v. Derstler*, 2 Yeates (Pa.) 278. See also *Peru v. French*, 55 Ill. 317.

In *Iowa* it is allowed by statute that the husband may recover for expenses incurred while the wife was suffering from the effects of the injury; the wife cannot recover therefor unless she had expended her own money in payment of such expenses. *Tuttle v. Chicago etc. R. Co.*, 42 Iowa 518.

Where a wife labors for another, her services no longer belong to her husband but to herself, and if she is injured she may recover for their loss so far as she is disabled. *Brooks v. Schwerin*, 54 N. Y. 343.



ages for the injury to the wife personally.<sup>1</sup>

The case of an insurance company is an exception to the general rule, since although indirectly injured by the injury to the plaintiff they cannot maintain an action against the injurer. The injury would not have obliged them to suffer any damage if they had not voluntarily undertaken to do so.<sup>2</sup>

When a special duty is imposed upon any person by law, and through the violation of it some one is injured, the rule that the injured party is the proper plaintiff applies, even though the duty was owing rather to the public than to any individual.<sup>3</sup>

In case of an injury to property the injured party may be either the owner, tenant or reversioner, according to the circumstances of the case and the nature of the injury. One who has a fixed reversionary interest under lease may bring an action for

1. **Damages for Injury to Wife.**—2 Thompson on Neg. 1240, § 15; Shear & Red. on Neg., § 115; Hyde v. Scysser, Cro. Jac. 538; 3 Black. Com. 140; Brockbank v. Whitehaven, 7 Hurls. & N. 834; Whitcomb v. Barre, 37 Vt. 148; Laughlin v. Eaton, 54 Me. 156; Matteson v. New York Cent. R. Co., 35 N. Y. 487; Hopkins v. Atlantic etc. R. Co., 36 N. H. 9; Brooks v. Schwerin, 54 N. Y. 343; Thomas v. Winchester, 6 N. Y. 397; 1 Chitty on Plead. (1828) 62.

**Statutory Alterations.**—The old principles of the common law, relative to suits by married women, have been changed in very many States and no rule can be laid down for all; the statutes must be consulted. See Harwood v. Lowell, 4 Cush. (Mass.) 310 (injury by defect in sidewalk); Chidsey v. Canton, 17 Conn. 475; Kavanaugh v. Janesville, 24 Wis. 618; Whitcomb v. Barre, 37 Vt. 148; Brooks v. Schwerin, 54 N. Y. 343; Neumeister v. Dubuque, 47 Iowa 465. See also HUSBAND AND WIFE, 9 Am. & Eng. Encyc. of Law 832.

2. Shear & Red. on Neg., §§ 115, 124; Connecticut L. Ins. Co. v. New Haven R. Co., 25 Conn. 265; s. c., 65 Am. Dec. 571; Rockingham Mut. F. Ins. Co. v. Boshier, 39 Me. 253; s. c., 63 Am. Dec. 618. See also Althorf v. Wolfe, 22 N. Y. 355; Antony v. Slaide, 11 Metc. (Mass.) 290 (contractor injured peculiarly by one of his paupers being beaten); Longmeid v. Holliday, 6 Eng. L. & Eq. 563; Peoria etc. Ins. Co. v. Frost, 37 Ill. 335; Hall v. Nashville etc. R. Co., 13 Wall. (U. S.) 372.

In the leading case (Connecticut Mut. L. Ins. Co. v. New Haven etc. R. Co., *supra*), the court say: "The single

question is whether a plaintiff can successfully claim a legal injury to himself from another because the latter has injured a third person in such a manner that the plaintiff's contract liabilities are thereby affected. An individual slanders a merchant, and thereby ruins his business. Is the wrongdoer liable to all the persons who, in consequence of their relations by contract to the bankrupt, can be clearly shown to have been damaged by the bankruptcy? . . .

To open the door of legal redress to wrongs received through the mere voluntary factitious relation of a contractor with the immediate subject of the enquiry would be to encourage collusion and extravagant contracts between men by which the death of either, through the involuntary default of others, might be made a source of splendid profits to the other, and would also invite a system of litigation, more portentous than our jurisprudence has yet known."

3. *Adsit v. Brady*, 4 Hill (N. Y.) 630 (action against city officer); *Clayburgh v. Chicago*, 25 Ill. 440; s. c., 79 Am. Dec. 346 (action for negligence in failing to perform a duty imposed by law); *City Council of Montgomery v. Gilmer*, 33 Ala. 116; s. c., 70 Am. Dec. 562 (negligence by city in care of sewers); *Rowe v. Portsmouth*, 56 N. H. 291; s. c., 22 Am. Rep. 464 (same as preceding); *Wendell v. Mayor etc. of Troy*, 39 Barb. (N. Y.) 329; s. c., 4 Abb. Ct. App. 563; *Shear & Red. on Neg.*, § 118. Compare *Hill v. Boston*, 122 Mass. 344; s. c., 23 Am. Rep. 332; *Fuchs v. Schmidt*, 8 Daly (N. Y.) 317; *Heintze v. New York*, 50 N. Y. Super. Ct. 295.

damages caused by an injury to such property as will depreciate its value when it comes into his hands;<sup>1</sup> nor is it any bar to his recovery that the injury is one which may possibly cease before he comes into possession, if it is in its nature permanent and liable to continue unless hindered.<sup>2</sup> The owner of a reversionary interest in personal property has the same right of action for injuries done to it as in case of real property.<sup>3</sup>

A person who employs another to do a lawful act is presumed, in the absence of evidence to the contrary, to employ him to do it in a lawful and proper manner, and therefore the employer is not responsible for injuries occasioned by the negligent mode in which the act is done, unless he sustains as to the employee the relation of master to servant; but if the thing contracted to be done, of itself and without negligence on the part of the contractor, causes injury, or if the thing to be done be an unlawful act, the person having it done will be held liable.<sup>4</sup>

**2. Defendant.**—In actions for negligence, the defendant proper is always the actor in the proximate cause of the injury; that is, he must be the actor personally or through some one for whose acts he is responsible.<sup>5</sup> Where a breach of duty is committed by

**1. Reversioners.**—Shear. & Red. on Neg., § 119; *Jesser v. Gifford*, 4 Burr. 2141; *Tomlinson v. Brown*, 1 Sayer 215; *Tucker v. Newman*, 11 Ad. & El. (Eng.) 40; *Raine v. Alderson*, 4 Bing. N. C. 702; 6 Scott 691.

**Equitable Owner.**—One in possession of land under a contract to purchase is considered the equitable owner and may recover damages for injuries caused by negligently setting fire to the woods and fences on it. *Rood v. New York etc. R. Co.*, 18 Barb. (N. Y.) 80; *Hays v. Miller*, 6 Hun (N. Y.) 320.

**2. Shear. & Red. on Neg., § 119.**

Under this principle, the building of an adjoining house, so that the rain drips upon the reversioner's land, is a permanent injury. *Tucker v. Newman*, 11 Ad. & El. 40. So also an excavation causing a falling in of the soil. *Raine v. Alderson*, 4 Bing. N. C. 702; 6 Scott 691.

In an action by a reversioner for the obstruction of ancient lights, it was objected that the obstruction might be removed, either by the voluntary act of the defendant, or by process of law, before the reversioner came into possession. But the objection was overruled. *Jesser v. Gifford*, 4 Burr. 2141; *Tomlinson v. Brown*, 1 Sayer 215; *S. P. Snadwell v. Hutchinson*, 4 Carr. & P. 333; 1 Moo. & M. 350 (*TENTERDEN*, C. J.).

**3. Shear. & Red. on Neg., § 119; Hawkins v. Phythian, 8 B. Mon. (Ky.) 515.**

**4. Butler v. Hunter, 31 L. J. Exch. 214; *Ready v. London etc. R. Co.*, 4 Exch. 244; *Wright v. Holbrook*, 52 N. H. 120 (*SARGENT, J.*, there discusses the question at length); s. c., 13 Am. Rep. 12; *Hilliard v. Richardson*, 3 Gray (Mass.) 349; *Cuff v. Newark etc. R. Co.*, 35 N. J. L. 17; *Daggett v. Robins*, 2 Blackf. (Ind.) 418. See also this whole subject well presented in *MASTER AND SERVANT*, 14 Am. & Eng. Encyc. of Law 891.**

**5. This follows as of course from the rule that defendant's act must have been the proximate cause of the injury. See, ante, PROXIMATE CAUSE, PARTIES TO ACTION, Am. & Eng. Encyc. of Law; MASTER AND SERVANT, 14 Am. & Eng. Encyc. of Law.**

**Master and Servant Jointly Liable for Negligence of Servant.**—It is laid down by Shear. & Red. on Neg., § 122, that "where a master is liable for the tortious negligence of his servant, the latter is jointly liable with him," citing *Phelps v. Wait*, 30 N. Y. 78; *Michael v. Alestree*, 2 Lev. (Eng.) 172; *Steel v. Lester*, L. R., 3 C. P. 121.

This is also supported by the cases of *Wright v. Wilcox*, 19 Wend. (N. Y.) 343; *Montfort v. Hughes*, 3 E. D. Smith (N. Y.) 591; *Suydam v. Moore*, 8 Barb.

more than one person, each contributing to the injury as a joint tort-feasor, the plaintiff has his election to make either or all of them defendant.<sup>1</sup> And it is not always essential in order to make them liable as joint tort-feasors, that they should have acted in concert; acting independently and causing together a

(N. Y.) 358; *Hewitt v. Swift*, 10 Am. Law Reg. 505; *Wright v. Compton*, 53 Ind. 337. But such action can only be joint where the injury is due to negligence; if the injury is wilful, there is no joint liability of the two. The term "tortious negligence" used above is to be noted. See *Wright v. Wilcox*, 19 Wend. (N. Y.) 343; *Garvey v. Dung*, 30 How. Pr. (N. Y.) 315; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479; *Isaacs v. Third Ave. etc. R. Co.*, 47 N. Y. 122; s. c., 7 Am. Rep. 418; *Fraser v. Freeman*, 43 N. Y. 566.

The case of *Schaefer v. Osterbrink*, 67 Wis. 495, was an action against a father and son jointly to recover damages for the negligence of the son who was a minor living with his father, in carelessly driving his father's sleigh and team past plaintiff's sleigh on the highway so as to frighten the plaintiff's team and injure his minor son. Evidence was permitted to be introduced that the son was in the habit of driving the team for his father to church and elsewhere; and that the team had acted in a similar way a few days before.

The case of *Campbell v. Portland Sugar Co.* (62 Me. 552; s. c., 16 Am. Rep. 503) is an interesting one as regards the liability of agents. A portion of a wharf was leased to A and B by the agents of the owners of the wharf, the agents being bound to repair. A person going to the portion of the wharf mentioned in order to take a vessel, was obliged, by obstructions on other parts of the wharf, to take a certain route through a shed, and, owing to a defect in the wharf, was injured. It was held that the owners and agents were liable for the injury, but that the liability was not joint. A verdict against both was allowed to stand against the agents upon the discontinuance of the suit as against the owners. See also *Shear. & Red. on Neg.*, § 122; *Phelps v. Wait*, 30 N. Y. 78; *Steel v. Lester*, L. R., 3 C. P. 121.

1. *Guille v. Swan*, 19 Johns. (N. Y.) 381; *Hawkeworth v. Thompson*, 99 Mass. 77; *Williams v. Sheldon*, 10 Wend. (N. Y.) 654; *Slater v. Merse-*

*reau*, 64 N. Y. 138; 2 *Thompson on Neg.* 1088, § 5; *Wabash etc. R. Co. v. Shacklet*, 105 Ill. 364; 12 Am. & Eng. R. Cas. 166; *Thompkins v. Clay etc. R. Co.*, 66 Cal. 163; *Little Schuykill Nav. Co. v. Richards*, 57 Pa. St. 148; *Kain v. Smith*, 80 N. Y. 458, 468; *Lyman v. Hampshire*, 140 Mass. 311; *Shear. & Red. on Neg.*, § 122; *Union etc. Co. v. Shacklet*, 119 Ill. 232.

Thus, all persons who are concerned, directly or indirectly, in the firing off of fireworks in a public street are responsible for the injuries done to an innocent person. *Jenne v. Sutton*, 43 N. J. L. 257; s. c., 39 Am. Rep. 578.

So, where A lent his wagon to B and C, who each furnished a horse, and then at their invitation A rode with them, it was held that they were all three jointly liable for the negligence of B in driving too fast. *Bishop v. Ely*, 9 Johns. (N. Y.) 294; *Davey v. Chamberlain*, 4 Esp. 229.

A switchman, who is in the employ of two railway companies at a point where they use a common track, and who contribute to pay his wages, may, on being injured while thus employed, by a defect in the road, sue either or both of the companies. *Vary v. Baltimore etc. R. Co.*, 42 Iowa 246.

But it is not always true that where two persons are associated and acting together they are equally liable; both must have been negligent. Thus A and B, employees of the fire patrol, went with a horse and wagon to remove some tarpaulins, used by the company at a fire, from the fourth story of a building. A was the driver and remained with his horse on the street while B went into the building and threw the tarpaulins out of the window. A warned pedestrians passing on the pavement of the danger. One of the tarpaulins struck a pedestrian as he was passing and so injured him that he died. In an action to recover damages for this negligence, brought by his wife and child against A and B, the court rightly granted a compulsory nonsuit as to A. *Boyd v. Philadelphia Ins. Patrol*, 113 Pa. St. 269.

single injury, they are liable jointly and severally.<sup>1</sup> The same is true where a duty is owing by several and there is a breach of it by one only.<sup>2</sup> But persons who act severally and independently, each causing a separate and distinct injury, are not jointly liable, although the injuries may have been precisely similar in character and inflicted at the same time.<sup>3</sup>

In the case of landlords and tenants, the question arises as to who is to be made defendant in an action for an injury caused by an improper condition of the property. It seems to be the proper rule that the landlord is liable for the negligent construction, and the tenant for the negligent use of the premises.<sup>4</sup> If a dangerous or injurious structure is erected on the premises when

1. Thus, where by the combined negligence of two railway corporations a collision occurs whereby a party is injured, both corporations are liable to a joint action for damages against them. *Colegrove v. New York etc. R. Co.*, 20 N. Y. 492; s. c., 75 Am. Dec. 418; *Slater v. Mersereau*, 64 N. Y. 147; *Arctic F. Ins. Co. v. Austin*, 3 Hun (N. Y.) 197; *Boyd v. Watt*, 27 Ohio St. 268; *Lyman v. Hampshire*, 140 Mass. 311.

A separate and joint liability arises in such cases, and the person injured may at his option sue one or all. *Chipman v. Palmer*, 9 Hun (N. Y.) 619; s. c., 77 N. Y. 54; *Pollett v. Long*, 56 N. Y. 205; *Lull v. Fox etc. Imp. Co.*, 19 Wis. 102; *Masterson v. New York etc. R. Co.*, 84 N. Y. 256; 3 Am. & Eng. R. Cas. 408. Compare *Brouk v. New York etc. R. Co.*, 3 Daly (N. Y.) 454.

2. Two municipal corporations owning a bridge uniting their territories are liable jointly and severally for an injury caused by the negligent construction or management of it. *Peckham v. Burlington*, 1 Brayt. (Vt.) 134; *Weiserberg v. Winneconne*, 56 Wis. 667; *Lyman v. Hampshire*, 140 Mass. 311; *Brown v. Fairhaven*, 47 Vt. 386. Consult *Walsh v. Trustees etc. of Brooklyn Bridge*, 96 N. Y. 427.

Likewise the two owners of a party wall are jointly and severally liable for injuries sustained in consequence of its falling through want of proper care. *Klauder v. McGrath*, 35 Pa. St. 128; s. c., 78 Am. Dec. 329.

Two persons were jointly superintending a work which was so negligently done that it caused injury to the plaintiff. Both were held jointly liable; it made no difference that one rendered his services to the other gratuitously, or that the acts of the other were done on

his own land. *Hawkesworth v. Thompson*, 98 Mass. 77.

3. *Shear. & Red. on Neg.*, § 123; *Williams v. Sheldon*, 10 Wend. (N. Y.) 654.

This was the principle asserted in the common law by reason of which a person, whose property was injured by animals belonging to several of his neighbors, could not make such owners jointly liable. See *ANIMALS*, 1 Am. & Eng. Encyc. of Law; *Van Steenburgh v. Tobias*, 17 Wend. (N. Y.) 562.

Where two persons are engaged in the accomplishment of a common purpose, and through the sole negligence of only one an injury is caused, the person actually causing the injury is alone liable. *Boyd v. Philadelphia Ins. Patrol*, 113 Pa. St. 269.

Persons who occupy the same building, but are separate renters of different portions of such building, are not jointly liable for their negligent use of the premises. They are only so when their right is joint. *Moore v. Goedel*, 7 Bosw. (N. Y.) 591; *Eakin v. Brown*, 1 E. D. Smith (N. Y.) 36.

4. *Shear. & Red. on Neg.*, § 120; *Eakin v. Brown*, 1 E. D. Smith (N. Y.) 44; *Irvine v. Wood*, 51 N. Y. 224; *Swords v. Edgar*, 59 N. Y. 34; *Allen v. Smith*, 76 Me. 335 (tenant liable for negligent use). See also *LANDLORD AND TENANT*, 12 Am. & Eng. Encyc. of Law 890.

The owners of a steamboat engaged in carrying passengers, but who have not the possession, control or management of it themselves, or by their agents, servants or employees, cannot be held responsible for the negligence or mismanagement of others who have the exclusive possession, control and management. *Gulzoni v. Tyler*, 64 Cal. 334.

he lets them to the tenant, the landlord is, of course, liable;<sup>1</sup> but he cannot be made answerable for such a structure erected by the tenant, unless he renews the lease for the premises after knowledge of it.<sup>2</sup> Nor is the landlord liable, in the absence of a

The case of *Ingwersen v. Rankin*, 47 N. J. L. 18; s. c., 54 Am. Rep. 109, established that (1) He who creates a nuisance on his own premises cannot escape liability for its continuance by demising the premises whereon the nuisance is; (2) Such liability will exist although the tenant by the demise stipulates to keep the premises in repair; (3) A landlord whose tenant during the term has created a nuisance on the demised premises will not be liable therefor so long as he has no right of entry or power to abate; but when the term expires, or the landlord may enter and abate the nuisance, he will become liable for its continuance, and that liability cannot be evaded by a renewal of the lease, though with covenants to repair and without the landlord's having taken actual possession.

**Ques.**—Whether knowledge of the existence of the nuisance is necessary to establish the landlord's liability in such cases.

**Party in Possession of Premises, Liable.**—The manufacturer of an elevator which had been in use two or three days sent an employee, at the purchaser's request, to see what was the matter with it. After taking the car to an upper floor the latter said to one of the purchasers, "Let us load it up," and the purchaser accordingly directed a servant to assist in the loading. The elevator fell while being loaded, and the servant was hurt. *Held*, that he had a right of action against the manufacturer, who was in possession by his employee. *Necker v. Harvey*, 49 Mich. 517; *Keeley v. O'Conner*, 106 Pa. St. 321 (A owning premises, B leasing second floor, B's servant injured by fire in building—A not liable); *Marshall v. Heard*, 59 Tex. 266.

1. *Roswell v. Pryor*, 12 Mod. 635; 1 Ld. Raym. 713; *Congreve v. Smith*, 18 N. Y. 79, 84; *Clifford v. Dam*, 81 N. Y. 52; *Swords v. Edgar*, 59 N. Y. 34; *Davenport v. Ruckman*, 37 N. Y. 568; *Anderson v. Dickie*, 26 How Pr. (N. Y.) 105; *Knauss v. Brua*, 107 Pa. St. 85 (privy well and sewer out of repair when tenant entered premises; landlord liable); *Khron v. Brock*, 144 Mass. 516; *Albert v. State*, 66 Md. 325 (wharf—same as preceding

case); *Marshall v. Heard*, 59 Tex. 266.

And his liability continues, although he is prevented from removing the construction afterwards by reason of having demised the premises; or because the construction is on the land of another. *Fish v. Dodge*, 4 Den. (N. Y.) 312; *Thompson v. Gibson*, 7 Mees. & W. 456; *Roswell v. Prior*, 12 Mod. 635; s. c., 1 Ld. Raym. 713.

In *Cunningham v. Bay State Shoe etc. Co.*, 93 N. Y. 481, the defendant had a contract with the county of K for the services of the convicts in the penitentiary of that county, to be rendered within its walls, in shops furnished by the county. The shops and convicts were under the control of the prison authorities. In a shop building furnished under the contract was an elevator used by the defendant in carrying on its business. Plaintiff, who was in the employ of persons engaged repairing the building under a contract with the county, fell down the elevator hole, which was not covered or guarded, and was injured. In an action to recover damages, *held* that defendant was not liable.

2. Thus in case of a tenancy from year to year the landlord chose to renew the tenancy after the tenant had created the nuisance, the landlord is liable for injuries caused by it. *Rex v. Pedly*, 1 Ad. & El. 827; *Gaudy v. Jubber*, 5 Best. & S. 78, 485; *Jessen v. Sweigert*, 66 Cal. 182 (landlord responsible for injury from an insecure awning which he had "suffered" to be put up); *Owings v. Jones*, 9 Md. 108; *Woram v. Noble*, 41 Hun (N. Y.) 398. *Shear. & Red. on Neg.*, § 120; *Edwards v. New York etc. R. Co.*, 98 N. Y. 245; s. c., 50 Am. Rep. 659 (dangerous construction on premises of which landlord was ignorant; tenant was liable); *Wolf v. Kilpatrick*, 101 N. Y. 146; s. c., 54 Am. Rep. 674 (same as preceding). Compare *Clifford v. Dam*, 81 N. Y. 52; *Anderson v. Dickie*, 1 Robt. (N. Y.) 238; *Dybert v. Schenck*, 23 Wend. (N. Y.) 445; *Congreve v. Morgan*, 18 N. Y. 84; *Davenport v. Ruckman*, 37 N. Y. 568; *Swords v. Edgar*, 59 N. Y. 28.

covenant,<sup>1</sup> for the consequences of a natural decay in the premises;<sup>2</sup> and if injury occurs, after he has alienated the property, from a dangerous structure erected by him before alienation, he is not liable, the new owner alone being responsible.<sup>3</sup> Where a structure is erected by the owner and used by the tenant of the premises (for example, a coal hole in the sidewalk), and a person is injured by this being negligently left open, the injured party may maintain an action against either the owner or the tenant.<sup>4</sup> As to whether and when infants and lunatics are such responsible persons as can be made defendants in an action for negligence, there is much conflict of authority.<sup>5</sup> Joint owners of real property are liable severally and jointly for injuries occasioned by its negligent use and management by either.<sup>6</sup>

1. *Payne v. Rogers*, 2 H. Blacks. 350; *Peoria v. Simpson*, 110 Ill. 294; s. c., 51 Am. Rep. 683; *Campbell v. Portland Sugar Co.*, 62 Me. 552; s. c., 16 Am. Rep. 503; *Shear. & Red. on Neg.*, § 120.

It has been said that where the tenant has not notified the landlord to repair, the latter is not liable, upon his covenant to repair, for injuries sustained by a stranger in consequence of a want of repair, while the latter is upon the premises by invitation of the tenant. *Pleon v. Staff*, 9 Mo. App. 309. But it is doubtful if this maintains the proper principle.

2. *Cheetham v. Hampson*, 4 T. Rep. 358 (cattle straying on premises and injured); *Couplan v. Hardingham*, 3 Camp. 308; *Daniells v. Potter*, 4 Carr. & P. 266; *Staple v. Spring*, 10 Mass. 74; *Peoria v. Simpson*, 110 Ill. 294; s. c., 51 Am. Rep. 683; *Odell v. Solomon*, 99 N. Y. 635 (tenant had covenanted to repair and was therefore liable).

It is the duty of a farm tenant by force of law to make all needed current repairs on the fences; and if they are not kept in lawful condition, it is his fault, and not the landlord's; and an action cannot be maintained against the landlord by an adjoining land owner, whose colt escaped through an insufficient division fence and strayed on to the railroad track, and was there injured. And this is so although the fence was in the same condition at the time of the accident as when the tenant went into possession. *Blood v. Spaulding*, 57 Vt. 422.

3. *Blunt v. Alkin*, 15 Wend. (N. Y.) 522; *Cheetham v. Hampson*, 4 T. Rep. 318; *OWNER*, 17 Am. & Eng. Encyc. of Law. Compare *Davenport v. Ruckman*, 10 Bosw. (N. Y.) 20.

4. *Irvin v. Fowler*, 5 Robt. (N. Y.) 482; *Calder v. Smalley*, 66 Iowa 219 (landlord's liability affirmed); *Irvine v. Wood*, 51 N. Y. 224 (tenant's liability affirmed); *Davenport v. Ruckman*, 37 N. Y. 568; *Leslie v. Pound*, 4 Taunt. 469. Compare *Keokuk v. Keokuk*, 53 Iowa 352.

In *Irvin v. Fowler*, 5 Robt. (N. Y.) 482, the jury were charged ". . . the sidewalk must be kept as safe as if the thing had not been there. It is at their peril to keep it so; and it is upon that ground that the defendants (landlord and tenant) are liable; the tenants as using it in putting in coal, the landlord as having received rent for the use of it."

Where the tenant surrendered the premises to the landlord for a brief period, to enable him to make repairs, the tenant was not liable because he was not in possession, and the landlord was liable without reference to his liability as owner, for the reason that he was in possession. *Leslie v. Pound*, 4 Taunt. 649.

5. Dr. Wharton asserts that they cannot be a judicial cause and are therefore not liable. Wharton on Neg., § 88. *Shear. & Red.* are equally positive the other way. *Shear. & Red. on Neg.*, § 121, and cases cited.

This subject has already been discussed *supra*, LEGALLY RESPONSIBLE PERSON.

6. Parties jointly interested in the carriage causing the damage are liable notwithstanding a private arrangement between them that one should manage for one distance of the road and the other for another. *Woland v. Elkins*, 1 Stark. 272; *Fremont v. Coupland*, 2 Bing. 170; *Moreton v. Hardern*, 4 B. & C. 223.

**XVIII. MEASURE OF DAMAGES.**—The rule as to the measure of damages caused by the actionable negligence of the defendant is quite different from that which applies in actions on contracts, being more comprehensive.<sup>1</sup> The rule purely stated is, that every wrongdoer must make reparation for such damages as are caused by his wrong-doing, and this whole division of the subject of negligence is but an explanation of this rule.<sup>2</sup> The measure

So where A and B each furnished a horse and B a carriage, all three were liable for an injury caused by the negligent management of the team. *Bishop v. Ely*, 9 Johns. (N. Y.) 294; *Davey v. Chamberlin*, 4 Esp. 229.

But the owner of a carriage who hires of a stable keeper a pair of horses to draw it for the day is not liable for the injury occasioned by the negligent driving of a person provided by the owner of the horses as a driver. *Inarman v. Burnitt*, 6 M. & W. 499; *Laugher v. Pointer*, 5 B. & C. 547. *Contra*, however, if he assent to the act. *McLaughlin v. Pryor*, 4 M. & G. 48.

1. *Shear. & Red. on Neg.*, § 739; *Ehrgott v. Mayor etc. of N. Y.*, 96 N. Y. 264; s. c., 48 Am. Rep. 622.

In case of a breach of contract damages are allowed only for such consequences as are the direct result of the breach, and were within the contemplation of the parties at the time of the formation of the contract. DAMAGES, 5 Am. & Eng. Encyc. of Law 13; 1 *Suth. on Dam.* 74; *Warwick v. Hutchinson*, 45 N. J. L. 61; *Hadley v. Baxendale*, 9 Exch. 41.

In case of torts not malicious (which include injuries by negligence), damages may be recovered not merely for the direct consequences, but for such indirect results as might reasonably be expected to ensue by a person of ordinary intelligence; or, in other words, for all the natural consequences of the wrongful act. DAMAGES, 5 Am. & Eng. Encyc. of Law 6; *Weston v. Grand Trunk R. Co.*, 54 Me. 376; *Warwick v. Hutchinson*, 45 N. J. L. 61; 2 *Greenleaf on Ev.*, §§ 254-256; *Cooper v. Young*, 22 Ga. 269.

An excellent illustration of this difference between an action for tort and for a negligent breach of contract is afforded by the case of *Walsh v. Chicago etc. R. Co.*, 42 Wis. 23. There the plaintiff, with several other residents of M, desiring to attend religious services at W on a certain Sunday,

through their agent individually contracted with defendant to convey them from M to W and back on the said Sunday by a special train, which was to leave W on its return to M at 5:30 P. M. The party was carried to W, but defendant did not have the cars ready to bring them back at the appointed time, and did not furnish such cars until 1:30 P. M. next day. It appeared that the carrier was not bound to run his trains on Sunday, nor had he held himself out as ready and willing to carry passengers on that day. In consideration of these circumstances it was held that no action could be sustained against the defendant for a breach of his *general duty as carrier*, since upon the day in question he was under no obligation to carry any person upon his road. It was held, also, that since the action was on the contract, the court below was in error in refusing to charge that the plaintiff could not recover for disappointment of mind, sense of wrong or injury to his feelings, and in charging that if defendant's conduct was wilful and oppressive, the jury might award full compensatory, though not punitive, damages. In such case the damages to be recovered were such only as might reasonably have been in contemplation of the parties at the time of the contract. *Compare Brown v. Chicago etc. R. Co.*, 54 Wis. 354; 3 Am. & Eng. R. Cas. 444.

2. *Ehrgott v. Mayor etc. of N. Y.*, 96 N. Y. 264; s. c., 48 Am. Rep. 622; DAMAGES, 5 Am. & Eng. Encyc. of Law 13-18.

The rule is better stated that a wrongdoer is responsible for the natural and proximate consequences of his misconduct, and what are such consequences must generally be left for the determination of the jury. *Milwaukee etc. R. Co. v. Kellogg*, 94 U. S. 469.

The same rule is laid down by THOMPSON on Neg. 2-1084, "Whoever does a wrongful act is answerable for all the consequences that may ensue in

of damages varies according to the relation of the parties, the character of the injuries received, and the circumstances under which the injuries occur. The exact amount is always a question for the jury, under instructions from the court, as to what considerations are to govern them in their estimate of the sum.<sup>1</sup> Let it be observed that since the lack of intent is an essential element of negligence, there can be no such thing as wilful, wanton or malicious negligence, and therefore vindictive, punitive or exemplary damages cannot be recovered. *Damages in negligence cases are always compensatory merely.*<sup>2</sup> There are, it is true, many cases which say that there is a "gross negligence," for which the jury may properly give exemplary damages; but these cases contradict that idea of actionable negligence which is the basis of this article and all true reasoning on the subject.<sup>3</sup> These cases

the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes if such intervening causes were set in motion by the original wrongdoer."

It is sometimes said that a party charged with a tort, or with breach of contract, is liable for such damages as may reasonably be supposed to have been in contemplation of both parties at the time, or with such damage as may reasonably be expected to result, under ordinary circumstances, from the misconduct, or with such damages as ought to have been foreseen or expected in the light of the attending circumstances, or in the ordinary course of things. But these various modes of stating the rule are all apt to be misleading and in most cases are absolutely worthless as guides to the jury. *Ehrgott v. Mayor etc. of N. Y.*, 96 N. Y. 264; s. c., 48 Am. Rep. 622; *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 544; s. c., 1 Am. Rep. 446.

1. DAMAGES, 5 Am. & Eng. Encyc. of Law 11; INSTRUCTIONS, vol. 11.

Where the court charged "that there was no certain rule by which to estimate the damages for the personal injury to the plaintiff and that the jury will fix them at such sum as they think right and proper under the evidence," it was considered by the appellate court that the instruction should have been more precise, and that, as the injury was not wilful there was no room for vindictive damages. *Heil v. Glanding*, 42 Pa. St. 493; *Louisville etc. R. Co. v. Case*, 9 Bush (Ky.) 728; *Shear. & Red. on Neg.*, § 758.

2. See, *ante*, § 3, INADVERTENCE AN ELEMENT. See also 2 Thompson on

Neg. 1255, § 42; *Shear. & Red. on Neg.*, § 749. Neither of these two authorities exactly sustain the text, but a careful study of the subject of negligence must demonstrate that the conclusion above is correct.

But in DAMAGES, 5 Am. & Eng. Encyc. of Law 21, the authorities and statements there fully sustain the principle in the text.

And the doctrine of exemplary damages is opposed by the English and federal courts and by very many of the State tribunals. See *Grill v. General Iron etc. Co.*, L. R., 1 C. P. 600; *Beall v. South Dam etc. R. Co.*, 3 Hurst & C. 337; *Milwaukee etc. R. Co. v. Arms*, 91 U. S. 489; *Philadelphia etc. R. Co. v. Derby*, 14 How. (U. S.) 468; *Wallace v. New York*, 2 Hilt. (N. Y.) 440; *Moody v. McDonald*, 4 Cal. 297; *Yerian v. Linkletter*, 80 Cal. 135; *Pittsburgh R. Co. v. Taylor*, 104 Pa. St. 306; s. c., 49 Am. Rep. 580; *Morford v. Woodworth*, 7 Ind. 83; *Milwaukee etc. R. Co. v. Finney*, 10 Wis. 388; *Craker v. Chicago etc. R. Co.*, 36 Wis. 657; *Cleghorn v. New York etc. R. Co.*, 56 N. Y. 44; *Hamilton v. Third Ave. etc. R. Co.*, 53 N. Y. 25; *Hogan v. Providence etc. R. Co.*, 3 R. I. 88; *Ackerson v. Erie R. Co.*, 32 N. J. L. 254; *New Orleans etc. R. Co. v. Statham*, 42 Miss. 607; *Du Laurans v. First Division etc. R. Co.*, 15 Minn. 49; *Great Western etc. R. Co. v. Miller*, 19 Mich. 305-315. See also EXEMPLARY DAMAGES, 7 Am. & Eng. Encyc. of Law.

3. *Ante*, subtit. III, 1, INADVERTENCE. This source of error is indicated by *DAVIS, J.*, in *Milwaukee etc. R. Co. v. Arms*, 91 U. S. 489: "Redress commensurate with such injuries should be afforded. In ascertaining its extent



## NEGOTIABLE—NEGOTIATING—NEGOTIATION.

assert as a ground of their holding that the failure to use proper care may be of such a character as to imply bad faith; or such a reckless disregard of duties as to justify the allowance of exemplary or punitive damages.<sup>1</sup> The number and importance of the cases so holding demand a notice of the doctrine, but it is nevertheless to be deprecated as being in controversion of principle.<sup>2</sup>

The rules as to the exact measure of damages in cases of injuries arising from the tortious or negligent act of the defendant have been set forth in a previous article, and need not be repeated here.<sup>3</sup>

**NEGOTIABLE; NEGOTIATING; NEGOTIATION**—(See **NEGOTIABLE INSTRUMENTS**).—To negotiate means to conduct business; and particularly to discuss terms of a bargain; to endeavor to effect a contract.<sup>4</sup>

the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go further unless it was done wilfully or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. The tort is aggravated by the *evil motive, and on this rests the rule of exemplary damages*. It is insisted, however, that where there is gross negligence the jury may properly give exemplary damages. There are many cases to this effect, but the difficulty is they do not define the term with any accuracy." See also Beven on Neg. 44, 45; **DAMAGES**, 5 Am. & Eng. Encyc. of Law.

1. Varrillat v. New Orleans etc. R. Co., 10 La. An. 88; Cochran v. Miller, 13 Iowa 128; Frink v. Coe, 4 Greene (Iowa) 555; Sawyer v. Sauer, 10 Kan. 466; Missouri Pac. R. Co. v. Johnson, 72 Tex. 95; Missouri Pac. R. Co. v. Mitchell, 72 Tex. 171; **EXEMPLARY DAMAGES**, 7 Am. & Eng. Encyc. of Law; Shear. & Red. on Neg., §§ 748, *et seq.*

In *Alabama*, the courts adopting the *dictum* of LORD DUNNAN, that it is impossible to trace the boundary line between wilful mischief and "gross negligence," allow exemplary damages for the latter. South & North Ala. R. Co. v. McLendon, 63 Ala. 266. See Chicago etc. R. Co. v. Scurr, 59 Miss. 456; 6 Am. & Eng. R. Cas. 341; Patterson v. South & North Ala. R. Co. (Ala. 1890), 7 So. Rep. 437; Louisville etc. R. Co. v. Hall, 87 Ala. 708; 39 Am. & Eng. R. Cas. 208.

But a great majority of the cases

which are cited as authorizing exemplary damages are not cases of negligence at all but of wilful tort. So that it may be said that both reason and the great weight of authority oppose the doctrine of exemplary damages in actions for negligence. In *Missouri* it is provided by statute that the damages in certain cases shall be double the actual damage done. The statute is held constitutional. Missouri Pac. R. Co. v. Humes, 115 U. S. 512; 22 Am. & Eng. R. Cas. 557.

2. An examination of the previous portion of this article on the subtitle of **INADVERTENCE**, and a study of the main principle which governs the measure of damages and determines whether they are to be only compensatory, or more, will demonstrate the error that has been made in such cases. An injury caused by what those cases call "negligence so gross as to indicate wilfulness, or such a reckless disregard of the rights of others, etc., and which justifies the allowance of exemplary damages," is nothing more nor less than a wilful tort and ought to be so treated. To allow a person to sue on the ground of *negligence* which requires less proof, and recover damages which only wilful tort will justify, is surely a perversion of justice. See cases cited, *supra*.

3. **DAMAGES**, 5 Am. & Eng. Encyc. of Law 40, *et seq.*; **DEATH**, vol. 5, 128.

4. Abb. Law Dict. To negotiate means, among other things, "to transfer, to sell, to pass, to procure by mutual intercourse and agreement with another, to arrange for, to settle by dealing and management." Webster's Dict. followed in *Yerkes v. National Bank*,

**NEGOTIABLE INSTRUMENTS.**—Negotiable instruments are instruments on which a right of action passes by an assignment by mere endorsement.<sup>1</sup> In its enlarged signification, the term "negotiable" applies to any written security transferable by endorsement or delivery, so as to vest in the transferee the legal title and enable him to maintain an action on the security in his own name.<sup>2</sup> The term is used frequently to signify simply that the instrument is assignable. Used in its commercial sense, the meaning of the term is still more restricted. Usually, the test of the negotiability of an instrument is found in the use of the words "order" or "bearer." It may be stated as a rule of law that these words, or their equivalent, are essential to invest the instrument with the attribute of negotiability.<sup>3</sup>

69 N. Y. 386. See *Inhabitants of Palmer v. Ferry*, 6 Gray (Mass.) 423; *Coles v. Shepard*, 30 Minn. 448.

**A Bill or Note.**—"Negotiate." To "negotiate" a bill can only mean to transfer it for value. It is a solecism to say that a bill has been negotiated by a payee who has never parted with its ownership and possession. *Blakiston v. Dudley*, 5 Duer (N. Y.) 373. See also *Baring v. Lyman*, 1 Story (U. S.) 416.

A power of attorney "to negotiate, make sale, dispose of, assign and transfer" a promissory note does not authorize its being pledged. Had the word "negotiate" stood alone, it might have included a pledge. *Jonmenjoy Coondoo v. Watson*, 53 L. J. P. C. 80; 9 App. Cas. 561. And if a power to "endorse" be included in the enabling words, that would authorize a pledge. *Bank of Bengal v. Macleod*, 5 Moo. Ind. App. 1.

"Negotiating," as used in § 5136 U. S. Rev. St., is used in its ordinary and appropriate transitive sense to indicate, not an act of purchase but one of transfer, whereby the negotiated paper is passed from the holder or owner and put into circulation. *First Nat. Bank v. Pierson*, 24 Minn. 141. But see *Merchants' Nat. Bank v. Hanson*, 33 Minn. 41; overruling *First Nat. Bank v. Pierson*, and *National Bank v. Mathews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99.

**Negotiation.**—The word "negotiation," as used by writers upon mercantile law, means the act by which a bill of exchange or promissory note is put into circulation, by being passed by one of the original parties to another person. *Walker v. Ocean Bank*, 19 Ind. 250. The term "negotiation," when applied to a bill or note, includes every mode of transfer, whether of sale or discount, by

endorsement or delivery. *Whitworth v. Adams*, 5 Rand. (Va.) 333. See index, NEGOTIABLE INSTRUMENTS. See *Mahoney v. San Francisco*, 53 Cal. 385.

1. *Stormonth's Dict.*

2. *Odell v. Gray*, 15 Mo. 337. A negotiable thing, says HANNA, J., in *Walker v. Ocean Bank*, 19 Ind. 247, is a thing which may be transferred by a sale and endorsement or delivery.

3. *Noland v. Ringgold*, 3 Harr. & J. (Md.) 216; *Huntington v. Harvey*, 4 Conn. 124; *Backus v. Danforth*, 10 Conn. 297; *Lyon v. Summers*, 7 Conn. 399; *Bank of Sherman v. Apperson*, 4 Fed. Rep. 25; *Smurr v. Forman*, 1 Ohio 272; *Parker v. Riddle*, 11 Ohio 102; *Hackney v. Jones*, 3 Humph. (Tenn.) 612; *Albright v. Griffin*, 78 Ind. 182; *Sinclair v. Johnson*, 85 Ind. 527; *United States v. White*, 2 Hill (N. Y.) 59.

It is said that the word "assigns" is sufficient. *Story on Bills*, § 60; *Story on Promissory Notes*, § 44; in *Porter v. Janesville*, 3 Fed. Rep. 617, it was held that a municipal bond payable to a certain railroad company, "or its assigns," rendered the instrument negotiable, as though the words "or order" had been used. In *Raymond v. Middleton*, 29 Pa. St. 529, the court said that, though the words "order" or "bearer" were convenient and expressive, clearly they were not the only words which would communicate the quality of negotiability; in this case, however, the words used were so unusual as not to import negotiability.

In *Dutchess County Ins. Co. v. Hachfield*, 1 Hun (N. Y.) 675, a coupon bond payable to a payee in blank, "his executors, administrators and assigns," was held negotiable; but in *Noxon v. Smith*, 127 Mass. 485, a note payable to the trustees of a church, "or their collector,"

It is not proposed in this definition to do more than to group the various classes of instruments which, under the rulings of the courts, are negotiable or non-negotiable, as the case may be, the law as applied to these different classes of instruments being stated under their respective titles.

Bills of exchange and promissory notes are the instruments concerning which questions of negotiability are raised most frequently.<sup>1</sup> Checks cannot be classed among negotiable instruments,<sup>2</sup> nor certified checks.<sup>3</sup> A certificate of deposit, which is a receipt for money deposited, with a promise to hold or to pay, as may be agreed, may or may not be negotiable, and when negotiable may be said to partake in effect of the attributes of a promissory note.<sup>4</sup> A mere bank deposit book is not negotiable.<sup>5</sup>

Orders drawn by one person upon another for the benefit of a third person, payable in goods or payable in money from a specified fund, are not negotiable instruments.<sup>6</sup>

Due bills, which are acknowledgments of indebtedness with no express promise of payment, are made by statute negotiable instruments in some States. In the absence of a statute, or of words indicating a promise of payment, a mere due bill or I O U is not, according to the weight of authority, regarded as a promissory note.<sup>7</sup>

was held not negotiable. In an English case, *Re Blakely Ordnance Co.*, L. R., 3 Ch. 154, a corporation bond payable to A and B, "their executors, administrators and assigns, or to the bearer hereof," was adjudged assignable, free from equities, in equity only; and in *Re Natal Investment Co.*, L. R., 3 Ch. 355, a corporation bond payable to A, "or his executors, administrators or transferees, or to the holder for the time being," was adjudged non-negotiable. In *Putnam v. Crymes*, 1 McMull. L. (S. Car.) 9, a note payable to "holder" was held negotiable, this word being equivalent to "bearer."

There are numerous statutes also both in the States of the Union and in foreign countries, requiring the insertion of these words, or their equivalent, to make instruments negotiable.

1. See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 2 Am. & Eng. Encyc. of Law 313.

2. See **CHECKS**, 3 Am. & Eng. Encyc. of Law 211.

3. See **CHECKS**, 3 Am. & Eng. Encyc. of Law 211.

4. See **BANKS AND BANKING**, 2 Am. & Eng. Encyc. of Law 89.

5. *Witte v. Vincenot*, 43 Cal. 325; *Howard v. Windham Co. Sav. Bank*, 40 Vt. 597.

6. See **ORDERS**.

7. It is not in *England*. *Byles on Bills*, 29; *Fesenmayer v. Adcock*, 16 Mees. & W. 449; *Melanotte v. Teasdale*, 13 Mees. & W. 216; *Smith v. Smith*, 1 F. & F. 539; *Gould v. Combs*, 1 C. B. 543; *Fisher v. Leslie*, 1 Esp. 425; *Israel v. Israel*, 1 Campb. 499; *Childers v. Boulnois*, Dowl. & Ry. 15; *Beeching v. Westbrook*, 8 Mees. & W. 412. See also to the same effect, *Carson v. Lucas*, 13 B. Mon. (Ky.) 213; *Garland v. Scott*, 15 La. An. 143; *Currier v. Lockwood*, 40 Conn. 349; *Brenzer v. Wightman*, 7 W. & S. (Pa.) 264. *Compare*, however, *Sackett v. Spencer*, 29 Barb. (N. Y.) 180; *Russell v. Whipple*, 2 Cow. (N. Y.) 536; *Huyck v. Meador*, 24 Ark. 191; *Wardwell v. Sterne*, 22 La. An. 28. And see *Hopson v. Brunwankel*, 24 Tex. 607; *Cummings v. Freeman*, 2 Humph. (Tenn.) 143; *Finney v. Shirley*, 7 Mo. 42; *McGowen v. West*, 7 Mo. 569; *Brady v. Chandler*, 31 Mo. 28; *Bacon v. Bicknell*, 17 Wis. 523; *Jacquín v. Warren*, 40 Ill. 459; *Spearing v. Zacharie*, 26 La. An. 496; *McDonald v. Yeager*, 42 Ind. 388.

In a very recent case, *Alexander v. Thompson* (Minn.), 44 N.W. Rep. 537, the court say, that "In some States a due bill is held to be a promissory note; in others it is held to be so if it contains

Letters of credit, which may be defined as open letters of request, whereby one person (usually a merchant or banker) requests another to advance money or to give credit to a third person named in the letter, and promises to repay the amount or to accept bills of exchange drawn on himself for the amount,<sup>1</sup> are not negotiable instruments.<sup>2</sup>

Bills of lading are not negotiable instruments in the same sense as promissory notes or bills of exchange, though in several States the question is affected by statutes, enacted with the view to making bills of lading negotiable or quasi negotiable;<sup>3</sup> nor warehouse receipts, though here again the question has been affected in some States by statutes.<sup>4</sup>

Receivers' certificates may be called quasi-negotiable instruments. The judicial order authorizing their issue provides generally that they be made payable to order or bearer, and the property in them is transferable by endorsement and delivery, as in the case of commercial paper; but, though the cases are not many in which the courts have had occasion to discuss the question of the negotiability of these instruments, it may be gathered from the cases that an endorsee, claiming to hold them freed from original equities, must show that in their issue the requirements of the order authorizing their issue were strictly observed.<sup>5</sup>

The effect of a seal on the question of negotiability has been

words denoting a promise to pay, or an intent that it shall be negotiable. But the better authority, as well as that most consistent with principle, is that a mere acknowledgment of indebtedness is not of itself a contract." It was held, therefore, that a purchaser of the due bill in suit could not invoke the principle of estoppel against the maker.

In *Roman v. Serna*, 40 Tex. 306, it was held that an instrument reciting that "the bearer leaves \$100 in my hands, which sum I hold subject to his order," was not a negotiable instrument but a non-negotiable letter of credit. Generally, in the absence of a statute, a receipt for personal property, payable at a certain time, is not a negotiable instrument. There are statutes making promises to pay personal property, and acknowledgments of such property negotiable instruments, as, for instance, in *Colorado, Illinois, Indiana, Iowa, and Idaho*.

1. Story on Bills, § 459.

2. See LETTER OF CREDIT, 13 Am. & Eng. Encyc. of Law 237.

3. See BILL OF LADING, 2 Am. & Eng. Encyc. of Law 223.

4. In *Wisconsin* (Rev. Statutes, §§ 1676-7), warehouse receipts are negotiable, unless otherwise expressed. The

Missouri and Minnesota statutes make warehouse receipts negotiable by endorsement and delivery. See *WAREHOUSE AND WAREHOUSEMAN*.

5. In *Stanton v. Alabama etc. R. Co.*, 2 Wood (U. S.) 506, where receivers hypothecated certificates at an enormous rate of interest and received less than half of their par value, it was held that they should be deemed good in the hands of the transferees for the amount actually advanced upon them, with interest according to the terms of the order of the court authorizing their issue.

In *Bank of Montreal v. Chicago etc. R. Co.*, 48 Iowa 518, a receiver issued certificates payable to bearer under a contract for the purchase of rails. The certificates recited the order of court. The rails, however, were never delivered. It was held that an innocent transferee of the certificates could not recover upon them.

In *Turner v. Peoria etc. R. Co.*, 95 Ill. 134, the court denied to these instruments the attribute of negotiability; and so in *Union Trust Co. v. Chicago etc. R. Co.*, 7 Fed. Rep. 513, where the transferee, claiming as an innocent holder, had purchased the certificates for 40 per cent. of their par value. See

treated elsewhere.<sup>1</sup> It may be stated briefly that the statute of Queen Anne, to which promissory notes owe their negotiability, did not extend to instruments under seal, and that formerly sealed bills and bonds, whether issued by corporations or individuals, were held to be non-negotiable.<sup>2</sup> Afterwards it was thought that the corporate seal was equivalent to a signature, and that a sealed corporate instrument might be treated as a simple contract and not as a specialty.<sup>3</sup> At the present day, however, no question is made as to the power of a corporation to execute a note or contract without the corporate seal.<sup>4</sup> And now, in the absence of a statute, corporation bonds executed under seal and negotiable in form are negotiable instruments, possessing the attribute of negotiable bills and notes, and the qualities generally of commercial paper.<sup>5</sup>

Railroad bonds made payable, as they usually are, to the trustee named in the mortgage given to secure them, or to the bearer, are in effect merely bills or notes and are negotiable. That they are called bonds does not imply necessarily that they are sealed, even if this would affect their quality of negotiability.<sup>6</sup> Debenture bonds in the form in common use in England may be said to possess, when made payable to bearer or order, the attribute of negotiability.<sup>7</sup>

also RAILROAD SECURITIES; RECEIVERS.

1. See **BILLS AND NOTES**, 2 Am. & Eng. Encyc. of Law 313.

2. Byles on Bills, 5; Story on Bills, § 62; Glyn v. Baker, 13 East 509.

3. Aggs v. Nicholson, 1 H. & N. 165.

4. Byles on Bills, 71; Story on Promissory Notes, § 74; Mechanics' Bank v. Bank of Columbia, 5 Wheat. (U. S.) 326.

5. Colson v. Arnot, 57 N. Y. 253; Evertson v. National Bank, 66 N. Y. 14; Carr v. Le Fevre, 27 Pa. St. 413; Hotchkiss v. National Bank, 21 Wall. (U. S.) 354; *In re Tallahassee Mfg. Co.*, 64 Ala. 567; Morris Canal & Banking Co. v. Fisher, 9 N. J. L. 699.

6. In *White v. Vermont etc. R. Co.*, 21 How. (U. S.) 575, the court says that "the usage and practice of the companies themselves and of the capitalists and business men of the country dealing in them, as well as the repeated decisions or recognition of the principle by courts and judges of the highest respectability, have settled the question." In *Moran v. Miami Co.*, 2 Black (U. S.) 722, railroad bonds are spoken of as "commercial securities." See also, as supporting the text statement, *Chapin v. Vermont etc. R. Co.*, 8 Gray (Mass.) 575; *Brainerd v. New York etc. R. Co.*,

25 N. Y. 496; *Birdsall v. Russell*, 29 N. Y. 228; *Langston v. South Carolina R. Co.*, 2 S. Car. 248; *Murray v. Lardner*, 2 Wall. (U. S.) 110; *State v. Cobb*, 64 Ala. 127; *Jones on Railroad Securities*, § 197. To the contrary is *Jackson v. York etc. R. Co.* (1858), 48 Me. 147; but this case, decided by a divided court, stands nearly or quite alone.

See **RAILROAD SECURITIES**.

7. *Re Imperial Land Co.*, 11 Eq. 478; *Re Blakely Ordnance Co.*, L. R., 3 Ch. 159; *Re General Estates Co.*, L. R., 3 Ch. 758. The English decisions have been conflicting on this point, however. Until recently, such bonds were regarded as *prima facie* non-negotiable. *Atheneum Life Ins. Soc. v. Pooley*, 3 De G. & J. 294; *Re Natal Investment Co.*, L. R., 3 Ch. 555; *Re Rhos Hall Co.*, 17 W. R. 343.

In *Crouch v. Credit Foncier*, L. R., 8 Q. B. 474, it was said that a condition endorsed upon debenture bonds, that at stated times a portion of the bonds should be drawn and paid off, destroyed their negotiability, though in terms they were made payable to bearer. It was held further that it was not competent for corporations to attach the incident of negotiability to such instruments, contrary to the general law, and that the custom to treat them as negotiable

Municipal bonds in the customary form, with interest coupons attached, and payable to bearer or to a named person or order, are, when put upon the market, treated as commercial securities, and possess the qualities and incidents of negotiable promissory notes,<sup>1</sup> and it makes no difference that they bear the corporate seal;<sup>2</sup> nor will such bonds be deemed unnegotiable on the ground that their payment is made conditional on the construction of the railroad to aid which they are issued, where the language used imports not a condition, but a recital merely of the reasons influencing the contract.<sup>3</sup>

The question of the negotiability of municipal bonds, as well as the question of their validity, depends upon the constitutional and legislative authority for their issue, and on the compliance with the requirements of law in their execution by the public officers charged therewith; though, as to execution, the necessary legislative authority existing, the doctrine of estoppel is sometimes invoked to complicate the question of the liability of the municipality to an innocent transferee for value. Other classes of municipal securities are orders, warrants, and certificates of indebted-

could not have that effect. But see *Goodwin v. Roberts*, L. R., 10 Exch. 337, where the court said that while the judgment in the previous case might well be supported, on the ground of a want of substantial proof and general usage, it would seem that the law would be otherwise had proof of general usage been established.

See *DEBENTURES*, 5 Am. & Eng. Encyc. of Law 141.

1. *Moran v. Miami Co.*, 2 Black (U. S.) 722; *Mercer Co. v. Hackett*, 1 Wall. (U. S.) 83; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 176; *Meyer v. Muscatine*, 1 Wall. (U. S.) 384; *Thomson v. Lee Co.*, 3 Wall. (U. S.) 327; *Lexington v. Butler*, 14 Wall. (U. S.) 282; *Ackley School Dist. v. Hall*, 113 U. S. 135.

2. *Mercer Co. v. Hackett*, 1 Wall. (U. S.) 83, where the court said: "This species of bonds is a modern invention, intended to pass by manual delivery, and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by States and corporations, they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usage of trade and commerce are ac-

knowledgeed by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability, to suit the necessities and usages of the mercantile and commercial world, is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer.

That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial recognition, not only in this court (see *White v. Vermont R. Co.*, 21 How. (U. S.) 575) but of nearly every State in the Union, is well known and admitted."

The court then adverts to *Diamond v. Lawrence Co.*, 37 Pa. St. 353, as the single decision to the contrary. It is pretty clear from the language used by the Pennsylvania supreme court in the subsequent case of *Kerr v. Corry*, 105 Pa. St. 282, that the doctrine of *Diamond v. Lawrence Co.* has been practically repudiated in that State.

3. *Humboldt Township v. Long*, 92 U. S. 642. See *MUNICIPAL SECURITIES*, 15 Am. & Eng. Encyc. of Law 1204.

ness. These ordinarily are not negotiable.<sup>1</sup> Another class of quasi-municipal securities is county warrants. These are not negotiable in the sense of the law merchant.<sup>2</sup>

Coupons which promise payment to bearer are in legal effect promissory notes by the law merchant, and possess the attributes of negotiable paper.<sup>3</sup>

Government bonds payable to bearer, or otherwise negotiable in form, are negotiable instruments, and transferable as such. This has been held in the case of United States treasury notes,<sup>4</sup> State bonds,<sup>5</sup> coupons detached from government bonds,<sup>6</sup> State endorsed negotiable railroad bonds,<sup>7</sup> a Prussian bond,<sup>8</sup> exchequer bills.<sup>9</sup>

Government or corporate scrip certificates issued on the negotiation of a loan, and promising to the bearer, after the payment of installments, a bond for the amount paid, with interest, are, by the English law and by the custom of all the stock markets of Europe, negotiable instruments, passing by delivery only to a *bona fide* holder for value.<sup>10</sup>

A stock certificate is not a negotiable instrument;<sup>11</sup> nor a dividend warrant.<sup>12</sup> A lottery ticket has been held not to be a negotiable instrument.<sup>13</sup>

**NEGRO.**<sup>14</sup>—See MULATTO; CONSTITUTIONAL LAW, 3 Am. & Eng. Encyc. of Law 727, *et seq.*

1. Though if a warrant is made expressly negotiable in form, it may be negotiable. *Kelley v. Mayor etc. of Brooklyn*, 4 Hill (N.Y.) 265; *Crawford Co. v. Wilson*, 7 Ark. 214. See also *Sweet v. Carver Co.*, 16 Minn. 107; *Dalrymple v. Whittingham*, 26 Vt. 355; *Klein v. Smith Co.*, 54 Miss. 254; *Mayor etc. of Nashville v. Ray*, 19 Wall. (U.S.) 478. See MUNICIPAL SECURITIES, 15 Am. & Eng. Encyc. of Law, where the law as applied to the various classes of municipal securities is fully treated.

2. Parish warrants have been held negotiable in *Louisiana*. *Guilfont v. Ascension Parish*, 28 La. An. 413; and county warrants in *Illinois*. *Garvin v. Wiswell*, 83 Ill. 215; and formerly in *Pennsylvania*. *Craig v. Richmond*, 1 Phila. (Pa.) 33. But see COUNTIES, 4 Am. & Eng. Encyc. of Law 343, for a full exposition of the law of this subject.

3. See COUPONS, 4 Am. & Eng. Encyc. of Law 430.

4. *Vernilyle v. Adams Express Co.*, 21 Wall. (U.S.) 138; *Dinsmore v. Duncan*, 57 N. Y. 573; *Seybel v. National Currency Bank*, 54 N. Y. 288; *Frazier v. D'Invilliers*, 2 Pa. St. 200; *Murray v. Lardner*, 2 Wall. (U.S.) 118.

5. *Delafield v. Illinois*, 2 Hill (N.Y.) 177; *Finnegan v. Lee*, 18 How. Pr. (N.

Y.) 186; *Railroad Companies v. Schutte*, 103 U. S. 118.

6. See COUPONS, 4 Am. & Eng. Encyc. of Law 430.

7. *State v. Cobb*, 64 Ala. 128.

8. *Gorgier v. Mieville*, 3 B. & C. 45.

9. *Wookey v. Pole*, 4 Barn. & A. 1.

10. *Goodwin v. Robarts*, 1 App. Cas. 476; *Rumball v. Metropolitan Bank, L. R.*, 2 Q. B. D. 104.

11. *Mechanics' Bank v. New York etc. R. Co.*, 13 N. Y. 599.

12. *Partridge v. Bank of England*, 9 Q. B. 396.

13. *Jones v. Carter*, 8 Q. B. 134.

14. 1 Bishop on Mar. & Div., § 308. A negro is a person having in his veins one-sixteenth or more of African blood. *State v. Chaver*, 5 Jones L. (N. Car.) 11. The term "negro" is identical in signification with the term "colored person," and is "a person with one-fourth or more of negro blood." *Jones v. Com.*, 80 Va. 544.

The word negro means a black man, one descended from the African race, and does not commonly include a mulatto. *Felix v. State*, 18 Ala. 720.

Negro does not include a person who has less, though only a drop less, than one-fourth of African blood. *McPherson v. Com.*, 28 Gratt. (Va.) 939.

## NEIGHBORHOOD—NEPHEW—NIECE.

**NEIGHBORHOOD.**—"A man's neighborhood is not necessarily confined to the particular locality in which he resides, but is co-extensive with the extent of territory occupied by those with whom he associates and frequently comes in contact with; one man's 'neighborhood' may be a small hamlet, while the 'neighborhood' of another may be a county or State."<sup>1</sup>

**NEPHEW ; NIECE.**—These words mean the immediate descendants, male and female, of the brothers and sisters of the person named.<sup>2</sup>

**In Alabama Code.**—Clause 5, § 2, of Code defines the terms "negro" and "mulatto," when and as used in the Code, and makes the former include the latter, and the latter to mean "a person of mixed blood, descended on the part of father or mother from negro ancestors, to the third generation, inclusive, though one ancestor of each generation may have been a white person. *Linton v. State*, 88 Ala. 216.

**In North Carolina** all who are descended from negro ancestors to the fourth generation, inclusive, though one ancestor of each generation may have been white. 1 Bish. on Mar. & Div., § 308; *State v. Watters*, 3 Ired. (N. Car.) 455; *State v. Melton*, Busb. L. (N. Car.) 49.

1. *Peters v. Bourneaw*, 22 Ill. App. 179. See also *State v. Henderson*, 29 W. Va. 147.

"Etymologically and by common understanding the phrase 'in the vicinity' means 'in the neighborhood,' and 'neighborhood' as applied to 'place' signifies 'nearness' as opposed to 'remoteness.' Whether a place is in the vicinity or in the neighborhood of another place depends upon no arbitrary rule of distance or topography. *Langley v. Barnstead*, 63 N. H. 246; *Territory v. Lan-non* (Mont.), 22 Pac. Rep. 496.

Where a general usage was shown for the merchants in a neighborhood to charge interest after six months, *BRONSON*, Ch. J., said: "I understand the word 'neighborhood,' as used in the case, to mean the same town or place where the plaintiffs carried on business, and not a different town or place." *Esterley v. Cole*, 3 N. Y. 505.

In discussing the meaning of "neighborhood" in a statute the court said, in *Coyle v. Chicago* etc. R. Co., 27 Mo. App. 584: "Webster defines neighborhood, in this connection, as 'a place near,' 'vicinity,' 'adjoining district,' syn. 'vicinity,' 'proximity.' Neighborhood is Anglo-Saxon, and vicinity is Latin; hence they differ in degree or strength.

Vicinity does not denote so close a connection as neighborhood. A neighborhood is a more immediate vicinity. The houses immediately adjoining a square are in the neighborhood of that square; those which are somewhat farther removed are in the vicinity of the square."

**In Statute.**—(As used in the Iowa Revision, § 3362, requiring for an appraisalment of land at judicial sale two householders "of the neighborhood.") One residing thirty-five miles from the land is not *prima facie* "of the neighborhood;" the sparsely settled condition of the county in the vicinity must be shown affirmatively to establish his competency to serve. *Woods v. Cochrane*, 38 Iowa 484.

**Neighboring.**—A covenant prohibiting anything that may be an annoyance, etc., to the "neighboring or adjoining" property is not restricted, so as only to prevent annoyance to the occupiers of property belonging to the covenantee. *Tod-Heatley v. Benham*, 40 Ch. D. 80.

2. *Cromer v. Pinckney*, 3 Barb. Ch. (N. Y.) 466. And. L. Dict.; Abb. L. Dict.; Bouv. L. Dict.; *Green's App*, 42 Pa. St. 25; *Wells v. Wells*, L. R., 18 Eq. 504.

A residuary legacy to testator's nephews and nieces, providing that "in case any one or more of the children of my deceased brothers and sisters mentioned in this clause of my will shall die or have died before me, leaving lawful issue surviving at the time of my death, then and in that case such issue of my deceased nephew or niece shall receive the share which his or her ancestor would have received," gives to the issue of a nephew or niece who had died before the making of the will the share which the parent would have taken if living. *Hayward v. Barker*, 113 N. Y. 366.

A devise of lands to testator's nephew, as trustee for one B, "to her use during her natural life; after her decease to the use of the lawful begotten heirs of



her body, each one to share and share alike; . . . In case of the death of B and all her children, all the property willed to her to revert to my nephew," gives the land to the nephew upon the death of B, after the decease of all her children, although one of them leaves children who survived B. *Lockman v. Hobbs*, 98 N. Car. 541.

The words, "all the children of my brother," though used as if to designate the class, mean the nephews and nieces enumerated in another part of the will, and will not let in children born after the testator's death. *Chapeau's Estate*, 1 Tuck. (N. Y.) 420.

**Grandnephews, Grandnieces.**—The term "nephews and nieces" may be shown, by circumstances, to include grandnephews and grandnieces, and even a great-grandniece. But the term, in its ordinary and primary sense, does not include grandnephews and grandnieces. *Cromer v. Pinckney*, 3 Barb. Ch. (N. Y.) 466; *In re Hunt's Estate*, 23 N. E. R. (N. Y.) 120.

A greatnephew or greatniece is not included in a testamentary gift to "nephews and nieces." *Shelley v. Bryer*, Jac. 207; *Falkner v. Butler*, 1 Amb. 514; *Crook v. Whitley*, 7 De G. M. & G. 490. Nor a great-grandnephew in a gift to "grandnephews." *Waring v. Lee*, 8 Bea. 247. But these extended meanings may be gathered from a context—*Weeds v. Bristow*, L. R., 2 Eq. 333—though not easily. *Thompson v. Robinson*, 27 Bea. 486. See *Wms. Exrs.* 108; 2 Jarm. 152.

The will of H, after various legacies to certain of his nephews and nieces, and to three persons who were described as children of a deceased niece, gave his residuary estate to his "nephews and nieces" therein before-named, excepting certain ones named, "in such proportionate shares as the legacies herein-before given and bequeathed to them respectively shall bear to each other." *Held*, that the term "nephews and nieces" did not include the children of the deceased niece, and that they were not entitled to a share in the residue. *Re Woodward*, 117 N. Y. 522; s. c., 27 N. Y. St. Rep. 830. Grandnephews and grandnieces held to be included under the term "nephews and nieces" in a will. *Shepard v. Shepard*, 57 Conn. 24.

By a devise to "nephews and nieces of every description mentioned in the will" of the residue of the testator's estate, the "children" of nephews and nieces, and denominated as such in the

will, shall not take; nor shall a niece by marriage. *Lewis v. Fisher*, 2 Yeates (Pa.) 196.

The terms "nephew" and "niece" apply as well to grandnephews and grandnieces, testatrix having so used them in other connections. *Shepard v. Shepard*, 17 Atl. Rep. 173.

**My Nephew.**—Parol evidence is admissible to show which of testator's nephews was intended under a bequest to "my nephew." *Phelan v. Slattery*, 19 L. R. I. 177. See PAROL EVIDENCE.

A testator appointed as executor to his will his "nephew, A B." At the time of the execution of the will there was living a son of the brother of the testator of that name, with whom the testator was not on terms of intimacy; and there was also a person of the same name who had lived with him for many years, and had latterly managed his business. *Held*, that the word "nephew" being applicable in an ordinary and popular sense as well as in a strict and primary sense, an ambiguity was raised, and the court might receive evidence of the circumstances in which the testator was placed when he executed his will, and of the sense in which he was accustomed to use the word, in order to ascertain the person indicated. *Grant v. Grant*, L. R., 2 P. & D. 8.

**Illegitimate Niece.**—A residuary bequest to "all my nephews and nieces," *held* (there being legitimate nieces) not to include an illegitimate niece who, in a previous part of the will, had been spoken of as testator's "niece." *Re Brown*, 58 L. J. Ch. 420; *Re Hall*, 35 Ch. D. 551.

**Of the Half-Blood.**—A nephew is the child of a person's brother or sister, whether such brother or sister be of the whole or only of the half-blood. *Grieves v. Rawley*, 10 Hare 63; *Shull v. Johnson*, 2 Jones Eq. (N. Car.) 202. See also *Bouv. L. Dict.*

**Testator's Wife's "Nephews and Nieces."**—If a testator has no nephews and nieces of his own, and no possibility of any, his wife's nephews and nieces would take under a bequest to his "nephews and nieces." *Sherratt v. Mountford*, 8 Ch. 928, 21 W. R. 818; *Hogg v. Cook*, 32 Beav. 641; *Adney v. Greatrex*, 17 W. R. 637; 20 L. T. 647. And so of a bequest to nephews and nieces "on both sides." *Frogley v. Phillips*, 30 Beav. 168; 3 De G. F. & J. 466; 3 L. T. 718. See *Smith v. Lidiard*, 3 K. & J. 252.

A testatrix by will made a residuary

**NET, NEAT, OR NETT.**—After deductions made; clear of charges; free from expenses.<sup>1</sup>

bequest to "all my nephews and nieces." *Held*, that only her own nephews and nieces were included, and not those of her husband. *Green's App.*, 42 Pa. St. 25.

"The only difficulty in the case arises from the decision of the exchequer chamber in *Grant v. Grant*, L. R., 5 C. P. 727. But that case only decided that the primary meaning of the word 'nephew' included not only the child of the testator's own brother, but also the child of his wife's brother. That is a question not of law but of the English dictionary; and, according to my view of the English language, the ordinary meanings of the words 'nephews and nieces' is a man's own nephews and nieces; that is, by consanguinity and not affinity, and therefore I am of opinion (as I must decide between the judgments of the two courts) that the decision of the court of appeal in chancery is to be preferred." Per *JESSEL*, M. R. *Wells v. Wells*, 18 Eq. 504; s. c., 10 Moakes 818. See also *Merrill v. Morton*, 17 Ch. D. 382; *In re Blower's Trusts*, L. R., 6 Ch. 355; *Sherratt v. Mountford*, L. R., 8 Ch. 928.

**Wife of Nephew.**—A devise to "my nephews and nieces living at my decease" does not include the wives and widows of the nephews of the testatrix. *Goddard v. Amory*, 147 Mass. 71; *Lewis v. Fisher*, 2 Yeates (Pa.) 196.

1. *Abb. L. Dict.* "The lexical definition of net is 'clear of all charges and deductions.'—*Webster*. 'That which remains after the deduction of all charges or outlay, as net profit.'—*Worcester*." *St. John v. Erie R. Co.*, 89 U. S. 136; *Bispham's Estate*, 24 W. N. C. (Pa.) 79. See also *Stephens v. Soule*, 83 Cal. 439.

**"Net Balance"** "means, in commercial usage, the balance of the proceeds after deducting the expenses incident to the sale." *Evans v. Waln*, 71 Pa. St. 74.

A direction by a testator, after making provision for the payment of certain amounts to his children out of the income of his residuary estate until the youngest attained majority, that when the youngest child becomes of age the executors divide "the net balance of income which may come into their hands" among the children, refers not only to income received thereafter, but to accumulations prior to the youngest child's

majority. *Stiver's Estate*, 5 Pa. Co. Ct. Rep. 113.

**"Net Cash."**—A direction to sell goods "at such a price as will realize" so much "net cash," does not mean that the goods are necessarily to be sold for ready money; though possibly, in the absence of a trade custom, that might be the construction if the direction were simply to sell for so much "net cash." *Boden v. French*, 10 C. B. 886.

**Net earnings**, as used in a contract giving preferred stockholders in a railroad company a priority in payment out of the net earnings of the road, means what remained of the earnings of the road after deducting expenses incurred by the company in conducting its operations in good faith free from dictation by the preferred stockholders. *St. John v. Erie R. Co.*, 22 Wall. (U. S.) 146.

**"Net Earnings."**—This phrase has been before the courts in a number of instances. In a general way it may be said that the net earnings of a railway company are the surplus of the transportation earnings above operating expenses. This was the definition in *St. John v. Erie R. Co.*, 10 Blatchf. (U. S.) 271; s. c., 22 Wall. (U. S.) 148; *Bates v. Androscoggin etc. R. Co.*, 49 Me. 491; *Sioux City etc. R. Co. v. United States*, 110 U. S. 205; s. c., 17 Am. & Eng. R. Cas. 480. Note to *Belfast etc. R. Co. v. Belfast*, 23 Am. & Eng. R. Cas. 475.

"As a general proposition, 'net earnings' are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves." *Union Pac. R. Co. v. United States*, 99 U. S. 420; *Barry v. Missouri etc. R. Co.*, 27 Fed. Rep. 1; 29 Am. & Eng. R. Cas. 384. See also *Hazelton v. Belfast etc. R. Co.*, 4 N. E. Rep. 708; *United States v. Kansas Pac. R. Co.*, 99 U. S. 455-460.

**"Net Earnings or Income,"** as used in the act of 1864, § 2, taxing corporations, does not include dividends. *Jones etc. Mfg. Co. v. Com.*, 69 Pa. St. 237. And see *St. John v. Erie R. Co.*, 10 Blatchf. (U. S.) 271.

**Net Income.**—There is no fair distinction between "income" and "net income." Net is a term used by merchants to

designate the quantity, amount or value of an article or commodity, after all tare and charges are deducted. The income of an estate means nothing more than the profit it will yield after deducting the charges of management, or the rent which may be obtained for the use of it. The rents and profits of an estate, the income or the net income of it, are all equivalent expressions. *Andrews v. Boyd*, 65 Me. 199; *Earl v. Rowe*, 38 Me. 420.

"By 'net income,' therefore, we understand the amount of money remaining to the corporation on making up their annual account, after deducting from all receipts for passage and freight, and other revenue, if any, the necessary expenses of repairs and management, and also the amount of annual or semi-annual interest on the debt of the commonwealth which the corporation are required by their obligation to the commonwealth to pay in their behalf. Opinion of the Judges, 5 Metc. (Mass.) 599.

**Net Proceeds.**—Under an agreement by a manufacturer, to allow another a "third of the net proceeds of what might be made therefrom," *held*, that before dividing the profits, the value of the labor and materials was to be deducted. *Dunlap v. O'Dena*, 1 Rich. Eq. (S. Car.) 272.

A commission payable to an agent on "net proceeds," is only payable on the actual sum which reaches the pocket of the principal, after deducting all charges, expenses, and bad debts. *Caine v. Horsfall*, 1 Ex. 519. See *Bower v. Jones*, 8 Bing. 65.

Net proceeds mean the actual net sum that comes to the party. *Gorst v. Timothy*, 2 C. & R. (N. P.) 350.

**Net Profits.**—See also PROFITS. The term does not mean what is made over the losses, expenses and interest on the amount invested. It includes the gain that accrues on the investment, after deducting simply the losses and expenses of the business. If but 2 or 3 per cent. is realized on the amount put in, the business may be a poor one, but still there would be net profits, even if the legal rate of interest were 10 per cent., or greater. Hence a partner who is, by the copartnership articles, to receive a certain share of the net profits, has no claim to interest on his contribution of capital. *Tutt v. Sand*, 50 Ga. 339, 350. See also *Sanford v. Barney*, 19 N. Y. St. R. 16, 18.

"Net profits" of a company. See Lam-

*bert v. Neuchatel Asphalte Co.*, 51 L. J. Ch. 882. Net profits is the sum divisible after discharging, or making provision for, every outgoing properly chargeable against the period, whether a year or less, for which the profits are to be calculated. Per *KEKEWICH, J.* *Glasier v. Rolls*, L. R., 42 Ch. D. 453; 30 Am. & Eng. Corp. Cas. 193. See *Fuller v. Miller*, 105 Mass. 105; *Repton v. Hodgson*, 7 Q. B. 84; s. c., 53 E. C. L. 82.

The *neat* profits must mean after all charges and expenses deducted. *Owston v. Ogle*, 13 East 534.

The transfer of a partner's share in the "net profits" of a firm does not include his claim against the firm for personal expenses incurred for the benefit of the partnership. *Stewart v. Stebbins*, 30 Miss. 66.

The words "net profits" define themselves. They mean what shall remain as the clear gains of any business venture, after deducting the capital invested in the business, the expenses incurred in by its conduct, and the losses sustained in its prosecution. *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114; *Hunter v. Roberts* (Mich.), 47 N. W. Rep. 134.

Where in articles of association it was provided that "in cases of dispute as to the amount of net profits, the decision of the company in general meeting shall be final," the court declined to interfere on the question of the meaning of "net profits." *Lambert v. Neuchatel Asphalte Co.*, 51 L. J. R., Ch. 882.

**Net Rent.**—"When a party stipulates to receive a 'net rent,' that means a rent clear of all deductions to which it would otherwise be liable; the covenant to pay land tax and sewer rates must, therefore, be a usual covenant in a lease reserving a certain net rent." Per *TENTERDEN, C. J.* *Bennett v. Wormack*, 7 B. & C. 628; 3 C. & P. 96. The principle of that case would seem to extend to all landlord's taxes, except property tax, where net rent is stipulated for. See also *Barrett v. Bedford*, 8 T. R. 602. Similarly a direction to trustees to permit A to receive "net rents and profits" vests the legal estate in the trustees, for they must take the gross rents and, after paying the charges thereon, hand over the net rents. *Barker v. Greenwood*, 4 M. & W. 421.

"Net rental" simply means the profit rent—*i. e.*, the difference between the gross rent paid by under-tenants and

**NE UNQUES EXECUTOR.**—Never executor; a plea denying that a plaintiff is a lawful executor.<sup>1</sup>

**NEUTRAL; NEUTRALITY.**—See note 2.

**NE VARIETUR.**—That it be not changed. This phrase is sometimes written by a notary upon a bill or note for the purpose of identification. The negotiability of the instrument is not thereby affected.<sup>3</sup>

**NEW.**—"The term 'new,' in its ordinary acceptation, when applied to the same subject or object, is the opposite of old."<sup>4</sup>

the head rents and annual fines. *Re* Barnewall, Ir. Rep., 1 Eq. 308.

"Net rent," as the subject of a poor-rate, *held* to mean "only that part of the rent which goes into the pocket of the landlord, and which is the rent paid by the tenant after deducting taxes and charges of collection." *Rex v. Tomlinson*, 9 B. & C. 163.

**Net Value—Net Annual Value.**—See VALUE.

1. Anderson's L. Dict.

2. See *BELLIGERENTS*, 2 Am. & Eng. Encyc. of Law 165; *INTERNATIONAL LAW*, 11 Am. & Eng. Encyc. of Law 466; *PRIZE*.

3. Abb. L. Dict.; *Fleckner v. Bank of United States*, 8 Wheat. (U. S.) 338; *Brabston v. Gibson*, 9 How. (U. S.) 263, 278.

4. Lessee of *Pollard v. Kibbe*, 14 Pet. (U. S.) 364.

**"New Assets."**—As a general rule no property can be considered "new assets" within the provisions of R. S., ch. 87, § 13 (Maine), which excepts assets coming into the hands of an administrator after the expiration of two years from the provision of the statute of limitations, which has been in the hands and under the control of the administrator, or has been inventoried, or which is the product of such property, although it may have assumed or been converted into a new form. *Littlefield v. Eaton*, 74 Me. 521; *Robinson v. Hodge*, 117 Mass. 224; *Sturtevant v. Sturtevant*, 4 Allen (Mass.) 124; *Veazie v. Manett*, 16 Allen (Mass.) 372; *Bradford v. Forbes*, 9 Allen (Mass.) 368; *Alden v. Stebbins*, 99 Mass. 616; *Chenery v. Webster*, 8 Allen (Mass.) 77.

**New Building.**—See *BUILDING*, 2 Am. & Eng. Encyc. of Law 603.

Where a small building erected against the wall of a yard belonging to a house is taken down and re-erected in another part of the yard, the old materials be-

ing reused, and portions of the old wall of the yard being used as two sides of the re-erection—such a re-erection is a "new building" within § 34, Local Government act, 1858 (21 & 22 V., ch. 98), and of by-laws made thereunder. *Hobbs v. Dance*, L. R., 9 C. P. 30. But where the proprietor of a house, yard, coach-house and stable pulled down the coach-house and stable and erected a building partly upon their site and partly upon the yard, with rooms over—the ground-floor opening into the yard and also into a back street, but the access to the rooms over the ground-floor was by a covered way from the old house—the object of the new works being to increase the accommodation of the old house, which had been converted into a hotel—this was held not to be a "new building" within the meaning of the act just cited. *Shiel v. Sunderland*, 6 H. & N. 796.

Under § 157, subs. 2, P. H. act, 1875, a movable structure used as a butcher's shop was held a "new building." *Richardson v. Brown*, 49 J. P. 661.

As to what is a "new building" seems chiefly a question of fact. *James v. Wyrill*, 48 J. P. 725. See also *Meadows v. Taylor*, L. R., 27 Q. B. D. 717; *Barlow v. Kensington*, L. R., 27 Ch. D. 381.

A fulling-mill, which was repaired, a new shed erected alongside of it, and new machinery placed in it to turn it into a grist-mill, is not such a new building as will subject it to a mechanic's lien for the work done or materials furnished. The question as to whether a building is an old one repaired or a new one erected is a question of law for the court. *Miller v. Hershey*, *Pearson* (Pa.) 282; s. c., 59 Pa. St. 64.

**"New machinery,"** as used in the act, Tex., Dec. 15th, 1863, which provides that any person who shall erect . . . new and efficient machinery "for certain manufactures shall be entitled to a bounty on land, obviously meant machinery

**NEW PROMISE.**—See BANKRUPTCY, 2 Am. & Eng. Encyc. of Law 67; INSOLVENCY, vol. 11, p. 167; LIMITATION OF ACTIONS, vol. 13, p. 749.

**NEWSPAPERS.**—(See ADVERTISEMENTS, 1 Am. & Eng. Encyc. of Law 306; LIBEL AND SLANDER, vol. 13, p. 292; COPYRIGHT, vol. 4, p. 147).

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**I. DEFINITION.**—A newspaper, as ordinarily understood, is a publication which contains, among other things, what is called the general news, the current news, or the news of the day; not a publication which does not contain such news, and is not intended for general circulation.<sup>1</sup>

**II. IN GENERAL.**—A newspaper may be religious, commercial, legal, scientific, or political.<sup>2</sup>

in condition as when first manufactured, not worn or defaced by use in any degree. The word was evidently used in opposition to the words 'old' or second-hand." *Maxwell v. Bastrop Mfg. Co.* (Tex.), 14 S. W. Rep. 36.

**New Promise.**—See LIMITATIONS TO ACTIONS, 13 Am. & Eng. Encyc. of Law 748.

"**New pound,**" within the sense of the Connecticut statute, which provides that when the selectmen of a town shall establish a "new pound," they shall appoint a poundkeeper for it, to hold office until the next annual meeting, does not embrace a pound which is merely a substitute for an old one. *Bosworth v. Trowbridge*, 45 Conn. 161.

1. And. L. Dict.; *Beecher v. Stevens*, 25 Minn. 147. A newspaper is a publication containing a narrative of recent events and occurrences, published regularly at short intervals from time to time. *Atty. Gen. v. Bradbury*, 7 Exch. 113. In commercial usage, it is a publication in numbers, consisting commonly of single sheets and published at short intervals, conveying intelligence of passing events. 4 Op. Atty. Gen. 11; 4 Op. Atty. Gen. 407.

The word "public" need not be used in describing a newspaper. *Bailey v. Myrick*, 50 Me. 171.

The advertising sheets of a newspaper, though entirely separate from the main part thereof, are still part of the newspaper. *Taylor v. Reid*, 103 Ill. 349.

As to whether a newspaper is a periodical, see *Cox v. Land & Water Journal*

*Co., L. R.*, 9 Eq. 324. *Contra*, *Walter v. Howe*, 17 C. D. 708.

2. *Hull v. King*, 38 Minn. 349; *Kellogg v. Carrico*, 47 Mo. 157; *Kerr v. Hitt*, 75 Ill. 51; *Hernandez v. Drake*, 81 Ill. 37.

As to whether a paper devoted mainly to distributing legal notices among the legal profession is a newspaper within the statutes providing for the publication of legal notices in newspapers, there is some difference of opinion. That such publications are not "newspapers" was held in *Re Application for Charter*, 11 Pa. St. 200; that they are, in *Kellogg v. Carrico*, 47 Mo. 157; *Benkendorf v. Vincenz*, 52 Mo. 441; *Kerr v. Hitt*, 75 Ill. 51, 53; *Railton v. Lander*, 26 Ill. App. 655.

A paper issued weekly, containing principally religious news, and especially reading of interest to persons of a particular religious denomination, but containing a column each week devoted to the general news of the day, embracing every sort of news of interest to the general reader, is a "newspaper" within the meaning of Minn. Gen. St. 1878, ch. 81, § 5, in which notice of sale on mortgage may be published. *Hull v. King*, 38 Minn. 349.

A weekly law publication, "The Northwestern Reporter," was held, in *Beecher v. Stephens*, 25 Minn. 126, not to be a "newspaper" within a statute requiring a publication of summons to be "made in a newspaper."

The Newspaper Libel and Registration act, 1881 (44 & 45 V., ch. 60, § 1),

A daily newspaper is one published at least six days in each week.<sup>1</sup> The *place* of publication is where the paper is first issued—that is, given to the public for circulation, and not the place where the paper may be sent for distribution.<sup>2</sup> A newspaper is published at the *time* when its copies, in part or whole, are out of the publisher's control.<sup>3</sup> Newspapers are packets within the prohibition against the private conveyance of letters and packets,<sup>4</sup> and are second-class mail matter.<sup>5</sup> Equity will protect a publisher in the use of the name of his paper as a trade mark.<sup>6</sup>

contains for its purposes (and, *semble*, it may be of general utility) the following definition: "The word 'newspaper' shall mean any paper containing public news, intelligence, or occurrences, or any remarks or observations therein, printed for sale, and published in England or Ireland periodically or in parts or numbers at intervals not exceeding 26 days between the publication of any two such papers, parts or numbers." This definition is a partial adoption of the definition in Sch. A, 6 & 7 W. IV, ch. 76. See *Atty. Gen. v. Bradbury*, Ex. 97. By the Copyright act of 1842 (5 & 6 V., ch. 45), § 2, a "book" is to be construed to mean "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published." Does this include a newspaper? *Cox v. Land & Water Journal Co.* L. R., 9 Eq. 324; *Walter v. Howe*, 17 Ch. D. 708; *Cate v. Devon etc. Newspaper Co.*, 40 Ch. D. 500. "Punch" is such a "book." *Bradbury v. Holton*, L. R., 8 Ex. 1.

In *Louisiana* it has been held that newspaper publishers are 'manufacturers,' and therefore exempt from licence laws. *State v. Dupre*, Alb. Law J. 122.

The subscription list of a newspaper is an incident to the newspaper, and passes with the sale of the printing materials. 2 *Watts* (Pa.) 111.

Where the owner of a newspaper, in negotiating a sale of the same, misrepresented the amount of business and profits of the establishment, it was held that they were material considerations in inducing the purchase, and representations such that the buyer had a right to rely upon for matters concerning which they were made, being peculiarly within the knowledge of the seller. *Harvey v. Smith*, 17 Ind. 272.

1. A statute prescribing publication of advertisements in some daily newspaper, is satisfied by a publication in a paper issued every day of the week ex-

cept one, whether the omitted one is Sunday or one of the week days. *Richardson v. Tobin*, 45 Cal. 30.

A newspaper printed and published six days consecutively each week, one of which is Sunday, is a daily newspaper within the intent and meaning of ch. 47, Minn. Gen. Laws, 1889. *Tribune Pub. Co. v. Duluth* (Minn.), 47 N. W. Rep. 309.

2. *Le Roy v. Jamison*, 3 Sawy. (U. S.) 369; *Haskell v. Bartlett*, 34 Cal. 281.

Where the paper is set up in one place and the press work done in another, the former is the place of publication. *State v. Hoboken*, 44 N. J. L. 131.

A paper, even though composed partly of a "patent insider" set up in another place, still is published in the place where issued. *Palmer v. McCormick*, 30 Fed. Rep. 82; *Hart v. Smith*, 44 Wis. 213.

The place of publication is that indicated upon the face of the newspaper, although it is printed and part of its issue mailed at another town or city. *Ricketts v. Hyde Park*, 85 Ill. 110.

3. *Pratt v. Tinkcom*, 21 Minn. 142.

4. *United States Mail etc.*, 4 Hughes 530.

5. R. S. (U. S.), § 3893; 1 Supp. R. S., p. 456. See *Ex parte Jackson*, 97 U. S. 727, where FIELD, J., reviews the discussion had in the United States senate in 1836, as to the power of congress to exclude publications from the mail, the question arising in view of the circulation of "incendiary publications" in the Southern States.

6. *Matsell v. Flanagan*, 2 Abb. Pr. N. S. 459. But where it appears that the names of the two papers are so far different that, considering the dissimilarity of type and general appearance, one is not liable to be mistaken for the other, no injunction can be granted. *Stephens v. De Conto*, 4 Abb. Pr., N. S. 47.

The general rules of law in regard to agency, contracts, etc., apply to the publishers of newspapers; but special applications of these principles will be found in the notes.<sup>1</sup>

**III. OFFICIAL NEWSPAPERS.**—Official newspapers are those designated by State or municipal legislative bodies, or agents empowered by them, in which the public acts, resolves, advertisements, and notices are required to be published.<sup>2</sup> The designation of official papers and compensation for notices printed in them are regulated by statute in the various States, but cases arising under them are collected in the note.<sup>3</sup>

1. The proprietors of a newspaper who, by advertisement, solicit voluntary news correspondence and promise to pay for it, admit, by the act of publishing a voluntary communication sent to them, to be paid for if used, and purporting to sum up special canvassing and estimates by the writer in regard to an approaching election, that it is of the character solicited, and are liable for its value. *Babcock v. Raymond*, 2 Hilt. (N. Y.) 61.

Where a publisher refused to sell papers to one who had bought out the newspaper "route" of a carrier who had always been supplied at a fixed price, selling the paper for a higher price at his own risk, although the publisher did substitute the name of the purchaser for the name of the old carrier on his list of carriers, it was held that the publisher was bound by no implied contract, in the absence of express contract or usage equivalent, to continue to furnish papers. *Hathaway v. Bennett*, 10 N. Y. 108.

Defendant, by its general manager, contracted with plaintiff for the publication in its paper of certain matter by a given date—the matter to be furnished and the details of the publication to be looked after by defendant's passenger agent. The agent failed to furnish the matter until after the date named in the contract for its publication. As soon as the matter was furnished plaintiff published it, in accordance with the contract, except as to time. *Held*, that the plaintiff had a right to assume that the delay of the agent was authorized by defendant.

Sending a business advertisement to a newspaper for publication without direction as to the number of insertions, implies a request to publish it in each issue till it is ordered stopped, except in the case of advertisements that imply a limitation, such as notice of sale on a given day. *Ahern v. Standard L. Ins. Co.*, 2 Sweeny 441.

A contract for the publication of an advertisement in a newspaper to be issued and sold on Sunday is void, for it contemplates and provides for "servile labor" and "sales," such as are prohibited by 1 R. S. N. Y. 676, §§ 70, 71. *Smith v. Wilcox*, 24 N. Y. 353, affirming 25 Barb. 341. These contracts were legalized by 2 L. (N. Y. 1871), p. 1533, ch. 702.

2. Maine St., 1883, art. 1, § 6; N. Y. Stat., 1 R. S., 7th ed., p. 450. See statutes in other States.

3. **Designation.**—Under the New York act of 1854, providing for the designation of a State paper, and permitting certain State officers "to enter into contract" with the publishers of a daily newspaper for the publication of legal notices, the power thus committed to such officers was held a continuing one, and not exhausted by a single exercise of it. *Weed v. Tucker*, 19 N. Y. 422.

The power conferred upon the judges by New York laws, 1874, ch. 656, to designate a newspaper in the city of New York for the publication of all court calendars, legal notices, etc., is not exhausted by a single designation. The conditions under which the power to make a new designation shall be exercised, and the cause or emergency justifying or requiring it are within the control of the judges themselves. *Daily Register Printing & Pub. Co. v. New York*, 52 Hun (N. Y.) 542.

*Hankins v. Mayor etc. of New York*, 64 N. Y. 18. By N. Y. laws, 1870, ch. 383, certain papers may be designated by the mayor and comptroller to publish the proceedings of the common council, and a *mandamus* will lie to compel the comptroller to pay for such publication. *People v. Green*, 44 How. Pr. (N. Y.) 201; 63 Barb. (N. Y.) 390.

The court cannot compel by *mandamus* the common council of the city of Troy to designate certain papers as official newspapers, even though they

have the largest circulation and the time for designation laid down in the city charter has expired. *People v. Common Council of Troy*, 78 N. Y. 20.

Where, in a municipal charter, special provision different from the ordinary course of city advertising is made for a particular class of advertisements, and a particular officer is designated to cause them to be published, and provision is made for the expense, they are withdrawn from the general power of the common council over city advertising. *Francis v. Troy*, 74 N. Y. 338.

A designation by the proper authorities under a discretionary power is an "employment" of the paper by the common council in the absence of any evidence that the service was declined by the paper. *Matter of Phillips*, 60 N. Y. 16. But in *matter of Anderson*, 60 N. Y. 457, it was held that the designation must have been communicated to the common council before the paper could be considered in the employment of the corporation. Under laws N. Y., 1886, ch. 515, providing that the boards of supervisors in the several counties shall designate newspapers "to publish the laws," a designation of papers "to do the public printing" is sufficient. *People v. Board of Supvs.*, 10 N. Y. St. 88.

A statute providing for the publication, in a newspaper of general circulation, of proclamations, ordinances, etc., of a city, and fixing the maximum price that the mayor or common council shall pay therefor, but without authorizing any officer or officers to make express contracts therefor, does not require imperatively that such publication shall be contracted for. The publication having been made, it is not a defence to an action against the city for the price that the councilman who brought the notices to the newspaper was a stockholder in the newspaper corporation. *Call Publishing Co. v. Lincoln* (Neb.), 45 N. W. Rep. 245.

In *Beale v. Supervisors*, 13 Wis. 500, it was held that ch. 22, § 3, of the laws of 1859, authorized the treasurer to publish the delinquent tax lists in a county newspaper of his selection, and that the publisher with whom he contracted might recover of the county fees for the service, notwithstanding that the county supervisors had contracted with other parties to do the whole of the county printing.

In *Kellogg v. Oshkosh*, 14 Wis. 678, it was held that in *Wisconsin* a com-

mon council might designate a German newspaper as its official paper.

In *State v. Dixon County* (Neb.), 37 N. W. Rep. 936, it was held, that under Comp. St., ch. 77, § 100, the power to designate the newspaper in which the county treasurer shall give notice of the sale of real property on which the taxes levied for the previous year shall remain unpaid, is with the county board, if the publication can be made at an expense not exceeding one-third of the legal rate for advertising notices, and that there being no law making it the duty of a county board to let by contract to the lowest bidder the printing and publishing of the delinquent tax list, or of the proceedings of such boards, a *mandamus* would not issue to compel such action by them.

Under the New Jersey act of March 19, 1872, the newspaper designated to publish the proceedings of the common council must, at the time of the passage of the act, have been published at least nine months, and have been designated to publish the State laws. *State v. Mayor etc. of Hoboken*, 38 N. J. L. 110.

A city council has no power to contract for the publication in a newspaper of its general proceedings at the cost of the city. *Stidger v. Red Oak*, 64 Iowa 465.

Where the board of supervisors, under Iowa laws of 1856, ch. 118, caused the laws to be published in a newspaper, it was held that they had not power, at their January session of the following year, to order publication again in another paper subsequently established. *Welch v. Board of Supervisors etc.*, 23 Iowa 199.

In *Hoxie v. Shaw* (Iowa), 39 N. W. 673, it was held that the act of the 20th Gen. Assembly of Iowa, ch. 197, directed the county board to make the selection of two newspapers to publish its proceedings at its January session, and that if the selection could not be made at that time, owing to the absence of a supervisor, the board might act at a subsequent session.

Under Missouri Rev. St., § 3500, an order of publication must be made in a paper approved by the judge or clerk making the order. *Otis v. Epperson*, 88 Mo. 131.

Gould, Dig. Ark., ch. 68, § 57, requiring a notice of the sale of land under an execution to be printed in a paper published in the county where the land was situated, was so far repealed by the act of July 14th, 1868, requiring the no-



**IV. NEWSPAPERS AS EVIDENCE.**—They may be admissible in evidence to impute knowledge of a fact,<sup>1</sup> as the dissolution of partnership;<sup>2</sup> or, when verified, to prove prices current;<sup>3</sup> but not

tice to be published in a newspaper designated by the governor that a sale where the notice was published in a paper designated by the governor but printed outside the county was held good. *Dennis v. Tomlinson*, 49 Ark. 568.

Whether the clerk of the district court has or has not power to designate, in a citation, the particular paper in which it shall be published, such designation is mere surplusage. *Wyser v. Calhoun*, 11 Tex. 323.

It has been held that where the method of designating papers to publish the session laws was irregular under the statute, the proceedings were not vitiated. *Wright v. Forrestal*, 65 Wis. 341; *People v. Supervisors of Kings Co.*, 23 How. Pr. (N. Y.) 89, affirming 3 Keyes (N. Y.) 630. But see *People v. Supervisors of Seneca Co.*, 18 How. Pr. (N. Y.) 461, decided several years previous, which, though holding the opposite view, was not mentioned in the later case. But in designating the paper to publish delinquent tax list, the statute must be strictly followed. *Russell v. Gilson etc. R. Co.*, 36 Minn. 366.

The "paper having the largest circulation" includes the entire circulation, wherever it may be. *People v. Brennan*, 39 Barb. (N. Y.) 651.

"The Enterprise" sufficiently designates the "Glencoe Enterprise" in the absence of any other paper of the same name. *Knight v. Alexander*, 38 Minn. 384. See also *Soule v. Chase*, 1 Abb. Pr. (N. Y.), N. S. 48. But where there are two papers of the same name, one being "daily" and the other "weekly," to give their common name would designate neither. *Russell v. Gilson*, 36 Minn. 366.

**Compensation.**—Where a city charter provides that printing shall be paid for by the folio, a contract to pay a gross sum will not be sustained. *State v. Mayor etc. of Hoboken*, 38 N. J. L. 110. Publisher of paper, after receiving notice of the price that would be paid, can receive nothing over that. *McArthur v. Troy*, 24 Hun (N. Y.) 55. Compensation may be recovered for publishing laws outside the statutory period. *Metcalf v. New York City*, 1 N. Y. Supp. 873.

In *Alabama*, although the laws are published in the daily and weekly editions of the same paper, no extra compensation is allowed for publication in the weekly. *Montgomery Advertiser Co. v. Burke*, 82 Ala. 381.

Under the Kansas tax law, the printer can recover no compensation for publishing notices of tax sales unless within fourteen days after the last publication he hands in his affidavit of publication. *Fox v. Cross*, 39 Kan. 350; *Blanchard v. Hatcher*, 40 Kan. 350; *Jackson v. Chalmers*, 41 Kan. 247.

In *Alabama* the printer's fee must be ascertained by the judge of probate before being paid. *Burke v. Blau*, 79 Ala. 97.

1. Whart. on Evidence, § 672.

The newspaper itself is the best evidence of an article published in it. *Bond v. Central Bank of Georgia*, 2 Ga. 92.

A copy of a newspaper, containing an advertisement of the usual time of arrival of a certain stage coach, is admissible in evidence of the advertised time of such arrival, and of the knowledge of such time by one who usually reads the paper. *Com. v. Robinson*, 1 Gray (Mass.) 555.

2. Against those never having dealt with a firm, notice of its dissolution printed in a newspaper is admissible. *Simmonds v. Strong*, 24 Vt. 642; *Roberts v. Spencer*, 123 Mass. 397; *Bristol v. Sprague*, 3 Wend. 423; *Vernon v. Manhattan Co.*, 22 Wend. 183; *Newsom v. Coles*, 2 Camp. 617; *Hart v. Alexander*, 7 C. & P. 753. Against those having had old and familiar dealings with the firm, they may be received as cumulative evidence of notoriety of dissolution, after first proving the fact of dissolution by deed or otherwise. *Hart v. Alexander*, 7 C. & P. 753. But mere notoriety cannot prove dissolution as against a party not shown to have been reached by such notoriety. *Pitcher v. Barrows*, 17 Pick. (Mass.) 361; *Dickinson v. Dickinson*, 25 Gratt. (Va.) 321.

3. *Sisson v. Cleveland etc. R. Co.*, 14 Mich. 489; *Cluquot's Champagne*, 8 Wall. (U. S.) 114; *Peter v. Thickett*, 51 Mich. 539. But see *Harris v. Ely*, Seld. Notes, No. 1, 35.

generally for other purposes.<sup>1</sup> Knowledge derived from a newspaper is provable inferentially, as from familiarity with the paper.<sup>2</sup>

A government gazette is admitted as evidence of the public acts of government, or matters of State, but is no evidence of private titles or private interests, or to prove a fact of a private nature.<sup>3</sup>

**V. WHAT CONSTITUTES PUBLICATION.**—See NOTICE.

**VI. NEWSPAPER CONTEMPTS OF COURT**—(See also CONTEMPT, 3 Am.

But additional evidence should be given, showing that the prices current are drawn from reliable sources. *Whelan v. Lynch*, 60 N. Y. 469. But see *Terry v. McNeil*, 58 Barb. (N. Y.) 241; *Whitney v. Thacher*, 117 Mass. 523; *Slisson v. Cleveland etc. R. Co.*, 14 Mich. 489; *Payson v. Everett*, 12 Minn. 216; *Chaffee v. United States*, 18 Wall. (U.S.) 541.

Where it was proved that the defendant had corrected the price current in a newspaper, files of the paper were properly admitted in evidence against him to prove the market value of grain. *Henkle v. Smith*, 21 Ill. 238.

1. *Whart. on Evidence*, § 674a; *Ring v. Huntington*, 1 Hill (S. Car.) 162.

A newspaper account of accident not admissible in an action against railroad company, without proof that it was an original memorandum, or that it contained statements made by the parties at the time. *Downs v. N. Y. Cent. R. Co.*, 47 N. Y. 83.

A comparison of two newspapers in regard to type, devices, etc., is allowed to show that they were both printed by the same person, where one of them is imperfectly proved. *McCorkle v. Binns*, 5 Binn. (Pa.) 440.

Where, in an action to foreclose a mortgage, the tenant offered to read from a newspaper the notice of foreclosure, and, an objection being made, read the same from the records of the registry. He was afterwards allowed, in his argument to the jury, to read from the newspaper. *Atkinson v. Snow*, 33 Me. 579.

A newspaper containing an announcement of the death of an individual is not admissible in evidence, in the courts of the State of New York, to prove the fact of such person's death. *Fosgate v. Herkimer Mfg. Co.*, 9 Barb. (N. Y.) 287.

Nor are floating newspaper references sufficient notice of the insolvency of the maker of a note to charge a party

with notice taking such note for value before maturity. *Goetz v. Kansas City Bank*, 119 U. S. 551.

The publications known as "bank-note detectors" are not admissible to prove the worthlessness of bank bills. *Payson v. Everett*, 12 Minn. 216.

**Advertisements.**—Advertisements that can be traced to a particular party as author are evidence against him, but not otherwise. *Somerville v. Hunt*, 3 Har. & M. 113; *Freno v. Freno*, 1 Weekly Notes of Cases, 165; *Henkle v. Smith*, 21 Ill. 238; *Stringer v. Davis*, 35 Cal. 25; *Mann v. Russell*, 11 Ill. 586; *Lee v. Flemingsburg*, 7 Dana (Ky.) 28; *Dennis v. Van Vay*, 28 N. J. L. 158; *Berry v. Mathewes*, 7 Ga. 457.

Advertisements in a newspaper are improper evidence to go to a jury, except to prove a notice under some statute, or for publishing a libel, or the like. *Sweet v. Avaunt*, 2 Bay (S. Car.) 492.

Where the advertisement was shown to have been copied from a manuscript, the printed advertisement is only admissible where the absence of the manuscript is accounted for. *Sweigart v. Lowmarter*, 14 Serg. & R. (Pa.) 200.

2. To bring home to a party knowledge of a newspaper notice it is not enough to show that the newspaper was circulated in the neighborhood of his residence. *Norwich Nav. Co. v. Theobald*, N. & M. 153; *Kellogg v. French*, 15 Gray (Mass.) 354. It was enough to show that it was taken by the party to be charged with notice, or that he attended a reading room where it was taken, or was in other ways familiar with it. *Godfrey v. Macaulay*, Pea. R. 155n; *Jenkins v. Blizard*, 1 Stark. R. 419; *Hart v. Alexander*, 2 M. & W. 484; *Leeson v. Holt*, 1 Stark. R. 186. Or that the newspaper is one with which it is his duty to be familiar, as underwriters with Lloyds' Shipping Register. *Mackintosh v. Marshall*, 11 M. & N. 116.

3. *Brundred v. Del Hayo*, 20 N. J. L. 328; *Lurton v. Gilham*, 2 Ill. 577.

& Eng. Encyc. of Law 777; LIBEL AND SLANDER, 13 Am. & Eng. Encyc. of Law 292; LIBERTY OF THE PRESS, 13 Am. & Eng. Encyc. of Law 510).—The subject of constructive contempt of court by newspaper publications of judicial proceedings has given rise to considerable discussion, and, in the United States, to some conflict of authority. With the general subject of constructive contempts as a class this article is not concerned, but only with such contempts in their relation to newspapers. In Great Britain the law is well settled, and the authority of the superior courts, at least, to punish summarily as a contempt publications tending constructively to affect pending proceedings, or to bring the judges into disrepute, is not denied.<sup>1</sup>

In an early American case,<sup>2</sup> the power was asserted more broadly than by all the subsequent cases. Here the publication tended, though perhaps slightly and indirectly, toward a criticism of the motives likely to influence the judges of the Supreme Court of Pennsylvania in a pending cause. Here it was argued that the spirit of American institutions, and the freedom of speech and of the press supposed to be guaranteed thereby, did not justify the court in following the English precedents; but the argument did not prevail. A few years afterward, however, a statute of Pennsylvania deprived the courts of the power to punish for constructive contempts, and it does not appear that the statute has since been attacked for unconstitutionality.

A leading and interesting case, denying to the courts the right to exercise this power as fully as in the case aforesaid and in *Great Britain*, was decided in *Mississippi* in 1844.<sup>3</sup> Here a newspaper commented adversely upon the action of a judge in admitting to bail one charged with a homicide. The decision was rendered on *habeas corpus*, and was not the decision of the full court, but that of a single judge, before whom the writ was returnable. The review of the question, in the light of principle and of the authorities, was learned and exhaustive, and it was thought that the constitution of the State guaranteed to the newspaper the right of criticism as fully as exercised by it.<sup>4</sup>

Other courts, in refusing to follow the learned Mississippi judge, have adverted to the fact that the newspaper criticism related to

1. *Re Cheltenham etc. R. Co.*, L. R., 8 Eq. 580; *Daw v. Eley*, L. R., 7 Eq. 49; *Rex v. Gilham, Moody & M.* 165; *Littler v. Thomson*, 2 Beav. 129; *Re Crawford*, 13 Jur. 955; *Reg. v. Onslow*, L. R., 9 Q. B. 219; *Reg. v. Skipworth*, L. R., 9 Q. B. 219; *Reg. v. O'Dogherty*, 5 Cox (C. C.) 348; *Rex v. Clement*, 4 Barn. & Ald. 218. See, for a review of the English authorities before the American Revolution, *Re Cheeseman*, 49 N. J. L. 115.

2. *Res Publica v. Oswald*, 1 Dall.

319. And see *Passmore's Case*, 3 Yeates (Pa.) 441.

3. *Ex parte Hickey*, 4 Smed. & M. (Miss.) 751.

4. See, however, *Ex parte Adams*, 25 Miss. 83; *Watson v. Williams*, 36 Miss. 331, in each of which cases language is used which, while not criticising the opinion in *Ex parte Hickey*, *supra*, is open to the construction of claiming for the courts a broader power in relation to constructive contempts than was there recognized.

an act which had been done, viz., admitting to bail, and that therefore a distinction might be taken between such a publication and one criticising a matter actually pending.<sup>1</sup> The Illinois cases have not been quite harmonious with one another. An early case<sup>2</sup> held that newspaper articles commenting upon the conduct of a juror, who was the editor also of a rival political paper, and reflecting contemptuously upon the judge, published during the pendency of a trial for murder, did not authorize an attachment for contempt. In a more recent case,<sup>3</sup> a majority of the court held that the publication of an article, indirectly charging the use of money to procure a decision favorable to the defendant in a case pending before the supreme court on error, was a contempt, for which an editor and publisher should be fined. Here stress was laid upon the fact that the case in relation to which the article was published was then pending before the court undecided, and that the article was calculated to, and was designed to, influence the members of the court in deciding the case.

After the decision of this case the provision of the Illinois statute on the subject of contempts was repealed. In the next and latest case on the subject,<sup>4</sup> the court declined, irrespective of any question of statutory power, and resting its decision on the common-law power to punish for contempt, to accede to all that was said in the majority opinion in the case last cited, and refused to hold guilty of a constructive contempt the publisher of a newspaper wherein had been printed an article reflecting upon the action of the grand jury, which had found indictments against the publisher. Here, again, the court laid stress on the fact that the indictment had been found. In *West Virginia*, in 1884, the subject again came up, and the supreme court of appeals, after reviewing the authorities in great detail, upheld the power of the court to quite as full an extent as in the early cases first above cited.<sup>5</sup> The latest judicial exposition of the subject is that of the Supreme Court of Colorado, in 1889;<sup>6</sup> and here again the power of the court was asserted. In this case the publication in question commented in severe and objectionable language upon the action of a judge of an inferior court in releasing a prisoner on bail.

The court declared that the statute did not deprive the court of its inherent power to punish for contempt, and pronounced this question *stare decisis* in that State.<sup>7</sup>

In a recent Oregon case<sup>8</sup> the objectionable publication was so general in its character, being in fact a sweeping criticism on the administration of justice generally in Southern Oregon, that it was adjudged not to constitute a contempt in any pending matter in such sense as to require judicial notice to be taken of it.

1. See *Storey v. People*, 79 Ill. 45.

2. *Stewart v. People*, 3 Scam. (Ill.) 402.

3. *People v. Wilson*, 64 Ill. 195.

4. *Storey v. People*, 79 Ill. 45.

5. *State v. Frew*, 24 W. Va. 416.

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6. *Cooper v. People*, 22 Pac. Rep. 790.

7. On the authority of *Hughes v. People*, 5 Col. 445.

8. *State v. Kaiser* (Oreg.), 23 Pac. Rep. 964.

There is an Indiana case,<sup>1</sup> where it was adjudged that a newspaper article describing the action of court and counsel during the absence of a prisoner, who, though on his way to the court house, did not reach it until after the issue of a bench warrant and the adjournment of the court, in a manner calculating to make the whole thing appear ridiculous, did not justify judicial action as for contempt.

In *New Jersey*, after a disagreement of the jury on a criminal trial, a newspaper article cast discredit on the grand jury, the sheriff, and the judge, and it was held that the publisher was properly adjudged guilty of contempt.<sup>2</sup>

In *New Hampshire*, the publication of a newspaper article animadverting in opprobrious terms on the character of a pending criminal prosecution was held a contempt, punishable summarily.<sup>3</sup>

In *Ohio*, a newspaper publication which in effect charged the judge, who called a grand jury to find an indictment, with proceeding with a special partisan purpose, and with packing the grand jury, was held punishable summarily.<sup>4</sup> In *Iowa*, publications which were adjudged not to constitute a contempt reflected upon the conduct of the judge in relation to cases disposed of before the publication.<sup>5</sup> In *Florida*, the court said: "In the absence of any statutory limitation or restriction, the power of the several courts over the matter of contempts is omnipotent;" and "it is the great bulwark established by the common law for the protection of courts of justice and for the maintenance of their dignity, authority, and efficacy, and neither in *England* nor in the *United States* has this unrestricted power been seriously questioned."<sup>6</sup>

In *Connecticut* it was said: "The statute is not to be regarded as conferring the power to punish for contempts, but merely as regulating an existing power. The power is inherent in all courts;" and again: "But, independently of the statute, we think the power is inherent in all courts. A court of justice must have, of necessity, the power to preserve its own dignity and protect itself."<sup>7</sup>

In *Arkansas*, the power was upheld to as full an extent as in any of the cases.<sup>8</sup>

In *North Carolina*, the supreme court asserted the right to punish summarily for contempt an attorney at its bar for a publication of an article in a newspaper reflecting on the court, and published when the court was not in session, and said: "A court has power

1. *Cheadle v. State*, 110 Ind. 301.

2. *Re Cheeseman*, 49 N. J. L. 115. The reasoning of the court in this case is founded largely on the English authorities anterior to the American Revolution.

3. *Re Sturoc*, 48 N. H. 425.

4. *Myers v. State*, 22 N. E. Rep. 42.

5. *Dunham v. State*, 6 Iowa 246; *State v. Anderson*, 40 Iowa 207.

6. *Ex parte Edwards*, 11 Fla. 174.

7. *Middlebrook v. State*, 42 Conn. 257. To the same effect, see *Re Cooper*, 32 Vt. 257; *State v. Woodfin*, 5 Ired. L. (N. Car.) 199.

8. *State v. Morrell*, 16 Ark. 385.

to require the members of its bar to purge themselves from a charge of contempt incurred by their publishing over their names, in a newspaper, libellous matter directly tending to impair the respect due to its members."<sup>1</sup>

The power of the federal courts has been curtailed by the act of March 2nd, 1831 (Rev. St., § 725), still in force. This act provides that the power of the courts of the United States to punish contempts "shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts." The reason for this statute is said to have been found in the arbitrary action of JUDGE PECK in relation to such a contempt. He was impeached and barely escaped conviction.<sup>2</sup>

It would seem, therefore, to be the legitimate deduction from the opinions of the State courts, and from the principle of the matter, that, according to the great weight of authority, the power to deal summarily with constructive newspaper contempts, consisting of the publication of comments on matters pending judicially, and calculated to influence the due course of the proceedings therein, is vested in the superior courts, except so far as statutes or constitutions have curtailed it, and that it is not wholly clear that courts will recognize always the power of legislatures to deprive them of what is so frequently spoken of as an inherent function of their being.<sup>3</sup>

1. *Ex parte* Moore, 63 N. Car. 397.

2. See, as to the construction and bearing of this statute, *United States v. Anonymous*, 21 Fed. Rep. 761, in which case also is to be found an exhaustive discussion, by HAMMOND, J., of the general subject of constructive contempts, supported by many citations.

Other States have similar statutes, *Tennessee*, for example (Code, § 4106). In *Ex parte* Robinson, 19 Wall. (U. S.) 505, FIELD, J., in delivering the opinion of the court, suggests a doubt as to the application of the federal statute to the supreme court. It has been questioned, though the point does not appear to have come in issue directly, whether the legislature has the power to curtail the jurisdiction of the courts in this respect. See *State v. Morrell*, 16 Ark. 385; *Cooper v. People*, 22 Pac. Rep. 790; *State v. Frew*, 24 W. Va. 416.

3. The text-writers are not in accord on this subject. Mr. Bishop (2 Crim. Law, §§ 257-262) is disposed to concede the power to as full an extent as claimed

in any of the cases, while Mr. Wharton (Pl. & Pr., §§ 957-961) takes the ground that a contempt of this character cannot be punished summarily.

See also, as tending to shed light upon this question, *Ex parte* Hardy, 68 Ala. 303; *State v. Woolley*, 11 Bush (Ky.) 95; *Whittem v. State*, 36 Ind. 196; *State v. Galloway*, 5 Coldw. (Tenn.) 326; *Hummel's Case*, 9 Watts (Pa.) 431; 42 Cal. 412; *Wheeling v. B. & O. R. Co.*, 13 Gratt. (Va.) 40; *Deskin's Case*, 4 Leigh (Va.) 685; *Lindsay v. Comrs.*, 2 Bay (S. Car.) 61; *State v. Sauvinet*, 24 La. An. 119; *Ex parte* Schenck, 65 N. Car. 353; *Weaver v. Hamilton*, 2 Jones Law 343; *In re Daves*, 81 N. Car. 72; *In re Walker*, 82 N. Car. 95; *Cromartie v. Comrs.*, 85 N. Car. 211; *Batchelder v. Moore*, 42 Cal. 412; *Rutherford v. Holmes*, 5 Hun (N. Y.) 317; *Morrison v. Moat*, 4 Edwards Ch. (N. Y.) 25; *Spalding v. People*, 7 Hill (N. Y.) 301; *Yates v. Lansing*, 9 Johns. (N. Y.) 417; *People v. Yates*, 6 Johns. (N. Y.) 337.

**NEW TRIAL**—(See also INSTRUCTIONS, 11 Am. & Eng. Encyc. of Law 236; JUDGE, vol. 12, p. 2; JURY and JURY TRIAL, vol. 12, p. 318; MOTIONS, vol. 15, p. 887; TRIAL; VERDICT).

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**I. DEFINITION**—1. **New Trial**.—A new trial is a rehearing of the legal rights of the parties upon disputed facts before another jury, granted by the court on motion of the party dissatisfied with the result of the previous trial, upon a proper case being presented for the purpose.<sup>1</sup> The new trial may be based upon the same, dif-

1. 2 Bouv. L. Dict. 220; 4 Chitty's Gen. Prac. 30.

**Other Definitions**.—A new trial is a re-examination of an issue of fact in the same court, after a trial and decision by a jury, court, or referees. Civ. Code Cal., ch. 16, § 192; Civ. Code Dak., p. 84, art. 9, § 285; Civ. Code Wyo., § 2652; Code Iowa, ch. 9, § 2837; Compiled Laws Neb. 1885, § 314, p. 670; Rev. Stat. Ohio 1886, ch. 5, § 5305.

A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before. 3 Stephens Com. 626; 3 Bl. Com. 391; *Gott v. Judge of Detroit Superior Court*, 42 Mich. 625.

**Origin of New Trials**.—The granting of new trials seems to date back to early times, and the first case in which a new trial was granted on the evidence was the case of *Wood v. Gunstan*



ferent, or additional evidence.<sup>1</sup> It may be heard by the same or a different judge, but there must be an entirely different jury, and the fact that a juror had served on a former trial is a good ground for challenge.<sup>2</sup> New trials are favored by the courts when there is any question as to the correctness of the verdict.<sup>3</sup>

**2. Venire de Novo.**—A *venire facias de novo*, that is, a new writ of *venire facias*, will be awarded at common law, when, by reason of some irregularity or defect in the proceedings on the first *venire*, or the trial, the proper effect of that writ has been frustrated, or the verdict become void in law; as, for example, where the jury has been improperly chosen, or given an uncertain or ambiguous or defective verdict. The consequence and object of a new venire are, of course, to obtain a new trial; and accordingly this proceeding is, in substance, the same with a motion for a new trial. Where, however, the unsuccessful party objects to the verdict, in respect of some irregularity or error in the practical course of proceeding, rather than on the merits, the form of the application is a motion for a *venire de novo*, and not for a new trial.<sup>4</sup> The motion for a *venire de novo* must not be confounded with the motion for a new trial. The essential difference is that a *venire de novo* is never granted except for causes appearing on the record, while a new trial is obtained for extrinsic reasons not appearing on the record. The *venire de novo* is an ancient process of the common law. The propriety of granting it is determined upon principles of law, allowing no discretion to the court. It affords the proper remedy where it appears from the record that the jury was improperly selected or returned, or a

(1665), Styles Rep. 462, 466. See also Bayley v. Boorne, 1 Strange 392; Hillard on New Trials (2nd ed.) 4; 2 Tidd's Prac. 904. However, Sellon says: It is not true that no new trials were granted before 1665, as has been said in Styles 466. The reason why this cannot be traced farther back is, "that the old report books do not give any accounts of determinations made by the court upon motions." 1 Sellon's Prac. 494 (1st Amer. ed.).

In the case of Witham v. Lewis, 1 Wils. 55 (1744), LORD CHIEF JUSTICE WILLES, in defining the difference between *venire facias de novo* and the motion for a new trial, says: "They agree in this, that a *venire facias de novo* must be awarded in both, and that the court may or may not grant either of them; but they differ, first, in this, that a *venire facias de novo* is the ancient proceeding of the common law—a new trial is only a new invention. The first is as ancient as the law, when attaints were in use; but motions for new trials

were introduced in this manner: the judgment in attaint was very severe and the punishment excessively hard, and therefore to avoid that severity it was thought better to proceed in a milder way, and so motions for new trials were introduced." See also 3 Bl. Com. 404; 3 Bouv. Inst. 502, note b; 1 Sellon's Prac. 494 (1st Am. ed.).

1. 4 Chitty Gen. Pr. 30.

2. 4 Chitty Gen. Pr. 93; Argent v. Darell, 2 Salk. 648; Rex v. Mawbey, 6 T. R. 622; 1 Stark. Ev. 468 (2nd ed.); 2 Tidd's Pr. 904; Herndon v. Bradshaw, 4 Bibb (Ky.) 45; Craig v. Elliott, 4 Bibb (Ky.) 272.

3. McCreary v. Hart, 39 Kan. 216; Field v. Kinnear, 5 Kan. 238; Owen v. Owen, 9 Kan. 96; Ateo v. Kelsey, 13 Kan. 216; Sedan v. Church, 29 Kan. 192; Union Pac. R. Co. v. Diehl, 33 Kan. 426.

4. Stephen on Pleading 128.

The nature of a *venire facias de novo*, at common law, is fully explained in Witham v. Lewis, 1 Wils. 48.

challenge was improperly disallowed.<sup>1</sup> Or where, upon its face, the verdict is so imperfect that the merits of the cause are not disclosed, and, therefore, no judgment can be rendered upon the verdict; or where it appears that the jury should have found other facts differently.<sup>2</sup> In practice, a *venire de novo* originates more frequently from a special verdict than from a general verdict, yet, if there are two or more issues of fact, and the verdict does not respond to all, the case is one for a *venire de novo*, though the verdict is general.<sup>3</sup>

**II. GENERAL PRINCIPLES GOVERNING THE RIGHT TO A NEW TRIAL; GROUNDS FOR A NEW TRIAL, ERRORS OF COURT.**—A motion for a new trial is addressed to the court which tried the cause; and is an appeal to the equitable discretion of the court to prevent a palpable and material wrong. The motion, therefore, is never to be granted if the court conceives that the substantial legal justice of the case has been reached, notwithstanding irregularities may have occurred; nor is it to be granted where the failure of justice has not been palpable; nor where the wrong done, however palpable it may be, is trivial in extent. The court does not exercise a power of appeal from the jury, but interposes its equitable authority to prevent the jury from inflicting by their verdict a gross, material, and palpable wrong.<sup>4</sup> The principal grounds on

1. 2 Tidd's Pr. 922.

2. As, for example, if, in trover, the jury found that the goods belonged to the plaintiff, and were demanded by him of the defendant, who refused to deliver them, a *venire de novo* should issue, for the reason that the jury have found only the evidence of a fact which they themselves should have determined—namely, a conversion to the defendant's use, for a demand and refusal are only evidence of a conversion, and the fact of the conversion should have been found. *Witham v. Earl of Derby*, 1 Wils. 56.

3. 4 Minor's Inst. 861; *Hite v. Wilson*, 2 H. & M. 268. And see, generally, *Gould on Pleading* 526.

4. 4 Minor's Inst. 837, citing *Patteson v. Ford*, 2 Gratt. (Va.) 19; *Powell v. Manson*, 22 Gratt. (Va.) 177; *Hill v. Peyton*, 22 Gratt. (Va.) 550; *Kelsey v. Hammer*, 18 Conn. 311; *Cowles v. Coe*, 21 Conn. 220; *Union Bank v. Middlebrook*, 33 Conn. 95; *Covington Mills Co. v. Summers*, 36 Ga. 615; *Fanning v. McCraney*, 1 Morr. (Iowa) 398; *Goode v. Love*, 4 Leigh (Va.) 635; *Cartwright v. Carpenter*, 7 How. (Miss.) 328; *Adams v. Webster*, 25 La. An. 113; *Dulany v. Rankin*, 47 Miss. 391; *Huston v. Vail*, 51 Ind. 299.

Upon a rule to show cause why a new trial should not be granted, if the

judges are divided in opinion as to granting a new trial, the rule must be discharged. *Lanning v. London*, 4 Wash. (U. S.) 332; *Goddard v. Coffin*, Dav. 381; *Lehre v. Murry*, 2 Brev. (S. Car.) 19; *Colony v. Hathaway*, 1 Tyler (Vt.) 281.

A court is not bound to grant a new trial, although both parties desire it. *Aiken v. Bruen*, 21 Ind. 137; *Phelan v. Ruiz*, 15 Cal. 90; *Nichols v. Sixth Ave. R. Co.*, 10 Bosw. (N. Y.) 260.

In a civil suit, brought to recover a penalty, the court has full power to grant a new trial, although the verdict was in favor of the defendant. *United States v. Halberstadt*, Gilpin (U. S.) 262.

It is within the discretion of the trial judge to grant or refuse a new trial in an action tried before a jury, where there is a substantial conflict in the evidence. *Tide Land Reclamation Co. v. Cunningham*, 71 Cal. 221.

A new trial will not be granted to enable the party to avail himself of a legal defence, where it is inequitable, and substantial justice has been done. *M'Connell v. Strong*, 11 Vt. 280.

Where the defendant must finally prevail, a new trial will be granted, though the judgment below was for the plaintiff and he appealed. *Mordecai v. Parker*, 3 Dev. L. (N. Car.) 425.

which new trials have been granted are that the verdict is contrary to the evidence, or unsupported by the weight of evidence, that since the trial new evidence has been discovered, which was not attainable at the first trial; that the damages given by the jury are excessive or clearly inadequate; that at the trial there was surprise or mistake; that there was misbehavior on the part of the jury, or that the jury was grossly mistaken as to its duty;<sup>1</sup> that the successful party was guilty of some fraud or misconduct; or that the court, in the conduct of the trial, erred in admitting or rejecting evidence.<sup>2</sup>

1. See JURY AND JURY TRIAL, 12 Am. & Eng. Encyc. of Law 318.

2. *Fitch v. Woodruff* etc. Iron Works, 20 Conn. 82; *Clark v. Pendleton*, 20 Conn. 495; *Trigg v. Conway*, 1 Hempst. (U. S.) 538; *Brown v. Cummings*, 7 Allen (Mass.) 507; *Kirkland v. Carr*, 35 Miss. 584; *Harris v. Panama R. Co.*, 5 Bosw. (N. Y.) 312; *Patterson v. Westervelt*, 17 Wend. (N. Y.) 543; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169; *Patterson v. Ramspeck* (Ga. 1888), 10 S. E. Rep. 390; *Herreshoff v. Tripp*, 15 R. I. 92; *Rencher v. Aycock* (N. Car. 1889), 10 S. E. Rep. 132; *Thompson v. Thompson*, 77 Ga. 692; *Tunell v. Larson*, 37 Minn. 258; *Sherman v. Delaware etc. R. Co.*, 106 N. Y. 542; *Central R. Co. v. Rouse*, 77 Ga. 393; *Harrison v. Baker*, 15 Neb. 43; *Simpson v. Armstrong*, 30 Neb. 512; *Meal v. Simmons*, 83 Ga. 363; *Provost v. Mayor etc. of N. Y.*, 3 N. Y. Supp. 531; *Savage v. D'Wolfe*, 1 Blatchf. (U. S.) 343; *Floyd v. Hamilton*, 10 Iowa 552; *Woodruff v. Iaffin*, 4 Ark. 527; *Santillan v. Moses*, 1 Cal. 92; *Owen v. Jones*, 14 Ark. 502; *Settle v. Allison*, 8 Ga. 201; *Ellis v. Smith*, 10 Ga. 253; *Parsons v. Dunaway* 5 Ill. 194; *Daniel v. Nelson*, 10 B. Mon. (Ky.) 316; *Lynes v. State*, 36 Miss. 617; *Foye v. Leighton*, 24 N. H. 29; *Northrup v. Wright*, 24 Wend. (N. Y.) 221; *Smith v. Kerr*, 1 Barb. (N. Y.) 155; *Weeks v. Lowerre*, 8 Barb. (N. Y.) 530; *Underhill v. New York etc. R. Co.*, 21 Barb. (N. Y.) 489; *Whiting v. Otis*, 1 Bosw. (N. Y.) 420; *Jaeger v. Kelly*, 7 Rebt. (N. Y.) 586; *Ames v. Potter*, 7 R. I. 265; *Bridier v. Yulee*, 9 Fla. 481; *Parson v. Gregory*, 21 Tex. 513; *State v. Avery*, 17 Wis. 672; *Robbins v. Lincoln*, 12 Wis. 1; *Aldige v. Knox*, 16 La. An. 180; *Stanton v. Bannister*, 2 Vt. 464; *Allen v. Young*, 6 B. Mon. (Ky.) 136; *Doe v. Town of Attica*, 7 Ind. 441; *Trippe v. Carr*, 80 Ind. 371; *Young v. Buckingham*, 5 Ohio 485; *McElevay v. Sutton*,

2 *Bailey* (S. Car.) 128; *Heath v. Shelby*, 1 Blackf. (Ind.) 228; *Coleman v. Allen*, 3 J. J. Marsh. (Ky.) 229; *Hunt v. Adams*, 7 Mass. 518; *McIntyre v. Clapp*, 31 N. Y. 569; *Lackman v. Wood*, 25 Cal. 147.

The rejection of proper evidence will not warrant a new trial if the complaining party is not injured thereby. *Baker v. Carr*, 100 Ind. 330; *Ruffin v. Oberby* (N. Car.), 11 S. E. Rep. 251.

The particular evidence received or excluded must be shown, that the supreme court may determine whether or not error has been committed. *McClain v. Jessup*, 76 Ind. 120; *Whittier v. Collins*, 15 R. I. 90.

The court below ruled out certain evidence offered by the defendant, and he moved for a new trial. The plaintiff claimed that he had made such admissions on the trial that the exclusion of the evidence had done him no harm. *Held*, that it must appear clearly in such a case that no harm has been done by the ruling, and that the admission must have covered all that was important in the evidence rejected. *Richmond v. Stahle*, 48 Conn. 22.

If the evidence excluded would not have changed the result of the trial had it been admitted, no error is committed. *Cogan v. Frisby*, 36 Miss. 178; *Bird v. State*, 14 Ga. 43; *Bohr v. Steamboat Baton Rouge*, 15 Miss. 715; *McMullen v. Mayo*, 16 Miss. 208; *Smith v. Northern Bank*, 1 Metc. (Ky.) 575; *Fitch v. Chapman*, 10 Conn. 8.

If the evidence excluded be only cumulative upon a question already fully proven, there is no ground for a new trial. *Park Bank v. Tilton*, 15 Abb. (N. Y.) Pr. 384; *Drake v. Surget*, 36 Miss. 458; *Litchfield v. Londonderry*, 39 N. H. 247. *Compare Dasset v. Miller*, 3 Sneed (Tenn.) 72.

If the verdict is not contrary to the law and evidence, the exclusion of irrelevant testimony is not error unless the jury has been misled by it. *Arch-*

dale v. Moore, 19 Ill. 565; Hunt v. Bennett, 4 E. D. Smith (N. Y.) 647; State v. Herrick, 12 Minn. 132; Fairchild v. Case, 24 Wend. (N. Y.) 381; Magee v. Harrington, 21 Miss. 403; Wiggins v. McGimpsey, 21 Miss. 532; Garnet v. Kirkman, 41 Miss. 94.

The rejection of a deposition which is unimportant and has little or no bearing upon the issues involved, is not of itself alone a good ground for the granting a new trial. Hill v. Meyers, 43 Pa. St. 170; Kimberlin v. Faris, 5 Dana (Ky.) 533.

If no objection is made to the asking of leading questions or the proving by parol of the contents of writings, without showing them to be lost or inaccessible, the admission of such evidence and allowance of such questions will not furnish a ground for a new trial. Cotton States L. Ins. Co. v. Edwards, 74 Ga. 220. See also Starne v. Farr, 17 Ill. App. 491.

Where the court is in doubt as to the remedy, the admission of illegal evidence in favor of the prevailing party, a new trial should by all means be granted. Neal v. Simmons, 8 S. E. Rep. 432.

A new trial was allowed where an unauthenticated telegram was admitted in evidence. Adams v. Mille Lacs Lumber Co., 32 Minn. 216.

If the decision of the court in excluding evidence is correct when given, no testimony subsequently introduced will render it erroneous. Depuy v. Williams, 26 Cal. 309.

Where the party offering material testimony fails to disclose to the court the object for which it is offered, and it is rejected for irrelevancy, he will not afterwards be granted a new trial by showing that such evidence could have been used for a purpose material to the issue. Barksdale v. Toomer, 2 Bailey (S. Car.) 180.

It must be shown that the excluded testimony would elucidate some issue made, and was legally admissible for that purpose. Patterson v. Ramspeck, (Ga.) 10 S. E. Rep. 390.

If improper evidence is allowed to go to the jury, a new trial will be allowed unless it can be seen that such evidence could have had no influence upon the jury. Owen v. Jones, 14 Ark. 502; Santillan v. Moses, 1 Cal. 92; Settle v. Allison, 8 Ga. 201; Ellis v. Smith, 10 Ga. 253; Parsons v. Dunaway, 5 Ill. 194; Daniel v. Nelson, 10 B. Mon. (Ky.) 316; Lynes v. State, 36 Miss. 617; Foye

v. Leighton, 24 N. H. 29; Lathrop v. Wright, 24 Wend. (N. Y.) 221; Smith v. Kerr, 1 Barb. (N. Y.) 155; Weeks v. Lowerre, 8 Barb. (N. Y.) 530; Underhill v. New York etc. R. Co., 21 Barb. (N. Y.) 489; Whiting v. Otis, 1 Bosw. (N. Y.) 420; Jaeger v. Kelley, 7 Robt. (N. Y.) 586; Ames v. Potter, 7 R. I. 265; Bridler v. Yulu, 9 Fla. 481; Patton v. Gregory, 21 Tex. 513; Field v. Avery, 17 Wis. 672; Robbins v. Lincoln, 12 Wis. 1; Harrison v. Baker, 15 Neb. 43; Baron de Rutzen v. Farr, 5 N. & M. 617; Ullman v. McCormick, 12 Col. 553; Hutchins v. Hutchins, 98 N. Y. 56; Moore v. Willard, 30 S. Car. 615; People's Bank v. McKetham, 84 N. Car. 582; Dusenbury v. Dusenbury, 48 N. Y. Super. Ct. 205.

When the record does not contain all the evidence, and it appears that improper evidence was admitted, a new trial will be awarded. Fowler v. Woodward, 6 J. J. Marsh. (Ky.) 606.

The admission, in rebuttal, of evidence which impeached no one, and was without any significance, is an immaterial error. Krueger v. City of Merrill, 66 Wis. 28.

The admission of illegal evidence, if objected to, though under an offer of connecting it with other proof that would render it competent, and, though charged out of the case by the court, is a cause for setting aside a verdict, unless the court is able to say affirmatively that it worked no injury to the adverse party. State v. Meader, 54 Vt. 126; State v. Meader, 54 Vt. 651; Mussey v. Mussey, 68 Me. 346.

A judgment rendered after trial without the intervention of a jury will not be reversed because improper evidence was heard by the judge. Lindsay v. Jaffray, 55 Tex. 626.

The best evidence of which a case in its nature is susceptible must be produced. When incompetent testimony is permitted to go to a jury, which may have influenced their verdict, the verdict will be set aside. Crane v. Andrews, 6 Col. 353; Rooney v. Milwaukee Chair Co., 65 Wis. 397; Yankton Co. v. Rossteuscher, 1 Dak. Ter. 125.

But if hearsay evidence is admitted and the same facts are proven during the trial by competent testimony, a new trial will not be granted. Wardlaw v. Rayford, 27 S. Car. 178.

But if the hearsay evidence may have contributed to the result, a new trial will be allowed. White v. Rayburn, 11 Ore. 450.

If incompetent and immaterial evidence is admitted under promise of counsel to follow it up with other evidence, which he failed to do, a new trial should be granted. *Hudson v. Feige*, 7 West. Rep. 343.

Where, in an action against sureties, the execution of a bond of a bank cashier and the reliance of the bank upon such security were in issue, the reception, after objection for inadmissibility, of immaterial or irrelevant evidence which is not calculated to mislead the jury, does not afford sufficient ground to set aside the verdict. *People's Nat. Bank v. McKethan*, 84 N. Car. 582; *May v. Gentry*, 4 Bev. & Bat. 117.

In an action for the conversion of personal property, attached upon a writ in favor of the defendant and against one D, the plaintiff offered evidence tending to show that the property was sold and delivered to him by D before the attachment. The defendant contended that the sale, if made, was fraudulent as against D's creditors. The plaintiff testified that, after the sale to him, he kept the property in a place hired by, and paid rent therefor, both before and after the attachment; and he was allowed to put in evidence the receipt taken by him for such payment. *Held*, that the admission in evidence of the receipt, although the evidence was immaterial, was not sufficient ground for a new trial. *McAvoy v. Wright*, 137 Mass. 207; *McAvoy v. Drew*, 137 Mass. 207.

If the illegal evidence is only cumulative, and there has been positive evidence upon the point, the admission of such evidence is not generally ground for a new trial. *McLendon v. Frost*, 57 Ga. 448; *Lindsay v. Jaffray*, 55 Tex. 626; *Ritter v. Schenk*, 101 Ill. 387.

If the immaterial evidence has a tendency to prejudice the minds of the jurors, a new trial will be granted. *Ellis v. Short*, 21 Pick. (Mass.) 142. See also *Buddington v. Shearer*, 22 Pick. (Mass.) 427; *Com. v. Bosworth*, 22 Pick. (Mass.) 397; *Clark v. Vorce*, 19 Wend. (N. Y.) 232; *Wilson v. Hamden F. Ins. Co.*, 4 R. I. 159; *Winkley v. Foye*, 28 N. H. 519; *Cook v. Brown*, 34 N. H. 460; *Center v. Center*, 38 N. H. 318.

Or if it have a tendency to mislead the jury, a new trial should be granted. *Simpson v. Armstrong*, 20 Neb. 512.

If the chances are equal that irrelevant testimony may have had an injurious tendency on a jury, a new trial will

be granted. *Farmers Bank v. V.* 24 Wend. (N. Y.) 419.

If the credibility of a witness have been affected by the admission of irrelevant and immaterial testimony, such error should be considered ground for a new trial. *Healey*, 36 How. Pr. (N. Y.)

When the irrelevant and immaterial evidence is admitted solely to ground of prejudice caused by the irrelevant testimony of the objecting witness, its admission is proper. *V. Hamden F. Ins. Co.*, 4 R. I. 159; also *Bank v. Woodward*, 5 N. H. 460.

In order that the verdict should be set aside for the admission of irrelevant and immaterial evidence it must be shown that the party complaining was prejudiced. *Landon v. Hum*, 10 Conn. 209; *Stone v. Stevens*, 219; *Dawson v. Walls*, 16; *Skowhegan Bank v. Cutler*, 5; *Minneapolis etc. R. Co. v. W.* Minn. 515; *Lynd v. Pickett*, 184; *Illingworth v. Greenleaf*, 235; *Cole v. Cheshire*, 1 Gra. 441; *Bragg v. Boston etc.* Allen (Mass.) 54; *Thorndike v. Metc.* (Mass.) 242; *Browning v. V.* 33 Miss. 47; *Daugherty v. V.* 35 Miss. 165; *Rand v. Dodge*, 343; *Winkley v. Foye*, 28 N. H. 519; *Cook v. Brown*, 34 N. H. 460; *v. Peasele*, 36 N. H. 167; *Center v. Center*, 38 N. H. 318; *Blodgett v. Mer*, 41 N. H. 298; *Rollins v. V.* 46 N. H. 411; *Van Cort v. V.* Edw. (N. Y.) 621; *Vallance v. Barb.* (N. Y.) 548; *Patten v. Jones L.* (N. Car.) 539; *Forbes v. ard*, 4 R. I. 364; *State v. Mac* 85; *State v. Sweetland*, 6; *Price v. Perry*, 2 Treadw. (Car.) 31; *Allen v. Parish*, 3; *Peters v. Barnhill*, 1 Hill (S. C.) 119; *Merriman v. Fulton*, 29; *Thurmond v. Trammell*, 22; *Dinsmick v. Milwaukee etc. R.* Wis. 471. See also *Clark v. L.* 21 Cal. 220; *Carpenter v. M.* Cal. 437; *Richards v. Noyes*, 609; *Lee v. Baldwin*, 10; *Marshall v. Morris*, 16 Ga. 36; *ett v. Mims*, 27 Ga. 207; *Jones*, 27 Ga. 266; *Wayne C.* v. Berry, 5 Ind. 286; *Packard v. Bedford*, 9 Allen (Mass.) 200; *scot v. Walker*, 22 N. H. 457; *District v. Bragdon*, 23 N. H. 471; *Page v. Parker*, 40 N. H. 47; *Hart*, 40 N. H. 93; *Adams v.*

in its instructions to the jury.<sup>1</sup>

7 N. H. 219; *Campbell v. Wilson*, 6 Tex. 379. Compare *Eddy v. Baldwin*, 2 Mo. 369; *Dresser v. Ainsworth*, 9 Barb. (N. Y.) 619; *Shipman v. Seymour*, 10 Mich. 277; *Strang v. People*, 24 Mich. 9; *Beebe v. Knapp*, 28 Mich. 72.

And especially if the jury has been instructed to disregard such testimony. *Whitney v. Bayley*, 4 Allen (Mass.) 73; *Philbrook v. Burgess*, 52 Me. 271; *Hamblett v. Hamblett*, 6 N. H. 333; *Smith v. Whitman*, 6 Allen (Mass.) 52; *Haws v. Gustin*, 2 Allen (Mass.) 52; *Hernden v. Henderson*, 41 Miss. 84; *Deerfield v. Northwood*, 10 N. H. 59; *Remington v. Bailey*, 13 Wis. 332; *Cravis v. Barger*, 24 Barb. (N. Y.) 614. And see *Erben v. Lorillard*, 19 N. Y. 99; *Gnen v. Hudson etc. R. Co.*, 32 Barb. (N. Y.) 25.

Certain evidence was produced upon the trial against the defendant charged with murder in the first degree, tending to impeach the wife of the defendant, who had testified in his behalf; thereupon the defendant asked the court to withdraw from the jury the evidence, upon the ground that no sufficient foundation had been laid therefor and because it was irrelevant and incompetent. The court overruled the motion, and the defendant excepted. Soon hereafter the court reconsidered its action, and of its own motion ruled out and took from the jury the evidence objected to. *Held*, that material error was committed thereby. *State v. Fooks*, 9 Kan. 425.

It has been held that the admission of illegal evidence is not cured by charging it out of the case. *Hall v. Jones*, 55 Vt. 297.

If the verdict is supported by unobjectionable evidence it will not be disturbed on the ground that illegal testimony was admitted. *Sharp v. Johnson*, 2 Ark. 79; *Zeigler v. Wells*, 28 Cal. 53; *Stephens v. Crawford*, 1 Ga. 574; *Murphy v. Justices*, 11 Ga. 331; *Mathes v. Colbert*, 24 Ga. 384; *Turner v. McIlhaney*, 8 Cal. 575; *Desverges v. Desverges*, 31 Ga. 753; *Emmons v. Lord*, 38 Me. 351; *Pronce v. Shepard*, 9 Pick. (Mass.) 176; *Doane v. Baker*, 6 Allen (Mass.) 260; *Hollingshead v. Neuman*, 45 Pa. St. 140; *Lowry v. Harris*, 12 Minn. 255; *Bradford v. Pierson*, 12 Mo. 71; *Garèschè v. Deane*, 10 Mo. 168; *Bailey v. Chapman*, 41 Mo. 36; *Sherwood v. Houston*, 41 Miss. 59;

*Lancaster v. State*, 3 Coldw. (Tenn.) 339; *Fowler v. Farmers' etc. Ins. Co.*, 21 Wis. 77; *Norris v. Badger*, 3 Cow. (N. Y.) 449; *Melton v. Cobb*, 21 Tex. 539. See also *Barringer v. Nesbitt*, 9 Miss. 22; *Shultz v. Lepage*, 21 Ill. 160; *Boynton v. Phelps*, 52 Ill. 210.

An error in admitting the evidence of an incompetent witness on the hearing of a chancery case, is no ground of reversal when the record contains other evidence which is competent and sufficient to sustain the decree. In chancery cases, it will be presumed that the court disregarded incompetent evidence, on the hearing, especially where there is competent evidence on which to base its decree. *Ritter v. Schenk*, 101 Ill. 387. And see *Craddock v. Craddock*, 3 Litt. (Ky.) 77; *Glasscock v. Wells*, *Cooke* (Tenn.) 262; *State v. Allen*, 1 Hawks (N. Car.) 6.

1. *Friedlander v. Pugh*, 43 Miss. 111; *Lellyett v. Markham*, 57 Ga. 13; *Ball v. Bradley*, 34 Conn. 496; *Travellers' Ins. Co. v. Jones* (Ga. 1888), 7 S. E. Rep. 83; *Bunten v. Orient Mut. Ins. Co.*, 4 Bosw. (N. Y.) 254; *Ray v. Bell*, 24 Ill. 444; *Elan v. Badger*, 23 Ill. 498; *Smith v. Grover*, 74 Wis. 171; *Thompson v. People*, 4 Neb. 524; *Watts v. Coxen*, 52 Ind. 155; *Fry v. Shehee*, 55 Ga. 208; *Morgan v. Taylor*, 55 Ga. 224; *Barber v. Terrell*, 54 Ga. 146; *Brown v. Kentfield*, 50 Cal. 129; *Charleston City Council v. People's Bank*, 23 S. Car. 410; *De Berry v. Carolina Cent. R. Co.*, 100 N. Car. 310; *Jenkins v. Lewis*, 23 Kan. 255.

If the party against whom an erroneous charge has been given has sustained no injury the verdict will not be set aside for the misdirection. *Branch v. Doane*, 17 Conn. 402; *Wood v. Wilds*, 11 Ark. 754; *Burton v. Merrick*, 21 Ark. 357; *Johnson v. Blackmore*, 11 Conn. 342; *Greenup v. Stoker*, 11 Ill. 202; *Prescott v. Johnson*, 8 Fla. 391; *Terhume v. Dever*, 36 Ga. 648; *Woodberry v. Larned*, 5 Miss. 339; *Evans v. Commercial etc. Ins. Co.*, 6 R. I. 47; *State v. Stack*, 1 Bailey (S. Car.) 339; *Alston v. Jones*, 17 Barb. (N. Y.) 276; *Simon v. Larkin*, 82 Ind. 385; *Hefflin v. Bevis*, 82 Ind. 388; *Mason v. Harpers' Ferry Bridge Co.*, 20 W. Va. 223; *Nicholas v. Kershner*, 20 W. Va. 251; *Finan v. Babcock*, 58 Mich. 307; *Dever v. Aiken*, 40 Ga. 423; *Duke of New Castle v. Hundred etc.*, 4 B. & Ad. 273;

*Martin v. Hill*, 3 Utah 157; *Brown v. Pussler* (Tex.), 1 S. W. Rep. 467; *Deasberger v. Harrington*, 28 Mo. App. 632.

But it has been held that a new trial may be granted for erroneous instructions, although the verdict may appear right upon the proof. *Gaines v. Buford*, 1 Dana (Ky.) 481; *Wardell v. Hughes*, 3 Wend. (N. Y.) 418; *Gillespie v. Gillespie*, 2 Bibb (Ky.) 89; *James v. Langon*, 7 B. Mon. (Ky.) 193; *Field v. Deulety*, 10 B. Mon. (Ky.) 4. *Compare Harris v. Doe*, 4 Blackf. (Ind.) 369; *Morton v. Lawson*, 1 B. Mon. (Ky.) 45; *Bolan v. Peeples*, 1 Brev. (S. Car.) 109; *Graham v. Bradley*, 5 Humph. (Tenn.) 476; *Ingraham v. South Carolina Ins. Co.*, 3 Brev. (S. Car.) 552; *Princeton etc. Turnpike Co. v. Gulick*, 16 N. J. L. 161; *Ashley v. Foreman*, 85 Ind. 55; *Taylor v. D. O. etc. R. Co.*, 10 Ill. App. 311; *Hanks v. Neal*, 44 Miss. 212; *Edmonson v. Machell*, 2 T. R. 4; *Wickes v. Clutterbuck*, 2 Bing. 483; *Simpson v. Bowden*, 23 Miss. 524; *Emanuel v. Cocke*, 6 Dana (Ky.) 212; *Thomas v. Taurer*, 6 Mon. (Ky.) 52; *Howard v. Stanley*, 21 Me. 512; *Freeman v. Rankin*, 21 Me. 446; *Reynolds v. Magness*, 2 Ired. L. (N. Car.) 26; *Jewitt v. Lincoln*, 14 Me. 116; *Burlings v. J. C. R. Co.*, 85 Ill. 18.

That one of the instructions to the jury is too broad when all the instructions taken together construe the law correctly, is not a ground for new trial. *Childress v. Ford*, 18 Miss. 25; *Hodges v. Bales*, 102 Ind. 494.

Instructions to the jury to disregard mischievous and improper testimony will not cure the error of allowing it to remain in the case until the close of the trial. For such error a new trial should be granted. *Taylor v. Adams*, 58 Mich. 187; *Cumins v. Leighton*, 9 Ill. App. 186.

Nor if the misdirection be in a matter that is immaterial to the issue. *Maynor v. Lewis*, 2 Ga. Dec. 205; *Milton v. Blackshear*, 8 Fla. 161; *Holden v. Bloxum*, 35 Miss. 381; *Eyser v. Weissgerber*, 2 Iowa 463; *Western Stage Co. v. Walker*, 2 Iowa 504; *Glover v. Holbrooke*, 5 Allen (Mass.) 155; *Wood v. Gibbs*, 35 Miss. 559; *Shaw v. Etheridge*, 7 Jones (N. Car.) 225; *McCread v. S. C. R. Co.*, 2 Strobb. (S. Car.) 356; *Lewis v. State*, 35 Ga. 131; *Lovell v. Frost*, 44 Cal. 471; *Canon v. Alsbury*, 1 A. K. Marsh. (Ky.) 56.

Where the instruction is in an irrele-

vant matter it must appear that the jury was not misled or the verdict will be set aside. *Wright v. Clark*, 34 Miss. 176; *Baldwin v. Peek*, 22 Tex. 708. *Compare Done v. People*, 5 Park Cr. (N. Y.) 364; *Wheeler v. Arnold*, 30 Mich. 303.

Where a case was tried and the charge erroneously given on the ground that a demand was necessary, and a demand was proven, a new trial for such error will not be granted. *Mackabin v. Clarkson*, 5 Minn. 247.

An erroneous charge as to the measure of damages will not affect the verdict, when, under the evidence, no damages can be recovered. *Barnhart v. Sternberger*, 68 Ga. 341. Or when the verdict is warranted by the evidence. *Blewett v. Wyandotte etc. R. Co.*, 72 Mo. 583. See also *Conillard v. Duncan*, 6 Allen (Mass.) 440.

Where the court failed to instruct the jury that the plaintiff was entitled to some damages, and although she was entitled to nominal damages a verdict for the defendant will not be set aside. *Elwell v. Bradham*, 2 Spears (S. Car.) 168.

So, too, if justice has been done by the verdict, and the court can see that a new trial ought to produce the same result. *Attington v. Cherry*, 10 Ga. 429; *Sheldon v. School District*, 24 Conn. 88; *Boyd v. State*, 17 Ga. 194; *Duckett v. Grider*, 11 B. Mon. (Ky.) 188; *Noyes v. Shepherd*, 30 Me. 173; *Brantley v. Carter*, 26 Miss. 282; *Hanna v. Renfro*, 32 Miss. 125; *Welborn v. Spears*, 32 Miss. 138; *Welch v. Butler*, 24 Ga. 445; *Brown v. Bowen*, 30 N. Y. 519; *Walworth v. Readsboro*, 24 Vt. 252; *Martin v. Hill*, 3 Utah 157; *Board of Supervisors v. People*, 17 Ill. App. 49; *Hewitt v. Jones*, 72 Ill. 218.

Or, if an erroneous charge has been disregarded by the jury and a right verdict given, a new trial will not be granted. *Tilman v. Stringer*, 26 Ga. 171; *Myrick v. Hicks*, 15 Ga. 155; *Vanuxen v. Rose*, 7 Ind. 222; *Cameron v. Watson*, 40 Miss. 191; *Matter of Pratte*, 12 Mo. 194; *Twigg v. Potts*, 1 C. M. & R. 89; *Blewett v. Wyandotte etc. R. Co.*, 72 Mo. 583.

A new trial will not be granted for erroneous charges as to the measure of damages when the jury evidently did not act upon them. *Baltimore & C. R. Co. v. Pumphrey*, 59 Md. 390.

An erroneous instruction as to the measure of damages is cured by a remittitur by the plaintiff of all the damages

awarded him. *Stone v. Burrett*, 34 Mo. App. 15.

But, if upon consideration of the charge as a whole it appear that the jury were misled thereby, a new trial will be granted; otherwise not. *Springdale etc. Assoc. v. Smith*, 24 Ill. 480; *Younge v. Pacific etc. S. S. Co.*, 1 Call (Va.) 353; *Carrington v. Pacific etc. Co.*, 1 Cal. 475; *Clark v. McElsoy*, 11 Cal. 154; *Smith v. Carr*, 16 Conn. 450; *Brown v. Graham*, 24 Ill. 628; *Adams v. Nantucket*, 11 Allen (Mass.) 203; *Holdane v. Butterworth*, 5 Bosw. (N. Y.) 1; *Chandler v. Fulton*, 10 Tex. 2; *Hubby v. Stokes*, 22 Tex. 217; *Sherman v. Champlain Transp. Co.*, 31 Vt. 162; *Zimmerman v. Knox*, 34 Kan. 245.

However, it has been held that even if the jury may have been influenced by an erroneous instruction a new trial should be granted. *Buglies v. Davis*, 1 Pick. (Mass.) 206; *Lane v. Crombie*, 12 Pick. (Mass.) 177; *Boyden v. Moore*, 5 Mass. 365; *Dudley v. Sumner*, 5 Mass. 438; *Hoyte v. Dimon*, 5 Day (Conn.) 479; *West v. Anderson*, 9 Conn. 107; *Doe v. Paine*, 4 Hawks (N. Car.) 64; *Christman v. Gregory*, 4 B. Mon. (Ky.) 474; *Weber v. Kingsland*, 8 Bosw. (N. Y.) 415; *Brazier v. Clapp*, 5 Mass.

Want of precision in charging the jury where there is no reason to believe that they were misled is no ground for a new trial. *Dunbar v. Briggs*, 13 Neb. 332; *State v. Miller*, 35 Kan. 328; *Cinrad v. Kinzes*, 105 Ind. 281; *Farnham v. Thompson*, 32 Minn. 22; *Malone v. Searight*, 8 Lea (Tenn.) 91; *West v. Wheatley*, 59 Ga. 559.

But when a material instruction is not only inaccurate but meaningless a new trial may be granted. *Singer Mfg. Co. v. Pike*, 12 Ill. App. 506; *King v. Ward*, 74 Me. 349.

An instruction to a jury stated that the weight of evidence does necessarily consist in the number of witnesses, the word "not" being inadvertently omitted. Held to be ground for a new trial. *Illinois Central v. Zang*, 10 Ill. App. 594.

A charge to the jury should be construed as a whole. Thus, where a portion of it is complained of, which, standing alone, would bear a construction that might mislead the jury, the objection will not be sustained when, considered with the rest of the charge, the jury would not be likely to put such a construction upon it, or to be misled by it. *Daniels v. Clegg*, 28 Mich. 32; *Welch v. Ware*, 32 Mich. 77; *Gneuler*

*v. C. Lowing*, 35 Mich. 63; *Russel v. Phelps*, 42 Mich. 377; *Grand Rapids etc. Co. v. Cameron*, 45 Mich. 451; *Castle v. Bullard*, 23 How. Pr. (N. Y.) 172; *Childress v. Ford*, 10 Smed. & M. (Miss.) 25; *Walker v. Collier*, 37 Ill. 362; *Murphy v. People*, 37 Ill. 447; *Hamilton v. State Bank*, 22 Iowa 306; *State v. Miller*, 35 Kan. 328.

If the charges have a tendency to mislead the jury, a new trial will be granted. *Benhard v. Cary*, 11 Wend. (N. Y.) 83; *Potts v. House*, 6 Ga. 324; *Hastings v. Baugherhouse*, 18 Me. 436; *Moffit v. Cressler*, 8 Iowa 122; *Taylor v. Morrison*, 26 Ala. 728; *People v. Reynolds*, 2 Mich. 422; *Smith v. Evans*, 13 Neb. 314; *Fairfield v. Rogers*, 32 Minn. 269.

A charge of the court to the jury which in effect wholly ignores the testimony of the defendant, is erroneous, and affords grounds for a new trial. *Brown v. McCormick*, 23 Mo. App. 181.

Where the instructions cannot be reconciled, and it is impossible to tell which set the jury followed, a new trial will be granted. *Frederick v. Allgaier*, 88 Mo. 598; *Aguire v. Alexander*, 58 Cal. 21; *McCreery v. Everding*, 44 Cal. 24; *Wendell v. Moulton*, 26 N. H. 41; *Hemdon v. Henderson*, 41 Miss. 584.

The giving of contradictory instructions for the plaintiff and defendant is a good ground for reversal. *Staples v. Canton*, 69 Mo. 592; *Knowlton v. Fritz*, 65 Ill. App. 217; *Peden v. Chicago etc. R. Co.*, 73 Iowa 328. See also *Aguire v. Alexander*, 58 Cal. 21.

A new trial must be granted where a general verdict has been rendered upon a charge embracing an unsound theory, and where it is uncertain whether the error did or did not affect the result. *Warner v. Beebe*, 47 Mich. 435.

If the judge suggests an erroneous method of computing damages a new trial will be granted. He should not tell the jury by what method they are to compute damages. *Sabine etc. R. Co. v. Brounsard*, 69 Tex. 617. Or if he tells the jury that they may assess exemplary damages which in law are not allowable. *Wentworth v. Blackman*, 71 Iowa 255.

An instruction that the jury must determine the credibility of the witnesses "and that certain matters enumerating them are proper matters for the jury to consider in coming to a conclusion as to whom they will believe and whom they will not believe," does not invade the province of the jury and is not er-



roneous. *Stanley v. Montgomery*, 102 Ind. 102.

If the verdict is based upon an erroneous instruction, a new trial will be granted. *Evans v. St. Paul Harvester Works*, 63 Iowa 204.

A charge to the jury should not treat uncontradicted facts as open questions. *Brewer v. Edson*, 47 Mich. 91; *Township of Medina v. Perkins*, 48 Mich. 67; *Sellgman v. Ten Eyke*, 49 Mich. 104.

An instruction which assumes the existence of disputed facts material to the issue, is erroneous. *Duffield v. Delancey*, 36 Ill. 258; *Farmer v. Childs*, 66 Ill. 544; *Jamison v. Graham*, 57 Ill. 94; *Doyle v. Stevens*, 4 Mich. 87, note 2. See also, *Elliott v. Reynolds*, 38 Kan. 274.

Where the court has instructed the jury under a misapprehension as to a material fact, a new trial should be allowed. *Johnson v. Harth*, 1 Bailey (S. Car.) 482; *Jones v. McNeill*, 1 Bailey (S. Car.) 235; *Murden v. S. C. Ins. Co.*, 1 Mill. Const. (S. Car.) 200; *Com. v. Taylor*, 10 Phila. (Pa.) 184; *State v. Richards*, 72 Iowa 17.

If the court had misapprehended the meaning of the witness, and instructed the jury accordingly, a new trial should be allowed, although in the view of the court the difference is immaterial. *Edwards v. Edwards*, 4 Phila. (Pa.) 11. *Compare Union Bank v. Sollar*, 2 Strobb. (S. Car.) 390.

If the court has charged that there is no evidence where there is some, a new trial will be granted, though the instruction was disregarded. *Fleming v. Marine Ins. Co.*, 4 Whart. (Pa.) 59; *Gardner v. Pickett*, 19 Wend. (N. Y.) 186. See also *Feige v. East Saginaw Bank*, 58 Mich. 164.

A question submitted by the court to the jury, on which there is no evidence, will entitle the injured party to a new trial. *Burnett v. Fulton*, 1 Jones L. (N. Car.) 343; *Fisher v. People*, 20 Mich. 135; *Purvis v. Coleman*, 1 Bosw. (N. Y.) 321; *Fisher v. Thiokell*, 21 Mich. 1; *Jones v. Eason*, 2 Ired. L. (N. Car.) 331; *Jacksonville Street R. Co. v. Chappell*, 21 Fla. 175; *Willis v. Oregon R. etc. Co.*, 11 Oreg. 257; *Smith v. Evans*, 13 Neb. 314; *Bethune v. McCrary*, 8 Ga. 114; *Snow v. Wiggan*, 19 Ill. App. 542; *Lange v. Perley*, 47 Mich. 352; *Johnson v. McKee*, 27 Mich. 470; *Dodge v. Brown*, 22 Mich. 446; *Druse v. Wheeler*, 26 Mich. 189; *Gibson v. Webster*, 44 Ill. 483; *Tognine v. Hansen*, 18 Nev.

61; *Dunbler v. Day*, 12 Neb. 596, and cases cited.

But if the jury could not have been misled by the instruction, a new trial will not be granted. *Southern Oil Works v. Bickford*, 14 Lea (Tenn.) 651.

And where the evidence of a material fact is only strong enough to raise a conjecture, it was error to submit it to the jury. *Mathis v. Mathis*, 3 Jones L. (N. Car.) 132.

But when there is any evidence, however slight, it is sufficient to sustain an instruction upon the hypothetical case it tends to prove. *Chicago v. Scholton*, 75 Ill. 468.

And if there is a total want of evidence upon any essential point, the jury should be so charged distinctly. *Scripps v. Reilly*, 38 Mich. 10.

A question rightly decided by the court, which should have been submitted to the jury, is not ground for a new trial. *Greene v. Dingley*, 24 Me. 131; *Copeland v. Copeland*, 28 Me. 525.

If the court instruct the jury that the plaintiff was bound to prove a fact which he was not bound to prove, and a verdict was found against the plaintiff, he will be entitled to a new trial. *Hendley v. Harrison*, 3 Bibb (Ky.) 481; *French v. Sale*, 63 Miss. 386; *Stevens v. Brown*, 14 Ill. App. 119.

An error of law in the charge of the court will be disregarded when the questions of fact on which the case depended were properly submitted to the jury. *Stoddard v. Long Island R. Co.*, 5 Sandf. (N. Y.) 180.

An erroneous charge of the court on a special matter will be disregarded when the jury properly found for the defendant on a plea in bar. *Hayden v. Palmer*, 7 Hill (N. Y.) 385.

For the court to assume that a material point has been proven upon which there is a conflict of testimony may be ground for a new trial. *Paine v. Kohn*, 14 Neb. 580; *Willson v. Waltersville School District*, 46 Conn. 400; *Linscott v. Trask*, 35 Me. 150; *French v. Sale*, 63 Miss. 386.

An instruction that assumes there is no evidence on a point on which there is some evidence, will entitle the injured party to a new trial. *Feige v. East Saginaw Bank*, 58 Mich. 164. Or that all the evidence tends to prove one contract when the testimony of the witnesses tends to prove three contracts. *Chadwick v. Butter*, 28 Mich. 349.

An instruction founded on nothing in the evidence is erroneous. *Snow v.*

It may be said generally that the grounds on which new trials may be granted are as various as are the circumstances of the various cases, and that a categorical enumeration of these grounds is impossible.<sup>1</sup> The principles applied by the courts in dealing with applications for new trials upon certain of the grounds afore-

Wiggin, 19 Ill. App. 542; Tognine v. Hansen, 18 Nev. 61; Willis v. Oregon etc. Co. 11 Oreg. 450; Nelson v. Dutton, 51 Mich. 416; Jones v. Mathieson, 2 Dak. 523; Harrison v. Baker, 15 Neb. 43; Barker v. Justice, 41 Miss. 291; Mognaham v. Conner, 30 Mich. 135; Vandensen v. Cathcart, 43 Mich. 258; Mailet v. People, 42 Mich. 262; Sheller v. McKenney, 17 Ill. App. 185. But if it appear that the jury could not have been misled, the verdict will stand. Southern Oil Works v. Bickford, 14 Lea (Tenn.) 651.

An instruction that implies a right of recovery upon a case not made by the petition, is ground for a new trial. Eby v. St. Louis etc. R. Co., 77 Mo. 34.

An instruction upon an abstract proposition not relating to the case, especially if there be any tendency in it to mislead the jury, is erroneous. Slaughter v. Fowler, 44 Cal. 246; Hopkins v. Fowler, 39 Me. 368; Ross v. Garrison, 1 Dana (Ky.) 35; Sheller v. McKenney, 17 Ill. App. 185.

An erroneous instruction upon an abstract question of law not involved in the case is not a ground for a new trial. Reed v. McGreed, 5 Ohio 375; Jordan v. Jame, 5 Ohio 88; People v. Marble, 39 Mich. 309; Chadwick v. Butler, 28 Mich. 349.

Instructions which fail to direct the attention of the jury to the issues may afford ground for a new trial. Felsenthal v. Black, 8 Ill. App. 425; Lewis v. State, 4 Ohio 389; Van Hoesen v. Van Alstyne, 3 Wend. (N. Y.) 75; Coleman v. Roberts, 1 Mo. 97; Adair v. Adair, 30 Ga. 102. But where additional instructions were not asked for, want of full instruction is not a good ground for a new trial. Blacketer v. House, 67 Ind. 414; Thompson v. Payne, 21 Tex. 621; Chiles v. Drake, 2 Metc. (Ky.) 146; Wright v. Boynton, 37 N. H. 9; Rodes v. Sherrod, 9 Ala. 63; Hooksett v. Amoskeag Co., 44 N. H. 105.

If instructions given to the jury, taken as a whole, express the law applicable to the case without material contradiction, the judgment will not be reversed because one instruction, if considered of itself, is capable of an application

which would ignore a material question involved in the jury issues. Blanchard v. Jones, 101 Ind. 542.

See on the general subject of instructions to juries, INSTRUCTIONS, 11 Am. & Eng. Encyc. of Law 236.

1. It may be ground for a new trial that an opportunity for cross-examination was refused. Petrie v. Lane, 58 Mich. 527; but not that the court allowed leading questions to be put to a witness, this being a matter within its discretion. Moran v. Abbey, 63 Cal. 56. Or that the court committed an injustice in limiting the number of witnesses on a certain issue. Ward v. Dick, 45 Conn. 235.

The dismissal of a case without a verdict, after testimony supporting the plaintiff's case has been submitted, is ground for a new trial. Smith v. Sioux City etc. R. Co., 15 Neb. 583; Pollock v. Wannamaker, 65 How. Pr. (N. Y.) 508.

An unintentional omission to send in to the jury an important instruction given by the court, with the others, is ground for a new trial. Hammond v. Foster, 4 Mont. 421.

Where a point not raised at the trial appears on the record and in the proceedings, and by them it also appears that no evidence touching it was produced, it may be a ground for a new trial. Slater v. Rawson, 1 Met. (Mass.) 453.

If there be sufficient certainty in the clerk's entry of the decree to support a declaration on a judgment on a summary proceeding, a new trial will not be granted for the irregularity of the clerk's entry. Gage v. Sartor, 2 Treadw. Const. S. Car. 247.

A new trial will be granted where judgment was rendered upon a point reserved, which did not appear upon the record. Dunett v. Barksdale, 2 Dev. L. (N. Car.) 251.

It is not a ground for a new trial that the court permitted the plaintiff, in an action of trover, to discontinue as to part of the co-defendants after verdict and judgment. Baldwin v. McKay, 41 Miss. 358.

The failure of the court to mark

said, are discussed at length and applied in detail in other subdivisions of this article. Where the motion is founded on the error of the trial court in the conduct of the trial, a new trial is a matter of course, unless it is apparent that the error complained of did not and could not affect the verdict.<sup>1</sup> On an appeal, however, if error appears, it is presumed by the appellate court to have affected the verdict and to afford ground for reversal,

"given" instructions asked, which were in fact given, as required by statute, is not ground for a reversal of the judgment. *Tobin v. People*, 101 Ill. 121.

It is no ground for a new trial that the instructions given were lost after the trial. *Porth v. Gilbert*, 85 Mo. 125.

A new trial will not be granted for the purpose of discrediting a witness by showing contradictory testimony from his own deposition given at an early stage of the same cause—the deposition being on the files of the court, but accidentally omitted to be read. *Keen v. Sprague*, 3 Me. 77.

Nor on the ground that a witness, having testified that the character for truth of another witness was not good, admitted, on cross-examination, that at a former period he had declared that his character was good. *Treat v. Browning*, 4 Conn. 408.

Nor on motion of the defendant, because one of plaintiff's witnesses was examined without being sworn, where it does not sufficiently appear that the defendant himself and his attorney were ignorant of that fact before a verdict was returned. *Riley v. Monohan*, 26 Iowa 507.

Where objection was made to the competency of a witness, yet upon *voir dire* he was found qualified and sworn, and examined in chief without an exception being taken, or notice of intention to do so before the jury retired, it was held that this could not be relied upon as an objection in support of a motion to set aside the verdict and judgment and grant a new trial. *Cunningham v. Porterfield*, 2 W. Va. 447.

If a demurrer to evidence is erroneously sustained, the error may be reached by a motion for a new trial. *Missouri Pac. R. Co. v. Goodrich*, 38 Kan. 224. And so an erroneous refusal to discharge a jury during the trial. *Evans v. Mengel*, 3 Pa. St. 239. But it is held in Georgia that rulings on a trial duly excepted to do not afford ground for a motion for a new trial. *Nicholls v. Popwell*, 80 Ga. 604.

Nor is it ground for a new trial, that

since the trial, the appellate court has changed its view of the law governing the case. *Forstman v. Schulting*, 38 Hun (N. Y.) 482.

1. *Mirick v. Hemphill*, 1 Hempst. (U. S.) 179; *Morford v. Woodworth*, 7 Ind. 83; *Lewis v. State*, 33 Ga. 131; *People v. Scott*, 6 Mich. 287; *Horner v. Wood*, 16 Barb. (N. Y.) 386; *Gardner v. Clark*, 17 Barb. (N. Y.) 538; *Hobbs v. Outlaw*, 6 Jones L. (N. Car.) 174; *Fagan v. Williamson*, 8 Jones L. (N. Car.) 433; *Hook v. Craghead*, 35 Mo. 380; *Price v. Evans*, 4 B. Mon. (Ky.) 386; *Ratliff v. Huntly*, 5 Ired. L. (N. Car.) 545; *Mansfield v. Wheeler*, 23 Wend. (N. Y.) 79; *Freeman v. Rankin*, 21 Me. 446; *Potter v. Hopkins*, 25 Wend. (N. Y.) 417; *Selleck v. Sugar Hollow Turnpike Co.*, 13 Conn. 453; *Camden etc. Transp. Co. v. Belknap*, 21 Wend. (N. Y.) 354; *McKay v. Leonard*, 17 Iowa 569; *Justices etc. v. Plank Road Co.*, 15 Ga. 39; *Cross v. Hall*, 4 Md. 426; *Coit v. Waples*, 1 Minn. 134; *Graham v. Houston*, 4 Dev. L. (N. Car.) 232; *State v. Frank*, 5 Jones L. (N. Car.) 384; *Means v. Means*, 7 Rich. L. (S. Car.) 533; *Newberg v. Farmer*, 1 Wash. 209; *Macy v. DeWolf*, 3 Woodb. & M. (U. S.) 193; *Holly v. Brown*, 14 Conn. 255; *Brush v. Keeler*, 34 Conn. 499; *Bischof v. Coffelt*, 6 Ind. 23; *Thacher v. Jones*, 31 Me. 528; *Newell v. Ayer*, 32 Me. 334; *People v. Hartung*, 8 Abb. Pr. (N. Y.) 132; *Myers v. Hollingsworth*, 26 N. J. L. 186; *McCall v. Seever*, 5 Ind. 187; *Camp v. Pulver*, 5 Barb. (N. Y.) 91; *Bronson v. Wiman*, 10 Barb. (N. Y.) 406; *Devendorf v. Wert*, 42 Barb. (N. Y.) 227; *Mitchel v. Churchman*, 4 Humph. (Tenn.) 218; *Hall v. Woodside*, 8 Ired. L. (N. Car.) 119; *McDugald v. Smith*, 11 Ired. L. (N. Car.) 576; *Olney v. Chadsey*, 7 R. I. 224; *Lewis v. Bell*, 3 Strobb. L. (S. Car.) 256; *Allen v. McNew*, 8 Humph. (Tenn.) 46; *Benjamin v. Smith*, 12 Wend. (N. Y.) 404; *Patterson v. O'Hara*, 2 E. D. Smith (N. Y.) 58; *Beach v. Raymond*, 2 E. D. Smith (N. Y.) 496; *Hunt v. Bennett*, 4 E. D.

unless, from the record taken as a whole, the appellate court can see that the error did not affect and could not have affected the verdict.<sup>1</sup> Errors in pleading cannot be reached by motion for a new trial.<sup>2</sup> An error in assessing costs is not ground for a new

Smith (N. Y.) 647; 19 N. Y. 173; Forrest v. Forrest, 6 Deur (N. Y.) 102; 3 Abb. Pr. (N. Y.) 144; Carlock v. Spencer, 7 Ark. 12; Norwich etc. R. Co. v. Cahill, 18 Conn. 484; Parker v. Griswold, 17 Conn. 288; Parke v. Foster, 26 Ga. 465; Lunday v. Thomas, 26 Ga. 537; Dodge v. Greeley, 31 Me. 343; Hovey v. Hobson, 55 Me. 256; Eckert v. Cameron, 43 Pa. St. 120; Peebles v. Smith, 8 Rich. L. (S. Car.) 90; Comstock v. Smith, 23 Me. 202; Lively v. Ball, 2 B. Mon. (Ky.) 53; Lett v. Homer, 5 Blackf. (Ind.) 296; Brown v. Hoburger, 52 Barb. (N. Y.) 15; Robinson v. Keith, 25 Iowa 321; Phenix Mfg. Co. v. West, 61 Ga. 120; Allen v. State, 61 Ga. 166; Stewart v. Belfast Foundry Co., 69 Me. 17; Musquis v. Blake, 24 Tex. 461; Renaud v. Peck, 2 Hilt. (N. Y.) 137; Union Water Co. v. Crary, 25 Cal. 504; Coit v. Waples, 1 Minn. 134; Andrist v. Union Pac. R. Co., 30 Fed. Rep. 345; Branch v. DuBose, 55 Ga. 21; Telford v. Wilson, 71 Ind. 555; Morton v. Pearman, 30 Ga. 281; Boon v. Boon, 29 Ga. 134; Pomeroy v. Taylor, Brayt. (Vt.) 169.

That the trial court, instead of dismissing an action, ordered judgment for defendant for six cents nominal damages was held error without material prejudice and not ground for a new trial. Osborn v. Johnson, 35 Minn. 300; Gerbier v. Emery, 2 Washb. (U. S.) 413.

A new trial will not be granted in the Supreme Court of Michigan unless the protection of substantial rights requires it, if the case is such that on a new trial such damages only as are nominal and will not carry costs can be recovered. Lewis v. Flint etc. R. Co., 56 Mich. 638.

A new trial will not be granted because one of the parties was, on the motion of the other, excluded from hearing the testimony of some of the latter's witnesses, where no detriment to the excluded party is shown. Randolph v. McCain, 34 Ark. 696.

1. Walker v. Hawxhurst, 5 Blatchf. (U. S.) 494; Chinn v. Davis, 21 Mo. App. 363; Keller v. Bley, 15 Oreg. 429.

2. Jordan v. James, 5 Ohio 88; Bates

v. Cooper, 5 Ohio 120; McMurtry v. Henry, 4 Bibb (Ky.) 410; Pearl v. Randin, 5 Day (Conn.) 244; Canterbury v. Bennett, 22 Conn. 623; Town of Tolland v. Town of Willington, 26 Conn. 578; Dwyer v. Brannon, 6 Mass. 330; Griffin v. Justices etc., 17 Ga. 96; Barney v. Bliss, 2 Aik. (Vt.) 60; Smith v. Floyd, 18 Barb. (N. Y.) 522; Toole v. Perry, 56 Ga. 627; Saluda Mfg. Co. v. Pennington, 2 Spears (S. Car.) 735; Brown v. Wilson, 12 B. Mon. (Ky.) 100; Winslow v. Bank of Cumberland, 26 Me. 9; Maxwell v. Potter, 47 Me. 487; Hendrie v. Rippey, 9 Iowa 351; Meyer v. M'Lean, 1 Johns. (N. Y.) 509; Stoll v. Ryan, Mill Const. (S. Car.) 96; Green v. Judith, 5 Rand. (Va.) 1; Beardsley v. Knight, 4 Vt. 471; Burns v. Allen, 2 B. Mon. (Ky.) 246; Chapin v. Jackson, 45 Ind. 153; Ward v. Bateman, 34 Ind. 110; Ely v. Parsons, 55 Conn. 83; Scofield v. Lockwood, 35 Conn. 425; Appeal of Dale, 57 Conn. 127; Skidmore v. Clark, 47 Conn. 20; Ullman v. McCormic, 12 Colo. 553; Dannenberg v. Guernsey, 80 Ga. 549; Mayor etc. of Gainesville v. Caldwell, 81 Ga. 76; Powers v. State, 44 Ga. 209; Dever v. Akin, 40 Ga. 423; Steinheimer v. Coleman, 39 Ga. 119; Matthis v. State, 33 Ga. 24; Lewis v. State, 33 Ga. 131; Clark v. Hulsey, 54 Ga. 608; Chicago etc. R. Co. v. Fietsam, 123 Ill. 518; Hall v. Robison, 25 Iowa 91; Smithfield v. Waterville, 64 Me. 412; State v. Kingsbury, 58 Me. 238; Hanks v. Neal, 44 Miss. 212; Memphis etc. R. Co. v. Whitfield, 44 Miss. 466; Head v. State, 44 Miss. 731; Evans v. State, 44 Miss. 762; Durrah v. State, 44 Miss. 789; Mobley v. State, 46 Miss. 501; Tarbell v. Whiting, 5 N. H. 63; Rowell v. Hollis, 62 N. H. 129; Wyckoff v. Runyon, 33 N. J. L. (4 Vr.) 107; Romero v. Desmarais, 4 N. Mex. 367; Carley v. New York etc. R. Co., 1 N. Y. Supp. 63; Herst v. DeComeau, 1 Sweeny (N. Y.) 590; Lamb v. Camden etc. R. Co., 2 Daly (N. Y.) 454; Livingston v. Dunlap, 99 N. Car. 268; Barton v. Wilmington etc. R. Co., 84 N. Car. 192; Ruffin v. Overby, 105 N. Car. 78; Moore v. Willard, 30 S. Car. 615; Flint v. Norwich etc. Trans. Co.

trial.<sup>1</sup> An abuse of discretion in granting or refusing an amend-

7 Blatchf. 536; Parshall v. Minneapolis etc. R. Co., 35 Fed. Rep. 649.

In Dwyer v. Brannon, 6 Mass. 330, the court said: "Whether the plea be good or bad is not now to be questioned on a motion for a new trial. The objection is on record and the plaintiff must seek her remedy by error if the plea is bad." So in Pearl v. Rawdin, 5 Day (Conn.) 244, it was decided that the insufficiency of the declaration was no ground for a motion for a new trial; and the court thought the point so clear that it refused to hear argument upon it, although it was stated that the question was brought up in that form by consent of parties. Again, in Minor v. Mead, 3 Conn. 289, it was held that an error apparent on the record could not be taken advantage of on a motion for a new trial. And so in Canterbury v. Bennett, 22 Conn. 623. Again in Tolland v. Willington, 26 Conn. 578, it was said that a motion for a new trial is the proper remedy for error in admitting or rejecting testimony, or in the charge of the judge to the jury, a motion in error for errors in the declaration, pleadings, and judgment.

To the same effect are Meyer v. M'Lean, 1 Johns. (N. Y.) 510, where the court said: "By going to trial on the plea and notice, the plaintiff admitted the plea to be valid, as a general issue. The judge at *nisi prius* is not to decide on the pleadings; and he was right in admitting the evidence. This is an application for a new trial; but why should we award a new trial, if the plea be bad. A new trial is never granted for a defect in the pleadings. The plaintiff should have sought a different remedy." And so in White v. Spencer, 14 N. Y. 247 and Corning v. Corning, 6 N. Y. 97. Again in Barney v. Bliss, 2 Aik. (Vt.) 60, the court said: "The judge at the trial is never to decide on the pleadings; nor is a new trial ever granted for a defect in the pleadings (*citing* Meyer v. M'Lean, *supra*). If the pleadings are bad, it would be quite idle to award a new trial. In such case, the party, if he has any remedy, must seek it in another form."

The ruling of the court on a plea of abatement is not ground for a new trial. Bohanan v. State, 15 Neb. 209.

Failure to compel a party to answer

Interrogatories filed with the pleadings has been held no ground for new trial. Cates v. Thayer, 93 Ind. 156.

The overruling of a demurrer is not ground for a new trial. Gibson v. Carreker, 82 Ga. 46; City of Griffin v. Johnson, 84 Ga. 279; De Barry-Baya Merchants' Line v. Austin, 76 Ga. 306; Nicholls v. Popwell, 80 Ga. 604; Rogers v. Rogers, 78 Ga. 688; Perkins v. McDowell (Wyoming, 1890), 23 Pac. Rep. 71.

It is not a ground for a new trial, but for an assignment of error, that a part of a pleading has been erroneously stricken out. New Albany v. White, 100 Ind. 206.

It is no ground for a new trial, that a demurrer to a special plea was erroneously sustained, when the facts alleged in such plea might have been given in evidence under other pleas. Powell v. Asten, 36 Ala. 140; Bates v. Coe, 10 Conn. 280.

A new trial will be granted when the state of the pleadings was calculated to confuse the minds of the jury, and to make it impossible for them to render an intelligent verdict. Pearce v. Jordan, 9 Fla. 526.

It is ground for a new trial to strike out a plea on motion, unless it was improperly filed or was utterly frivolous. Marshall v. Hamilton, 41 Miss. 229.

In Vance v. Isabel, 13 Smed. & M. (Miss.) 371, it was held that a verdict should be set aside where the cause was submitted to the jury on the issues joined, without disposing of a demurrer to a plea.

In Calderwood v. Tevis, 23 Cal. 335, this was held not ground for a new trial, where objection was not made at the time of the trial.

A new trial will be granted after a trial on a general plea of *non est factum*, if the court, on demurrer, rejected a special plea which was good. Johnson v. Bank of U. S., 2 B. Mon. (Ky.) 310.

That a *feme sole* defendant married pending the trial, and that the marriage was not suggested of record, nor the husband made a party, is no ground for a new trial. Phillips v. Stewart, 27 Ga. 402.

1. Broward v. Roche, 21 Fla. 465.

A new trial will not be granted because auditor's fees were taxed equally

ment may afford ground for a new trial;<sup>1</sup> so may a refusal of the right to open and close;<sup>2</sup> an abuse of discretion in refusing a continuance,<sup>3</sup> or a change of venue;<sup>4</sup> or a defect in the issues, the defect being more than a mere irregularity.<sup>5</sup> The death of the trial judge, without having settled the bill of exceptions, is ground for a new trial;<sup>6</sup> or the going out of office of the trial judge before having made up the case on appeal.<sup>7</sup> If the findings of a court, which has tried the case without a jury, are clearly against the weight of evidence, it may be ground for a new trial, as in the case of a verdict rendered under similar circumstances.<sup>8</sup>

against each party. *Green v. Frank*, 63 Ga. 78.

1. *Allison v. Barrett*, 16 Iowa 278; *Crane v. Lincoln*, 2 Gray (Mass.) 401; *Hawkes v. Davenport*, 5 Allen (Mass.) 390; *Bigelow v. Law*, 5 Abb. Pr. (N. Y.) 455; *Floyd v. Woods*, 4 Yerg. (Tenn.) 165; *Hendricks v. Decker*, 35 Barb. (N. Y.) 298; *Russell v. Conn.*, 20 N. Y. 81; *Kirstein v. Madden*, 38 Cal. 162; *Dyer v. McPhee*, 6 Cal. 174.

2. *Davis v. Mason*, 4 Pick. (Mass.) 156. But not, if no injustice has resulted. *Schoff v. Laithe*, 58 N. H. 503; *Sodousky v. M'Gee*, 4 J. J. Marsh. (Ky.) 267; *Paine v. Smith*, 33 Minn. 495; *Bethea v. Prothro*, 28 Ga. 109; *Ayer v. Austin*, 6 Pick. (Mass.) 225; *Farrell v. Brennan*, 32 Mo. 328; *McClintock v. Curd*, 32 Mo. 411; *Lucas v. Sullivan*, 33 Mo. 389; *Steptoe v. Harvey*, 7 Leigh (Va.) 501. See *Huntington v. Conkey*, 33 Barb. (N. Y.) 218.

3. *Johnson v. Dinsmore*, 11 Neb. 391; *Young v. Gibson*, 2 Tex. 417. Unless, however, there is an abuse of discretion, a motion for a new trial cannot be founded upon the refusal. *Collier v. State*, 20 Ark. 36; *Campbell v. Thompson*, 16 Me. 117; *Peebles v. Overton*, 2 Murph. (N. Car.) 384; *Farand v. Bouchell*, Harp. (S. Car.) 83; *State v. Smith*, 8 Rich. L. (S. Car.) 460.

4. *Blakely v. Frazier*, 11 S. Car. 122.

5. Where, in debt upon a bond, defendant pleaded "payment," and "fully administered," and issues were joined, and the jury found "for the defendant, he having fully administered all the assets which came to his hands," it was held that a new trial should be granted upon the ground "that the issue, upon the plea of payment, had not been tried." *Brown v. Hendersons*, 4 Munf. (Va.) 492.

Upon discovering, after verdict, that an immaterial issue has been formed,

the court should award a new trial. *Hitchcock v. Haight*, 7 Ill. 604.

Where the record shows that a good plea in bar has not been tried, the defendant can have a new trial. *Dermott v. Wallack*, 1 Black (U. S.) 96.

Where an office judgment was rendered against the defendant, in an action on the case, with a writ of enquiry, and afterwards, without any plea in the cause, the jury was sworn as if there was an issue, and a verdict was found for the defendant, it was held that the verdict should be set aside and a new trial ordered. *M'Million v. Dobbins*, 9 Leigh (Va.) 422.

The requirement of N. Car. Code, § 395, that issues shall be made up and reduced to writing for submission to the jury, is mandatory, and if not complied with, a new trial should be granted. *Bowen v. Whitaker*, 92 N. Car. 367.

6. *People v. Superior Court Judge*, 40 Mich. 630; *People v. Detroit Superior Court Judge*, 41 Mich. 726.

7. *Simonton v. Simonton*, 80 N. Car. 7; *Jones v. Holmes*, 83 N. Car. 108; *Shelton v. Shelton*, 89 N. Car. 185; *Nichols v. Dunning*, 91 N. Car. 4; *Shelton v. Shelton*, 91 N. Car. 329.

So where, by reason of the loss of his notes, the trial judge is unable to settle the case on appeal. *Burton v. Green*, 94 N. Car. 215; *Owens v. Paxton*, 106 N. Car. 480.

And where, the stenographer having died, the copy of the testimony essential to the perfecting of the appeal cannot be had. *Lidgerwood Mfg. Co. v. Rogers*, 56 N. Y. Super. Ct. 350.

8. *Riley v. Boyer*, 76 Ind. 152; *Simmons v. Hamilton*, 56 Cal. 493; *Brown v. Burbank*, 59 Cal. 535; *Benjamin v. Levy*, 39 Minn. 11; *O'Grady v. Supple*, 148 Mass. 522.

So if the findings are against law. *Marshall v. Golden Fleece etc. Min. Co.*, 16 Nev. 156.

Where what purports to be a special

**III. DISCRETION OF TRIAL COURT IN GRANTING OR REFUSING NEW TRIAL.**—It may be stated generally that, except where, under a statute, a party is entitled to a new trial as matter of right, as, in some States, in ejectment suits and actions involving questions of title to land,<sup>1</sup> and except in those cases where the motion for a new trial is founded on error of law, the motion is addressed to the discretion of the court.<sup>2</sup> This discretion is, of course, a

finding of facts, with conclusions of law thereon, does not find facts, but merely states evidence, a new trial is properly ordered. *Smith v. Goodwin*, 86 Ind. 300.

Or if they fail to find upon a material issue raised by the pleadings. *Spreckels v. Ord*, 72 Cal. 86.

1. See *infra*, IX, NEW TRIAL AS OF RIGHT.

2. *Alderman v. Montcalm* Judge, 41 Mich. 550; *Indiana etc. R. Co. v. McBroom*, 103 Ind. 310; *Lester v. State*, 11 Conn. 415; *Final v. Backus*, 18 Mich. 218; *Pennsylvania Min. Co. v. Brady*, 14 Mich. 260; *Spence v. Tuggle*, 10 Ala. 538; *Walker v. Blassingame*, 17 Ala. 810; *Young v. Englehard*, 1 How. (Miss.) 19; *Commonwealth v. Ruisseau*, 140 Mass. 363; *Gray v. Bridge*, 11 Pick. (Mass.) 189; *Waters v. Waters*, 26 Md. 53; *Tefft v. Marsh*, 1 W. Va. 38; *Marchaud v. Noyes*, 33 La. An. 882; *State v. Fisher*, 33 La. An. 882; *Roberts v. Leslie*, 46 N. Y. Supr. Ct. 76; *State v. Brittain*, 89 N. Car. 481; *Kohne v. Insurance Co. etc.*, 1 Wash. (C. C.) 123; *Hill v. Deulinger*, 61 Iowa 240; *Shenandoah First Nat. Bank v. Wabash etc. R. Co.*, 61 Iowa 700; *McManus v. Commonwealth*, 91 Pa. St. 57; *State v. Haase*, 14 La. An. 79; *State v. Brunetto*, 13 La. An. 45; *Redmon v. Commonwealth*, 82 Ky. 333; *Pate v. People*, 8 Ill. (3 Gilm.) 644; *Holliday v. People*, 9 Ill. (4 Gilm.) 111; *Martin v. People*, 13 Ill. 341; *Commonwealth v. Green*, 17 Mass. 513; *Wassissimi v. Territory*, 1 Wash. T. 9; *Bigelow v. Sickles*, 75 Wis. 427; *Carson v. Dellinger*, 90 N. Car. 226; *Foster v. Collamer*, 10 Vt. 466; *Knowles v. Van Gormer*, 23 Minn. 197; *Sittig v. Birkestack*, 38 Md. 158; *McLanahan v. Universal Ins. Co.*, 1 Pet. 170; *Calbreath v. Gracy*, 1 Wash. 198; *Denniston v. McKeen*, 2 McLean 253; *United States v. Martin*, Id. 256; *Benedict v. Divis*, Id. 347; *Cherry v. Sweeney*, 1 Cranch C. Ct. 530; *Lloyd v. Scott*, 4 Id. 206; *Humphries v. Hoyt*, 4 Greene (Iowa) 245; *Waters v. Waters*, 26 Md. 53; *Gant v. Hunsucker*, 12 Ired. (N. Car.) L. 254; *Carter v. Bennett*, 4

Fla. 283; *Steinman v. Tolivar*, 13 Mo. 590; *Commonwealth v. Manson*, 2 Ashm. (Pa.) 31; *Mahoney v. People*, 43 Mich. 39; *Toulman v. Swain*, 47 Mich. 82; *People v. Pearsall*, 50 Mich. 233; *Houghton v. Slack*, 10 Vt. 520; *Clase v. Davis*, 7 Vt. 476; *People v. Frances*, 52 Mich. 575; *Sandford v. Wigginn*, 14 N. H. 441; *Munden v. Casey*, 93 N. Car. 97; *State Bank v. Hunter*, 1 Dev. (N. Car.) 100; *Norwich etc. R. Co. v. Cahill*, 18 Conn. 484, and cases cited; *Gant v. Hunsucker*, 12 Ired. (N. Car.) 254; *Walker v. Blassingame*, 17 Ala. 810; *Sweeney v. Jarvis*, 6 Tex. 36; *Commonwealth v. Rinsseau*, 140 Mass. 363; *Riggs v. Savage*, 4 Gil. (Ill.) 129; *Steiman v. Tolivar*, 13 Miss. 590; *Carter v. Bennett*, 4 Fla. 283; *President etc. v. Patchen*, 8 Wend. (N. Y.) 47; *McLannahan v. Universal etc. Co.*, 1 Pet. (U. S.) 170; *Gray v. Bridge*, 11 Pick. (Mass.) 189; *Lester v. State of Connecticut*, 11 Conn. 415; *White v. Trinity Church*, 5 Conn. 187; *Calhoun v. McMeans*, 1 Nott & M. (S. Car.) 422; *Ferguson v. Gilbert*, 16 Ohio St. 88; *Burkholder v. Stahl*, 58 Pa. St. 371, 378; *Coit v. Waples*, 1 Minn. 134; *Franklin v. State*, 29 Ala. 14; *Martin v. Higgins*, 23 Ala. 775; *Cook v. Otto*, 13 Ind. 380; *Fennell v. Patrick*, 3 Starr & P. (Ala.) 244; *Barr v. White*, 2 Port. (Ala.) 342; *Sawyer v. Stephenson*, 1 Ill. (Breese) 6; *Cornelius v. Boucher*, 1 Ill. (Breese) 12; *Laber v. Cooper*, 7 Wall. (U. S.) 565; *Pomeroy's Lessee v. Bank of Ind.*, 1 Wall. (U. S.) 592; *Lessee v. Smith*, 7 Wheat. (U. S.) 248; *Pennsylvania Mining Co. v. Brady*, 14 Mich. 260; *Lindsey v. Lee*, 1 Dev. L. (N. Car.) 464; *Holdsworth v. Tucker*, 147 Mass. 572; *Larkin v. Larkin*, 76 Cal. 396; *Cuddy v. Major*, 12 Mich. 368; *Gunn v. Durkee*, 41 Kan. 144; *George v. Swafford* (Iowa), 39 N. W. Rep. 804.

So held where the ground of the motion was newly discovered evidence in *Spottiswood v. Weir*, 80 Cal. 448; *Redmond v. Stepp* (N. Car.), 6 S. E. Rep. 727; and in *Symons v. Bunnell* (Cal.), 20 Pac. Rep. 859, and *Mulford*

judicial discretion,<sup>1</sup> and, if shown to have been abused, will be revised by the appellate court. As, however, the trial court has the better opportunity of passing upon the question, where the motion is founded on newly discovered evidence, surprise, misconduct of jurors, parties, or witnesses, that the verdict is against the evidence, or against the weight of evidence, or that the damages given are excessive or inadequate, the appellate court is

*v. Yager*, 7 N. Y. Supp. 88, where the ground was surprise.

A refusal of the trial court to grant a new trial where the question depends merely upon the credibility of the witnesses will not be reversed. *Weinzorpflin v. State*, 7 Blackf. (Ind.) 186; *Patteson v. Ford*, 2 Gratt. (Va.) 18; *Hill's Case*, 2 Gratt. (Va.) 594.

An order by a trial judge vacating a judgment and ordering a new trial on the ground that he had, as he supposed, discovered that he had a personal interest in the case, is proper and will not be reviewed. *Alderman v. Montcalm* *Case*, 41 Mich. 550.

An order granting a new trial does not finally dispose of any rights, and cannot be reviewed. *Stark v. Judge Super. Court*, 41 Mich. 5. See also *Wampler v. Walker*, 28 Tex. 598.

Under statutory provisions in *Illinois* error may be assigned upon the refusal of the court to grant a new trial. *Hewitt v. Jones*, 72 Ill. 218.

When the supreme court has the whole case presented to it on the record, the discretion of the trial court in granting or refusing a new trial upon the insufficiency of the evidence may be reviewed. *Barker v. Brown*, 15 Iowa 70. See also *McKee v. Ingalls*, 5 Ill. 30; *Rollins v. Clark*, 8 Dana (Ky.) 15; *Weatherford v. Wilson*, 3 Ill. 253; *Nutt v. Merrill*, 40 Me. 237; *Re Coffman*, 12 Iowa 491.

Where a case was submitted to the court without a jury and the court decided that the plaintiff was not entitled to recover on the proof given, and without entering judgment of record, continued the case and permitted the plaintiff to amend his petition, and at a subsequent term the cause was tried again, it was held that the action of the court was simply an exercise of the power to grant a new trial and would not be reviewed. *Simpson v. Blunt*, 42 Mo. 542.

When a new trial is erroneously granted it is the proper practice to remand the cause for judgment on the first finding or verdict. *Sharpe v. O'Brien*,

39 Ind. 501; *Gaan v. Worman*, 69 Ind. 548; *Williams v. Thames etc. Co.*, 105 Ind. 420.

In North Carolina the supreme court cannot grant a new trial upon the ground that the verdict was against the evidence or the weight of evidence, that being a matter of discretion with the judge who presides at the trial in the court below, which cannot be reviewed upon appeal. *Long v. Guntley*, 4 Dev. & B. (N. Car.) L. 313; *Boykin v. Perry*, 4 Jones L. (N. Car.) 325. See also *Holliday v. Atterbury*, 22 Mo. 512; *Spratt v. Vaughn*, 10 Ark. 474; *Myers v. State*, 7 Ark. 174; *Chitwood v. State*, 18 Ark. 453; *Grubb v. Kalb*, 37 Ga. 459; *Perry v. Hodnett*, 38 Ga. 103; *Evans v. Fisher*, 10 Ill. 569; *Nuneumasher v. Ingle*, 20 Ind. 135; *Gordon v. Norman*, 21 Ind. 300; *Keating v. Bradford*, 25 Mo. 86; *Lockwood v. Stewart*, 12 Wis. 628; *Laville v. Lucas*, 13 Wis. 657; *Leszyusky v. Leszyusky*, 24 N. Y. St. Rep. 768.

1. *Haggin v. Christian*, 1 A. K. Marsh. (Ky.) 579; *Vanderberg v. Campbell*, 64 Miss. 89; *Commonwealth v. Manson*, 2 Ashm. 31; *Tefft v. Marsh*, 1 W. Va. 38; *Howser v. Commonwealth*, 1 Smith (Pa.) 332; *Longley v. Daly* (S. D.), 46 N. W. Rep. 247; *O'Meara v. State*, 17 Ohio St. 515; *United States v. Lewis*, 2 N. Mex. 459; *Carpenter v. Coe*, 67 Barb. (N. Y.) 411; *Platt v. Monroe*, 34 Barb. (N. Y.) 291.

The discretion of the trial court in granting or refusing a new trial must be exercised in a prudent and reasonable manner. *Tefft v. Marsh*, 1 W. Va. 38; *People v. Superior Court*, 5 Wend. (N. Y.) 114.

Where a recovery was had against a city for an injury to a passenger walking over a rough place in its sidewalk, the fact that the presiding judge, in the order overruling a motion for a new trial, stated that, "in his judgment the alleged injury was, or should not be an actionable defect, as to require the city to remedy such slight imperfections, would be to impose upon it an



reluctant to interfere;<sup>1</sup> and here appears the foundation for the

extraordinary degree of diligence; but as he had fully and fairly charged the jury as to the defect being actionable, and they, having found in favor of the plaintiff on that question, he felt that he should not disturb their verdict," did not render his refusal of a new trial an improper use of his discretion. *City of Atlanta v. Brown*, 73 Ga. 630.

It will always be presumed that the discretion of the trial court has been rightly used unless the contrary plainly appear. *Edsall v. Ayres*, 15 Ind. 286; *Lloyd v. McClure*, 2 Greene (Iowa) 139; *Finley v. David*, 7 Iowa 3; *Ruble v. McDonald*, 7 Iowa 90.

Though the discretionary power of the trial court is wide, it must be exercised in accordance with fixed legal principles. *Freeman v. Rich*, 1 Iowa 504; *Hendricks v. Wallis*, 7 Iowa 224; *Barnes v. Merrick*, 6 Wis. 57; *Todd v. State*, 25 Ind. 212; *Dorr v. Watson*, 28 Miss. 383.

1. *People v. Hotz*, 73 Cal. 241; *City of Atlanta v. Brown*, 73 Ga. 630; *McCreary v. Hart*, 39 Kan. 216; *Tift v. Marsh*, 1 W. Va. 38; *Powers v. Bridges*, 1 Iowa 235; *Carter v. Carter*, 5 Tex. 93; *Hooe v. Lockwood*, 3 Chand. (Wis.) 41; *Caker v. State*, 20 Ark. 53; *Anderson v. State*, 41 Ark. 229; *Burnett v. Whitesides*, 15 Cal. 35; *Peters v. Foss*, 16 Cal. 357; *Walton v. McGuire*, 17 Cal. 92; *Newell v. Sanford*, 10 Iowa 396; *Caffrey v. Groome*, 10 Iowa 548; *Shumaker v. Gelpcke*, 11 Iowa 401; *Jewitt v. Miller*, 12 Iowa 85; *Nolan v. Chambers*, 19 Ga. 503; *Hopkins v. Tilman*, 25 Ga. 212; *Foster v. Thomas*, 26 Ga. 290; *Cook v. Helms*, 5 Wis. 107; *Van Valkenburgh v. Huskins*, 7 Wis. 496; *Zweig v. Horicon etc. Co.*, 14 Wis. 356; *Lewellen v. Williams*, 14 Wis. 687; *Leppar v. Endernton*, 9 Ind. 353; *Sanders v. Clark*, 22 Iowa 275; *Devot v. Marx*, 19 La. An. 491; *Waterson v. Waterson*, 1 Head (Tenn.) 1; *Sanford Mfg. Co. v. Wiggins*, 14 N. H. 441; *First Nat. Bank etc. v. Wabash etc. R. Co.*, 61 Iowa 700; *Higginbotham v. Campbell* (Ga.), 11 S. E. Rep. 1027; *Merriam v. Atlanta*, 61 Ga. 222; *Newcomb v. Wood*, 97 U. S. (7 Otto) 581; *Coleman v. Bell* (N. Mex.), 12 Pac. Rep. 657; *Iron Mountain Bank v. Armstrong* (Mo.), 4 S. W. Rep. 720; *Pacific Rolling Mill Co. v. Telegraph Hill R.*

*Co.*, 79 Cal. 340; *Haas v. Whittier* (Cal.), 21 Pac. Rep. 547; *People v. Sutton* (Cal.), 15 Pac. Rep. 86; *Davenport v. Terrell*, 103 N. Car. 53; *Burnett v. Neves*, 82 Ga. 241; *Felton v. State*, 56 Ga. 84; *Carnes v. State*, 28 Ga. 192; *McCune v. Com.*, 2 Rob. (Va.) 771; *Parsons v. Com.*, 2 Rob. (Va.) 771; *Bronson v. State*, 2 Tex. App. 46; *Joe v. State*, 6 Fla. 591; *McLane v. State*, 4 Ga. 335; *Jones v. State*, 1 Ga. 610; *State v. Hunt*, 4 La. An. 438; *State v. Long*, 4 La. An. 441; *Archey v. State*, 64 Ind. 56; *State v. Montgomery*, 71 Iowa 630; *State v. Rolland*, 14 La. An. 40; *Hobler v. Cole*, 49 Cal. 251; *Smith v. Champagne*, 72 Wis. 480; *Burnett v. Neves*, 9 Southeast 128; *Commonwealth v. White*, 147 Mass. 76; *Harrison v. Dykes*, 77 Ga. 494; *Wicker v. Walter*, 77 Ga. 490; *Mullen v. Reinig*, 68 Wis. 408.

Where the exercise of discretion clearly prejudices the complaining party, an order of the trial court denying a motion for a new trial will be reversed. *Roberts v. Leslie*, 46 N. Y. Supr. Ct. 76; *President etc. v. Pachen*, 8 Wend. (N. Y.) 47.

If there is some evidence to support a verdict, the refusal of a new trial will not be disturbed by the supreme court. *Turner v. Scott*, 77 Ga. 270; *Stevens v. Middlebrooks*, 77 Ga. 81.

Where a verdict was given for \$1,000 jointly against two joint trespassers, and afterwards most of the jury made affidavit that they had intended to render a verdict against the defendants for \$500 each, a motion for a new trial on this ground was overruled, and the supreme court refused to interfere with the discretion of the trial court. *Alexander v. Humber*, 86 Ky. 565.

Under the statutes of Arkansas, the circuit court has discretion whether to receive a motion for a new trial, although filed after the prescribed time, and the supreme court would be slow to interfere with the discretion exercised; but where the circuit court considered the statute imperative, the supreme court may direct the trial court to use, but not how to use, its discretion. *Gould v. Fatum*, 21 Ark. 329; see also *Hilliard v. Carr*, 6 Ala. 557.

The discretion of the trial court in granting or refusing a new trial is made a matter for consideration for the

general statement frequently made that the appellate court will not revise such exercise of discretion. The right of revision will be exercised more freely by the appellate court where the trial court has refused than where it has granted a new trial.<sup>1</sup>

**IV. MISCONDUCT AS REASON FOR NEW TRIAL.**—1. **Misconduct Defined.**—Misconduct, as the term is used in connection with the subject under discussion, is any unlawful behavior by those entrusted in any degree with the administration of justice, by which the rights of the parties and the justice of the case may have been affected.<sup>2</sup> It need not be shown, necessarily, that the misconduct relied on as ground for a new trial actually controlled or determined the verdict, if it is made apparent that the verdict might have been affected by it.<sup>3</sup>

supreme court by statute. *Augusta & Co. v. Wellbourn*, 31 Ga. 365.

When the propriety of an order granting a new trial for excessive damages comes before an appellate court for review, the question is not precisely that presented to the trial court on the motion for the new trial, but rather whether it clearly appears that the trial court, in granting the order, abused its sound discretion in failing to exercise a sound, practical judgment upon all the relevant facts before it. *Pratt v. Pioneer Press Co.*, 32 Minn. 47.

Where the jury, in action to condemn land for a street, brought in a verdict of \$4,000 for the owner, when three of the latter's witnesses testified that the land was worth \$7,000, and five of the city's witnesses testified that it was worth from \$3,200 to \$4,000, it was held that an order granting a new trial was no abuse of discretion. *Allen v. Milwaukee*, 72 Wis. 182.

1. *Oliver v. Pace*, 6 Ga. 185; *Shepherd v. Brenton*, 15 Iowa 84; *Whitney v. Blunt*, 15 Iowa 283; *McNair v. McComber*, 15 Iowa 368; *House v. Wright*, 22 Ind. 383; *Gore v. Moses*, 1 Wash. Ter. 13; *McGregor v. Christle*, 37 Ga. 557; *White v. Poorman*, 24 Iowa 108; *Robinson v. Bacon*, 24 Iowa 409; *Nagle v. Hornberger*, 6 Ind. 69; *Chapman v. Wilkinson*, 22 Iowa 541; *Newell v. Sanford*, 10 Iowa 396.

2. 2 Bouv. Law Dict. 183, tit. Misconduct.

3. *Johnson v. Root*, 2 Cliff. (U. S.) 108, 128.

In *Com. v. Roby*, 12 Pick. (Mass.) 406, where the ground for the motion in a criminal case was, that the jury received food and drink during their retirement, this, under the then existing state of the law, being unlawful,

*SHAW, C. J.*, reviewed the authorities and declared that "It is not every irregularity which will render the verdict void and warrant a setting aside. This depends upon another and additional consideration, namely, whether the irregularity is of such a nature as to affect the impartiality, purity, and regularity of the verdict itself;" and cited as authority for this proposition, 21 Viner's Abr. 448, art. Trial; *Rex v. Burdett*, 2 Salk. 645; 2 Hale's P. C. 306; *Hix v. Drury*, 5 Pick. (Mass.) 302; *Rex v. Kinnear*, 2 B. & Ald. 462, where the jury separated without licence from the court, and it was held that though the jurors might be punishable, there was not a mistrial, and no ground for a motion for a new trial; and also *Barnes* 441; *Duke of Richmond v. Wise*, 1 Vent. 125, where the fact of the jury having had wine, it not appearing to have been at the expense of the party, was held not to be a cause for a new trial; and *Co. Litt.* 227b, where it was said, if a juror eats or drinks at his own expense, before the jury have agreed, he is liable to be fined, but the verdict is good; and further said: "The result of the authorities is, that where there is an irregularity of the proceedings, as where meat and drink or other refreshment has been furnished by a party, or where the jury have been exposed to the effect of such influence, as where they have improperly separated themselves, or have had communications not authorized, there, inasmuch as there can be no certainty that the verdict has not been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what is thus improperly and may have been corruptly done; or where the irregularity consists in doing

**2. Misconduct of the Court—(a) GENERALLY.**—Private communications between judge and jury constitute ground for a new trial, and it may be stated generally that the party moving for the new trial on this ground is not required to show affirmatively that the communications tended to his injury, the principle upon which the rule rests being that such communications are so dangerous and impolitic that it should be presumed conclusively that harm was done; but the source of danger is in the secret nature of the communications.<sup>1</sup> Intoxication of the judge during the progress of a trial is such misconduct as will entitle the defeated party to a

that which may disqualify the jurors for proper deliberation and exercise of their reason and judgment, as where ardent spirits are introduced, there it would be proper to set aside the verdict, because no reliance can be placed upon its purity and correctness. But where the irregularity consists in doing that which does not and cannot affect the impartiality of the jury, or disqualify them for exercising the powers of reason and judgment, as where the act done is contrary to the ordinary forms, and to the duties which jurors owe to the public, the mode of correcting the irregularity is by animadversion upon the conduct of the jurors or of the officers, but such irregularity has no tendency to impair the respect due to such verdict."

The text proposition may be said, in short, to be elementary, and to be supported and assumed by a multitude of cases.

1. In *Wiggins v. Downer*, 67 How. Pr. (N. Y.) 65, the authorities are reviewed, and the rule stated in the text declared to result therefrom. Here the jury returned into court at the close of the evening session, when neither party was present in person or by counsel, and requested the court to repeat certain propositions which the jury had passed upon. In response to such request, the judge outlined the propositions as he had stated them previously in his charge. The attendance of counsel could not have been secured before the next morning, and the colloquy between court and counsel took place in open court. It was held that here was not such a communication as should vitiate the verdict.

In *Thayer v. Van Vleet*, 5 Johns. (N. Y.) 111, it appeared that a justice's court jury sent for the justice after they had retired; that he went into their room, and, on being asked if they could add anything to the charge, replied

"no," and left them. It was held that no such abuse of justice was shown as required a new trial.

In *Bunn v. Croul*, 10 Johns. (N. Y.) 239, it was held that a justice of the peace could not, in the absence of the parties, or without their consent, answer the question whether certain evidence had been given, the question having been asked by the jury after they had retired.

In *Taylor v. Betsford*, 13 Johns. (N. Y.) 487, it was held that a justice of the peace could not, after the retirement of the jury, enter their room at their request, but apart from and without the consent of the parties to answer certain questions. In *Benson v. Clark*, 1 Cow. (N. Y.) 258, it appeared that the justice, at the request of the jury, after their retirement, without the consent of the parties, entered the jury room, but refused to answer questions put to him and retired; but, after leaving, sent to them a certain paper for which they had sent an officer to him. Here it was held that both acts were irregular.

In *Neil v. Abel*, 24 Wend. (N. Y.) 185, it was held error for the justice, without the consent of the parties, to permit the jury to use his minutes sent for by them.

In *Plunkett v. Appleton*, 51 How. Pr. (N. Y.) 469, a verdict was set aside because the judge, without the knowledge of counsel, sent written communications to the jury, answering questions of law addressed to him by the jury and sent to him by an officer.

*Watertown Bank etc. Co. v. Mix*, 51 N. Y. 559, may be referred to as an additional authority, though the point was not here squarely presented.

In *Sargent v. Roberts*, 1 Pick. (Mass.) 337, the court said: "We are all of the opinion, after considering the question maturely, that no communication whatever ought to take place be-

new trial.<sup>1</sup> A trial judge must not allow needless and scandalous attacks upon the character of parties; this is such misconduct as will warrant setting aside the verdict.<sup>2</sup> A refusal to allow counsel for a party to argue the evidence before the jury is good ground for a new trial.<sup>3</sup> Even the manner and deportment of the presiding

tween the judge and the jury, after the cause has been committed to them by the charge of the court, unless in open court, and where practicable, in the presence of the counsel in the cause." Here the jury sent a written communication to the judge, stating that they could not agree, and the judge replied in writing.

There is a South Carolina case, *Goldsmith v. Solomons*, 2 Strobb. (S. Car.) 206, where it was held that the fact that the presiding judge answered an enquiry of the foreman which he came into court to make, and without communicating its purport to parties or counsel, afforded no ground for a new trial; and there are New Hampshire cases to the point that the court, in its discretion, may give written instructions to the jury upon questions of law at their request, after they have retired. *Allen v. Aldrich*, 29 N. H. 63; *School Dis. v. Bragdon*, 23 N. H. 517. And that this may be done in the absence of counsel. *Shapely v. White*, 6 N. H. 172; *Basset v. Salisbury Co.*, 28 N. H. 438. It has been held in this State, however, that it is irregular to state the evidence in this way in the absence of counsel. *Shapely v. White*, 6 N. H. 172.

In *Chinn v. Davis*, 21 Mo. App. 363, it was held that though the judge should not communicate with the foreman of a jury in a whisper, after the case has been submitted, and without consent of counsel, yet that this was not ground for reversal, it being apparent that no harm was done.

"A judge has no more right to communicate with a jury after it has retired than any other person, and we must look upon his visit in this case in the same light that we would view the entry of any third person into the jury room while the jury was in consultation." *Hoberg v. State*, 3 Minn. 262.

And see also in support of the statement of the text, *Henlow v. Leonard*, 7 Johns. (N. Y.) 200; *State v. Alexander*, 66 Mo. 148; *United States v. Gilbert*, 2 Sumn. (U. S.) 21; *Church v. Hubbard*, 2 Cranch (U. S.) 239, note; *Douglass v. McAllister*, 3 Cranch (U.

S.) 209; *Brown v. Campbell*, 1 S. & R. (Pa.) 176; *Shaeffer v. Landis*, 1 S. & R. (Pa.) 449.

It was held in *Mahoney v. Decker*, 18 Hun (N. Y.) 365, where, after the jury had retired, and in the absence of counsel, the court replied to a communication sent by the jury that there was no evidence upon a certain point, that the fact that counsel learned of the communication before the jury retired a second time and made no objection, constituted such a waiver of the irregularity as to make it right to refuse a new trial, especially as it appeared that in no event could he have been prejudiced by the communication. And see *Rogers v. Moulthrop*, 13 Wend. (N. Y.) 274; *Horton v. Horton*, 2 Cow. (N. Y.) 589.

Where, the defendant and his counsel, having left the court room after the retirement of the jury, the court, in their absence, gave to the jury, who could not agree on a question of fact, additional instructions, and caused to be read to them the phonographic report of certain testimony, it was held that the absence of the defendant and his counsel afforded no ground for a new trial. *Alexander v. Gardiner*, 14 R. I. 15.

1. "It would be better to submit questions in dispute to the arbitration of chance than to the decision of a tribunal which is not thoroughly upright and scrupulously fair as between litigants; and can it be said that an upright judge, a scrupulously fair man, one who appreciates the dignity of his office, can impartially determine the interests of litigants, and fairly administer the law, when in a state of intoxication? Such conduct on the part of a judge is not only reprehensible, but is indeed criminal." *Repath v. Waker*, 13 Colo. 109.

2. *Rickabus v. Gott*, 51 Mich. 227, where it was held ground for a new trial that hearsay and irrelevant testimony, which could have had no other object than to wound and disparage one of the parties, constituted a ground for a new trial.

3. *Belmore v. Caldwell*, 2 Bibb (Ky.) 76; *Olds v. Com.*, 3 A. K. Marsh. (Ky.) 467; *Hunt v. State*, 49 Ga. 255.

judge may afford ground for a new trial, where it is such as must obviously have prejudiced the jury by its display of bias.<sup>1</sup>

(b) REMARKS TO COUNSEL.—It is misconduct, for which a new trial will be granted, for the trial court to compliment one attorney at the expense of the other, or to use language which tends to bring an attorney into contempt before the jury,<sup>2</sup> or where the remarks of the court to counsel show an unfavorable opinion toward either party to the suit.<sup>3</sup>

(c) REMARKS TO JURY; COERCION OF JURY.—Language on the part of the court, the obvious tendency of which is to coerce an agreement on the part of the jury affords ground for a new trial. To insist too strenuously upon the necessity of an agreement may have such effect.<sup>4</sup> Any improper remark of the court in the

1. *Wheeler v. Wallace*, 53 Mich. 355, where COOK, C. J., after stating what took place upon the trial, said: "It is very unusual to have exception taken on writ of error to the manner and deportment of the trial judge in the conduct of the trial, and under ordinary circumstances a court of review would not scrutinize very closely his methods when no error in his rulings was alleged. Still, it is possible for a judge to deprive a party of a fair trial, even without intending to do so, by the manner in which he conducts the case, and by a plain exhibition to the jury of his own opinions in respect to the parties, or to their case."

In a seduction case, where the age of the parties was before the jury, it was held not error calling for a reversal that the court frequently alluded to the female (a woman of twenty-four) as a "girl." *State v. Richards*, 72 Iowa 17.

2. *McDuff v. Detroit Evening Journal Co.* (Mich., 1891), 47 N. W. 671; *Wheeler v. Wallace*, 53 Mich. 355. In the former case, to an objection made by defendant's attorney to the admission of evidence, the court said: "I don't want to compliment Mr. P. (plaintiff's attorney), but I am well aware of the fact that Mr. P. knows how to try a lawsuit." *Held*, to be improper language from the court.

It is no ground for reversal that the court said that the attorney was trifling with the court in asking for a continuance, the remark being justified by the facts. *Krapp v. Hauer*, 38 Kan. 430.

3. *Cronkhite v. Dickerson*, 51 Mich. 177; *People v. Hare*, 57 Mich. 505; *Mittel v. Chicago*, 9 Ill. App. 534; in the former of which cases the court said: "Jurors are very vigilant in scrutinizing all that is said by the trial judge in the

progress of a cause before them, and great care should be observed that nothing is said which can by any possibility be construed to the prejudice of either party. Courts cannot be too circumspect in this regard."

4. In *Green v. Telfair*, 11 How. Pr. (N. Y.) 260, the court says: "A judge may also keep the jury together as long as in his judgment there is any reasonable prospect of their being able to agree; but beyond this I do not think he is at liberty to go. An attempt to influence the jury by referring to the time they are to be kept together, or the inconvenience to which they are to be subjected, in case they shall be so pertinacious as to adhere to their individual opinions and thus continue to disagree, cannot be justified. A judge has no right to threaten or intimidate a jury in order to affect their deliberations. I think he has no right even to allude to his own purposes as to the length of time they are to be kept together. There should be nothing in his intercourse with the jury having the least appearance of duress or coercion."

In this case the cause was submitted to the jury between 2 and 3 o'clock on Saturday afternoon, and was the last cause tried at the circuit. The jury, after being absent several hours, stated their inability to agree, and asked to be discharged. The trial judge, after adverting to the desirability of an agreement, said that in five years he had discharged but one jury for inability to agree, and sent the jury out again. One of the jurors said that he supposed that they would be discharged at midnight, but the court said "no;" that he was authorized to receive their verdict on Sunday; that he was going away by the next train, and that if they should

not agree before he left he would return on Monday and receive the verdict. The verdict was returned in half an hour. It was held that it should be set aside. This case, though only a special term case, was cited with approval in *Slater v. Mead* (N.Y. Supreme Court), 53 How. Pr. (N.Y.) 57; but was disapproved in *Erwin v. Hamilton* (N.Y. Supreme Court), 50 How. Pr. (N.Y.) 32, in which latter case the facts were substantially similar; and was approved also in *Phoenix Ins. Co. v. Moog*, 81 Ala. 335. In support of the general rule may be cited *Terre Haute etc. R. Co. v. Jackson*, 81 Ind. 19; *Obear v. Gray*, 68 Ga. 182; *Gholston v. Gholston*, 31 Ga. 625; *Furhman v. Mayor etc. of Huntsville*, 64 Ala. 263; *Spearman v. Wilson*, 44 Ga. 473; *People v. Olcott*, 2 Johns. Cas. (N.Y.) 301; *State v. Green*, 7 La. An. 518; *State v. Ladd*, 10 La. An. 271; *State v. Bybee*, 17 Kan. 462; *Spearman v. Wilson*, 44 Ga. 473; *Sickler v. Town of La Valle*, 65 Wis. 572.

In *Peirce v. Rehtuss*, 35 Mich. 53, it appeared that the jury, after having been out five hours, announced their inability to agree, and were then instructed as to their duty in endeavoring to reconcile their views and arrive at a verdict, if consistent with their consciences, rather than that the parties should be put to the trouble and expense of trying the case again. It was urged that this language afforded ground for a new trial; but the appellate court held otherwise, and declared that the trial court, in thus instructing the jury, was but acting in the performance of a highly commendable duty. This holding, and the language thereof, were approved as correct in principle in *Phoenix Ins. Co. v. Moog*, 81 Ala. 335. To the same point, substantially, is *Allen v. Woodson*, 50 Ga. 53.

A new trial should be granted where the verdict was rendered shortly after the judge told the jury (which had been out all night) that they could have breakfast at their own expense, they having had no supper. *Physioc v. Shea*, 75 Ga. 466.

A jury reported its inability to agree. The judge said that this seemed to be too common, and that there ought to be an agreement; that he should not discharge them, but should keep them together for the remaining three weeks of the term unless they agreed. A verdict was returned the next day. It was held that it should be set aside. *Chesapeake etc. R. Co. v. Barlow*, 86 Tenn. 537.

Where the judge, without the knowledge of either party to a suit, sent word to the jury that if they did not agree he would keep them together for four days, it was held that a verdict would be set aside without proof that, but for the threat, it would not have been rendered. *Terre Haute etc. R. Co. v. Jackson*, 81 Ind. 19.

**Bias of the Judge.**—An exception to a charge on the ground that the manner in which the judge submitted the case, and his comments on the evidence, gave undue prominence to whatever would tell in the appellee's favor, and thereby unfairly prejudice the appellant's case, cannot have weight if the bias of the judge is not manifest in the charge, so that there is reason to believe the jury were improperly influenced, and the charge should be considered together and not merely by the passages. *Merchants' Bank v. Örtmann*, 48 Mich. 419.

**Preliminary Remarks as to the Duty of Jurors Are Proper.**—Thus, in an action against a town to recover damages for an injury sustained by reason of a defective highway, the trial judge, after twelve jurors of the regular panel were called and had taken their seats, and before they were sworn or the parties had exercised their right of challenge, said to them in substance that he had learned that in a similar case tried at that term some of the jurors had taken the ground that, no matter what the testimony or merits of the case might be, they would not find a verdict against a challenge for damages occasioned by a defective highway. He then reminded them of their duty and the obligation which their oath imposed to try and decide such cases according to the law and testimony adduced, regardless of their individual opinion as to the wisdom or justice of the law making towns liable in such cases, and told them that as jurors they had nothing whatever to do with the policy of the law, but were bound to administer it faithfully while it was in force. *Held*, that such remarks were proper, and furnished no ground for new trial. *Sickler v. Town of La Valle*, 65 Wis. 572. See also cases cited *supra*, and *Mayor etc. of Columbus v. Goetchins*, 7 Ga. 139.

*Edens v. Hannibal etc. R. Co.*, 72 Mo. 212; *Farnham v. Farnham*, 73 Ill. 497; *State v. Bybee*, 17 Kan. 462. In this case the court say: "It may not be possible to single out any single sentence and say that this is, strictly speaking

presence and hearing of the jury, liable to influence their action, is misconduct.<sup>1</sup>

**3. Misconduct of Counsel—(a) IMPROPER REMARKS TO JURY.**—The argument of counsel to the jury must be confined to the law and evidence.<sup>2</sup> The misconduct of counsel in argument, in order to warrant a reversal, must be of such a nature as to injure

and taken by itself, erroneous, and sufficient to justify a reversal, though there are some that seem to trespass a good deal on the right and duty of each juror to the free exercise of his individual judgment. Yet the general impression of these instructions, as we read them and as it seems to us must have been received by the jury is, that the jury ought, by compromise and surrender of individual convictions, if necessary, to come to an agreement, and that a failure to do so would be an imputation upon both jury and court. Now, while a court may properly call attention of the jury to many matters which increase desirability of agreement, such as the time already taken, the improbability of securing additional testimony, the general public benefit, the speedy close of a litigation, and, at least in cases where the matters of State are of minor importance, the question of expense to the parties and the public, yet no juror should be influenced to a verdict by fear of personal disgrace or pecuniary injury. No juror should be induced to agree to a verdict by a fear that a failure to so agree would be regarded by the public as reflecting upon either his intelligence or his integrity. Personal considerations should never be permitted to influence his conclusion, and the thought of them should never be presented to him as a motive for action."

1. *Skelly v. Boland*, 78 Ill. 438; *Wanack v. Mayor etc. of Macon*, 53 Ga. 163; *Hasbrouck v. Milwaukee*, 21 Wis. 217; *Hair v. Little*, 28 Ala. 236; *Cronkhite v. Dickerson*, 51 Mich. 177; *Moncallo v. State*, 12 Tex. App. 171; *Bowman v. State*, 19 Neb. 523; *Sarah v. State*, 28 Ga. 576.

In charging the jury that they might give exemplary damages if the trespass was accompanied with circumstances of aggravation, the judge "playfully remarked, in the way of illustration, 'such damages as would teach the old gentleman not to violate the Sabbath, nor injure his health by riding in the night, nor interfere with the rights of others.'" *Held*, that the instructions were errone-

ous, because the remarks were calculated to make the jury believe that the judge thought the facts justified heavy exemplary damages. *Hair v. Little*, 28 Ala. 236.

A remark by a presiding judge on the trial of a case, that the proceeding was "a civil suit, but if the jury considered the evidence they would find it decidedly criminal," if excepted to and not withdrawn, is a reversible error. *Furham v. Mayor etc. of Huntsville*, 54 Ala. 263.

2. *Campbell v. Maher*, 105 Ind. 383; *Tucker v. Henniker*, 41 N. H. 318; *Dickerson v. Burke*, 25 Ga. 225; *Cook v. Ritter*, 4 E. D. Smith (N. Y.) 253; *Union Cent. L. Ins. Co. v. Cheever*, 36 Ohio St. 201; *Kinnaman v. Kinnaman*, 71 Ind. 417; *Cleveland Paper Co. v. Banks*, 15 Neb. 20; *Hall v. Wolff*, 61 Iowa, 559; *Huckell v. McCoy*, 38 Kan. 53.

Where the defendant's attorney persisted in commenting upon the fact that the plaintiff had secured a change of venue, it was held that a new trial should be granted. *Campbell v. Maher*, 105 Ind. 383; *Farman v. Lauman*, 73 Ind. 568; *Carter v. Carter*, 101 Ind. 450.

So, too, where counsel referred to the fact that defendant failed to testify in a criminal case. *Long v. State*, 56 Ind. 182; *Petite v. People*, 8 Colo. 518; *State v. Balch*, 31 Kan. 465.

Allusions to the importance of the case to either party are to be guarded very closely. *Gault v. Concord R. Co.*, 63 N. H. 356.

It is misconduct for which a new trial will be granted for counsel to read to the jury extracts from newspapers for the purpose of prejudicing the jury in favor of his client. *Chicago etc. R. Co. v. Bragonier*, 13 Ill. App. 467; *Baldwin v. Bricker*, 86 Ind. 221; *Thomp. & M. on Juries*, § 351.

A new trial will be granted where the counsel for one party, by fraudulent representations, deceived the other party and his counsel as to the correctness of a plat in an action of ejectment. *Webb v. Parker*, 41 Ga. 478.

the opposite party.<sup>1</sup> Counsel must not state as evidence, facts within his own knowledge, but which have not been proven on the trial.<sup>2</sup> When there has been an abuse of privilege by counsel

1. *Shular v. State*, 105 Ind. 289; *Combs v. State*, 75 Ind. 215; *Morrison v. State*, 76 Ind. 335; *Epps v. State*, 102 Ind. 539; *Anderson v. State*, 104 Ind. 467; *Railroad v. Gurley*, 12 Lea (Tenn). 46; *Hinton v. Cream City R. Co.*, 65 Wis. 323; *Porter v. Throop*, 47 Mich. 313; *State v. Abrams*, 11 Oreg. 169; *State v. McCoot*, 34 Kan. 613; *Henry v. Sioux City etc. R. Co.*, 70 Iowa 233; *Sunberg v. Babcock*, 66 Iowa 515; *Hammond v. Sioux City etc. R. Co.*, 49 Iowa 450; *State v. Underwood*, 77 N. Car. 502; *Winter v. Sass*, 19 Kan. 566.

Where counsel has made an improper statement in argument, but, when interrupted by opposing counsel, has declared that there was no evidence in the case to sustain his statement, and that he only put it as a conjecture, it will not be presumed that the jury were prejudiced by such statement. *Hinton v. Cream City R. Co.*, 65 Wis. 323.

In *Chicago etc. R. Co. v. Sullivan* (Ill., 1888), 17 N. E. Rep. 460, it was held that to say to a witness, "Remembering that you told us that you expected your expert fee in this case, I hope you won't charge the poor railroad company anything extra," did not require reversal. So in *Festner v. Omaha etc. R. Co.*, 17 Neb. 280, an immaterial statement as to the price paid by the plaintiff for a house damaged by taking land for a right of way was held not prejudicial error sufficient to require a new trial.

In *Miner v. Lorman*, 66 Mich. 530, and *Willis v. McNatt*, 75 Tex. 69, it was held that remarks of counsel, though based on facts not in evidence, made in answer to that said by the opposing counsel, did not require a new trial.

In *Enright v. Atlanta*, 78 Ga. 288, it was held immaterial that the defendant's counsel, in the cross-examination, addressed the plaintiff familiarly. In *Gulf etc. R. Co. v. Coon*, 69 Tex. 730, an allusion by counsel to the fact that his client and himself had "fought shoulder to shoulder in the late war," was held immaterial. See also *Goff v. Scott* (Ind., 1890), 25 N. E. Rep. 906.

Where, however, in an action on a fire insurance policy, counsel for plaintiffs, in his concluding argument to the jury, said that the ancestry of plaintiffs was well known to counsel, and to every

one else who had lived in the community with them; that their honor, integrity, honesty, and truthfulness, and that of their descendants, had never been called in question until this soulless corporation, defendant in the case, had charged one of their descendants with falsehood, fraud, and misrepresentation, it was held objectionable language. *Commercial F. Ins. Co. v. Allen*, 80 Ala. 571.

Again, where, in a suit against a railroad for injuries, plaintiff's counsel said to the jury, "You ought to deal severely with these bloated corporations, that can run their road right through a man's house or yard," and the court did not control him, and the jury found a verdict for plaintiff "for amount sued for" (\$20,000), it was held that it was reasonably evident the jury were influenced by the improper language, and the court should have given a new trial. *Galveston etc. R. Co. v. Cooper*, 70 Tex. 67.

But it must clearly appear that the line of argument was unwarranted. *Baltimore etc. R. Co. v. Boyd*, 67 Md. 32; *Miller v. Brown* (Iowa, 1889), 42 N. W. Rep. 561. And see also on the general subject, *Newton v. State*, 21 Fla. 53; *Angelo v. People*, 96 Ill. 209; s. c., 36 Am. Rep. 132; *Martin v. State*, 63 Miss. 505; *Laubach v. State*, 12 Tex. App. 583; *State v. Ryan*, 70 Iowa 154; *Scott v. State*, 7 Lea (Tenn.) 232; *State v. Guy*, 69 Mo. 430; *State v. Braswell*, 82 N. Car. 693; *State v. Balch*, 31 Kan. 465; *Stancell v. Kenan*, 33 Ga. 56; *Long v. State*, 56 Ind. 182.

2. *Brow v. State*, 103 Ind. 133; *Roeder v. Studt*, 12 Mo. App. 566; *Hall v. Wolff*, 61 Iowa 559; *People v. Dane*, 59 Mich. 350; *Gibson v. Zeibig*, 24 Mo. App. 65. In *Roeder v. Studt*, 12 Mo. App. 566, the court say: "An advocate must not make himself a witness and state facts not in evidence to prejudice the jury. Such statements should be checked, and a severe reprimand administered in the presence of the jury to the attorney who is guilty of this violation of duty."

It is error for the court to allow counsel, against objection, to repeat and argue therefrom testimony that has been offered and excluded, nor is the error



it is the duty of the court to stop the counsel or caution the jury against it in the charge.<sup>1</sup> And this, if done, may cure the error.<sup>2</sup> Language that tends to degrade and bring into contempt the character of the opposite party, when his character has not been impeached, should not be used.<sup>3</sup> While the conduct of coun-

cured by an instruction to disregard the testimony. *Marble v. Walters*, 19 Mo. App. 134. See also *Reich v. Mayor etc. of N. Y.*, 12 Daly (N. Y.) 72; *Mitchum v. State*, 11 Ga. 615; *Tucker v. Henniker*, 41 N. H. 318; *Hoxie v. Home Ins. Co.*, 33 Conn. 471; *Cross v. Grant*, 62 N. H. 675; *McCormick v. Chicago etc. R. Co.*, 47 Iowa 345.

Misstatement of evidence by counsel is such misconduct as will entitle the injured party to a new trial. *Bradshaw v. State*, 19 Neb. 147; *Bullard v. Boston etc. R. Co.*, 64 N. H. 27; *Thompson v. Barkley*, 27 Pa. St. 263; *Berry v. State*, 10 Ga. 511.

However, it has been held that an erroneous statement of the testimony by counsel is not a good ground for a new trial. *People v. Barnhart*, 59 Cal. 402; *People v. Lee Ah Yute*, 60 Cal. 95.

Nor must he refer to matters not in evidence which are liable to influence the jury. *Norton v. State*, 106 Ind. 163; *Brow v. State*, 103 Ind. 133; *State v. Abrams*, 11 Oreg. 169; *Hall v. Wolff*, 61 Iowa 559; *Union Central L. Ins. etc. Co. v. Cheever*, 36 Ohio St. 201; *Chase v. Chicago*, 20 Ill. App. 274; *Rudolph v. Landwerlen*, 92 Ind. 34; *Thompson on Trials*, § 963, and cases cited.

When the evidence is conflicting, counsel has a right to assume that the facts testified to by his witnesses were proven. *Hatcher v. State*, 18 Ga. 460.

In an action against a railroad company for personal injuries, the plaintiff's attorney, holding up a paper, asked a witness if he knew the handwriting of one of the brakemen on the train, and also if the defendant had not discharged the brakeman for making a statement. It was held that, as the paper itself was inadmissible in evidence, the question tended to bring out the inference that the paper was adverse to the defendant, and that the defendant was entitled to a new trial for the attorney's misconduct. *Baldwin v. Grand Trunk R. Co.*, 64 N. H. 516.

1. *Greenlee v. Greenlee*, 93 N. Car. 278; *Wilson v. White*, 80 N. Car. 280; *Kerchner v. McRae*, 80 N. Car. 219; *Cannon v. Morris*, 81 N. Car. 139; *Jenkins v. North Carolina Ore Dressing*

*Co.*, 65 N. Car. 563; *State v. Wilson*, 90 N. Car. 736; *Saunders v. Baxter*, 6 Heisk. (Tenn.) 369; *Chicago etc. R. Co. v. Bragonier*, 13 Ill. App. 467; *Hennies v. Vogel*, 87 Ill. 242; *Proctor v. DeCamp*, 83 Ind. 559; *Bedford v. Penny*, 58 Mich. 424; *Coombs v. State*, 75 Ind. 216; *Read v. State*, 2 Ind. 438; *Dickerson v. Burke*, 25 Ga. 225; *Forsyth v. Cothran*, 61 Ga. 278; *Fredericks v. Judah*, 73 Cal. 604; *Jackson v. State*, 116 Ind. 464; *Fathman v. Tumilty*, 34 Mo. App. 236; *Greenlee v. Greenlee*, 93 N. Car. 278; *Bulloch v. Smith*, 15 Ga. 395; *Doster v. Brown*, 25 Ga. 24; *Bankard v. Baltimore etc. R. Co.*, 34 Md. 197.

An appellate court should be careful and critical in recognizing alleged improper statements of counsel. *Chase v. Chicago*, 20 Ill. App. 274; *Rolfe v. Rumford*, 66 Me. 567; *Scripps v. Reilly*, 35 Mich. 371; *Hennies v. Vogel*, 87 Ill. 242.

In *Proctor v. DeCamp*, 83 Ind. 559, the court say: "There was evidence in the case before us upon which the appellee's counsel had a right to comment. Granting that he drew from it an unauthorized conclusion, or that he gave it a wrong coloring and meaning, he was still within the evidence, and when this is so courts cannot interfere. If counsel go beyond the evidence and bring in foreign and unproved matters, courts should interfere; and if the trial court does not interfere, and the matter improperly brought before the jury is of a material character, the appellate court may reverse the judgment." See also *Gibson v. Zeibig*, 24 Mo. App. 65; *Martin v. Orndorff*, 22 Iowa 504; *Union Cent. L. Ins. Co. v. Cheever*, 36 Ohio St. 210.

For discussion of the reciprocal duties of court and counsel in the argument of cases, see *Tucker v. Henniker*, 41 N. H. 317, and cases cited in *St. Louis etc. R. Co. v. Myrtle*, 51 Ind. 566.

2. *Little Rock etc. R. Co. v. Cave-nesse*, 48 Ark. 106; *Felix v. Scharn-weber*, 114 Ill. 445; *Sinclair v. Stanley*, 69 Tex. 718; *Jackson v. Harby*, 70 Tex. 410; *State v. Wilson*, 90 N. Car. 736; *State v. Rivers*, 90 N. Car. 738.

3. *Coble v. Coble*, 79 N. Car. 589;

sel is largely subject to the discretion of the trial court, such discretion is a judicial discretion, and should not be abused.<sup>1</sup> If counsel, in argument to the jury, repeatedly makes improper remarks prejudicial to the interests of the adverse party, and the verdict may have been procured by reason of such remarks, a new trial should be granted.<sup>2</sup> The remarks, to afford ground for a

*School Town of Rochester v. Shaw*, 100 Ind. 268; *McGowen v. Campbell*, 28 Kan. 25; *Henry v. Sioux City R. Co.*, 70 Iowa 233; *State v. Smith*, 75 N. Car. 306.

Nor must he attack the character of the jurymen in such a way as will render them unable to try the case with impartiality. *State v. Noland*, 85 N. Car. 576.

It is the privilege and duty of counsel to show up in their true light such acts and conduct of the opposite party as are deserving of criticism or condemnation, but he must not depart from the evidence for such purpose, and surreptitiously introduce before the jury irrelevant matters. *Denver etc. R. Co. v. Moynahan*, 8 Colo. 56.

Where plaintiff's counsel urged upon the jury that the facts warranted the supposition that the defendant had procured an indictment against the plaintiff in order to impair his credibility, and as there was no such evidence, a verdict of more than double a former verdict, and \$4,000 more than the trial court was willing to allow, was set aside and new trial ordered. *Henry v. Sioux City etc. R. Co.*, 70 Iowa 233.

1. *Ferguson v. State*, 49 Ind. 33; *State v. Hamilton*, 55 Mo. 520; *McNabb v. Lockhart*, 18 Ga. 495; *Thompson v. Barkley*, 27 Pa. St. 263; *Scripps v. Reilley*, 35 Mich. 371; *Barden v. Briscoe*, 36 Mich. 254; *Kaim v. Village of Omro*, 49 Wis. 371; *State v. Waltham*, 46 Mo. 55; *St. Louis etc. R. Co. v. Mathias*, 50 Ind. 65; *Combs v. State*, 75 Ind. 215; *Overcash v. Kitchie*, 89 N. Car. 384; *Olson v. Gertsen*, 42 Minn. 407; *Huckshold v. St. Louis etc. R. Co.*, 90 Mo. 548; *Watson v. St. Paul City R. Co.*, 42 Minn. 46.

Great latitude is allowed counsel in argument in appealing to the sympathy of the jury; and it was held that the court did not abuse its discretion in allowing plaintiff's attorney to appeal to the jury in her behalf as a soldier's widow, and in denouncing her opponents as leeches and oppressors of poor women and widows, she, in the meantime, sitting near facing the jury and

weeping, or pretending to weep, when such appeals were made. *Dowdell v. Wilcox*, 64 Iowa 721.

Courts should not attempt to draw too closely the line between what is or is not proper argument of counsel, but there should be ascribed to counsel a sense of honor and to jurymen ordinary intelligence. *Combs v. State*, 75 Ind. 215; *Morrison v. State*, 76 Ind. 335; *McNabb v. Lockhart*, 18 Ga. 495; *Larkins v. Tarter*, 3 Sneed (Tenn.) 681; *Haderlin v. St. Louis etc. R. Co.*, 3 Mo. App. 601; *Winter v. Sass*, 19 Kan. 557; 14 Cent. L. J. 406.

It is only in a plain case of injustice that an appellate court will reverse a judgment for an unfair opening address of counsel to the jury. *Porter v. Throop*, 47 Mich. 313.

Counsel must be allowed some discretion in addressing the jury, and absolute correctness of statement as to matters of law are not required. *Scott v. Chicago etc. R. Co.*, 68 Iowa 360.

2. *Huckell v. McCoy*, 38 Kan. 53; *Brown v. Swineford*, 44 Wis. 282; *Bremmer v. Green Bay etc. R. Co.*, 61 Wis. 114; *Bullard v. Baltimore etc. R. Co.*, 64 N. H. 27; *Cleveland Paper Co. v. Banks*, 15 Neb. 20; *Hall v. Wolff*, 61 Iowa 559; *Henry v. Sioux City etc. R. Co.*, 70 Iowa 233; *Campbell v. Maher*, 105 Ind. 383; *Bedford v. Penny*, 58 Mich. 424; *Union Cent. Ins. Co. v. Cheever*, 36 Ohio St. 201; *Cook v. Ritter*, 4 E. D. Smith (N. Y.) 253; *Lloyd v. Hannibal etc. R. Co.*, 53 Mo. 509; *Read v. State*, 2 Ind. 438; *Walker v. State*, 6 Blackf. (Ind.) 1; *State v. Lee*, 66 Mo. 165.

Reading extracts from works of science or art, as well as from a classical, historical or other publication, is allowed in argument of counsel to the jury by way of illustration, but such reading cannot be made a pretext to get improper matter before a jury. *Legg v. Drake*, 1 Ohio St. 287; *Union Cent. Ins. Co. v. Cheever*, 36 Ohio St. 201.

Statements of plaintiff's counsel in an action of slander, that the action was only brought to vindicate character, and that the damages given

new trial, must have been objected to when made.<sup>1</sup>

(b) MISCONDUCT IN CONDUCT OF THE TRIAL.—It is misconduct, for which a new trial will be granted, for counsel to state in the presence of the jury what he can or proposes to prove, when such evidence has been excluded.<sup>2</sup> No indirect method of getting excluded evidence before the jury should be allowed,<sup>3</sup> nor should counsel persist in getting inadmissible evidence before the jury.<sup>4</sup> Communications between juror and counsel during trial is such misconduct as will entitle the injured party to a new trial.<sup>5</sup> It is misconduct for counsel to introduce evidence immaterial to the issue for the sake of assailing the character of the opposite party.<sup>6</sup> Such misconduct of counsel as intoxication may afford

over expenses would be returned, while held to be very improper, unless made in good faith, were not sufficient to warrant the appellate court in granting a new trial. *Larkins v. Tartar*, 3 Sneed (Tenn.) 681.

Counsel should not appeal to the prejudices of the jurors against the opposite party, and such conduct, unless unrebuked by the court, will warrant a new trial. *Gibson v. Zeibig*, 24 Mo. App. 65; *Miller v. Dunlap*, 22 Mo. App. 97; *State v. Lee*, 66 Mo. 165; *State v. Barham*, 82 Mo. 67; *Brown v. Hannibal etc. R. Co.*, 66 Mo. 588; *Bremmer v. Green Bay etc. R. Co.*, 61 Wis. 114; *Brown v. Swineford*, 44 Wis. 282.

Instructions of the court to the jury to disregard improper remarks of counsel do not cure the error. *The School Town of Rochester v. Shaw*, 100 Ind. 268; *State v. Noland*, 85 N. Car. 576. But see *Evansville v. Wilter*, 86 Ind. 414; *Railroad v. Gurley*, 12 Lea (Tenn.) 46.

Reading from law books to the jury against the will of the court and stating what they contained after being stopped by the court is misconduct of counsel, for which a new trial will be granted. *Reich v. Mayor etc. of New York*, 12 Daly (N. Y.) 72. See also *Lesser v. Perkins*, 39 Hun (N. Y.) 341; *People v. Anderson*, 44 Cal. 70; *Tuller v. Talbot*, 23 Ill. 357; *Sprague v. Craig*, 51 Ill. 288; *Koelges v. Guardian L. Ins. Co.*, 57 N. Y. 638.

But reading from law books before instructions are given, where the law read corresponded with the instructions given, will not entitle the defeated party to a new trial. *Bloyd v. Pollock*, 27 W. Va. 75. See also *Koelges v. Guardian L. Ins. Co.*, 57 N. Y. 638.

A citizen of M county was engaged to teach school in F county, and subsequently brought suit to recover for services. On application of the plaintiff, the venue of the cause was changed from F county to M county, where, upon the trial of the cause, the plaintiff's attorney, in the closing argument over the objection of the defendant, urged the jury to "stand by your own citizen;" and, also over objection and against the admonition of the court, told the jury that the school trustees, pupils and citizens of F county are trying to disgrace and oppress a citizen of M county, and other language calculated to prejudice the jury against the defendant. *Held*, that the defendant was entitled to a new trial for such misconduct of counsel. *The School Trustees of Rochester v. Shaw*, 100 Ind. 168.

1. *Skaggs v. Given*, 29 Mo. App. 612; *Huckell v. McCoy*, 38 Kan. 53; *Ross v. Davenport*, 66 Iowa 548; *Powers v. Mitchel*, 77 Me. 361; *St. Louis etc. R. Co. v. Myrtle*, 51 Ind. 566; *Chandler v. Thompson*, 30 Fed. Rep. 38; *Muirhead v. Hannibal etc. R. Co.*, 31 Mo. App. 578; *Cotton States L. Ins. Co. v. Edwards*, 74 Ga. 220; *Brennan v. St. Louis (Mo. 1886)*, 2 S. W. Rep. 481; *Morrison v. State*, 76 Ind. 335; *Choen v. State*, 85 Ind. 209; *Turner v. State*, 70 Ga. 765.

2. *McDuff v. Detroit Evening Journal Co. (Mich. 1891)*, 47 N. W. Rep. 671.

3. *Cleveland Paper Co. v. Banks*, 15 Neb. 20; *McDuff v. Detroit Evening Journal Co. (Mich. 1891)*, 47 N. W. Rep. 671.

4. *Riech v. Balch*, 68 Iowa 526.

5. *Oleson v. Meader*, 40 Iowa 662; *Stafford v. Oskaloosa*, 57 Iowa 748; *Koester v. Ottumwa*, 34 Iowa 41.

6. *Rickabus v. Gott*, 51 Mich. 227.

ground for a new trial:<sup>1</sup> or bringing a case on for trial in violation of a stipulation to give notice.<sup>2</sup>

**4. Misconduct of Litigants.**—Misconduct of one of the litigants may afford ground for a new trial; as, for example, where it is shown that he subpoenaed as witnesses ten out of the original panel of eighteen jurors, in order to gain an undue advantage in the selection of the jury.<sup>3</sup> Furnishing refreshments to the jurors by the successful party to a suit is generally a ground for a new trial.<sup>4</sup> A verdict will be set aside even for the least intermeddling with the jurors.<sup>5</sup> But where the tampering is known to the op-

1. While the intoxication of the attorney of the losing party might, under some circumstances, afford ground for a new trial, the refusal of the trial court to grant a new trial on such ground will not be disturbed by the appellate court, the extent of the intoxication being in doubt and the matter not having been brought to the attention of the court until the trial had ended. *Fitch v. Ellison* (Colo. 1890), 24 Pac. Rep. 872.

2. *Foote v. Despain*, 87 Ill. 28; *Felton v. Moffet* (Neb. 1890), 45 N. W. Rep. 930; *Hankins v. Mutual Ben. L. Ins. Co.*, 4 Ill. App. 130; *Preston v. Eureka Art Stone Co.*, 54 Cal. 108.

3. *Boyce v. Aubuchon*, 34 Mo. App. 315. See also *Allen v. State*, 4 Tex. App. 581.

But if neither the prevailing party nor the witness had any idea that the proceeding was irregular nor had any corrupt motive, a new trial will not be granted for the subpoenaing a jurymen and paying him witness fees. *Handly v. Call*, 30 Me. 9.

4. *Phillipsburg Bank v. Fulner*, 31 N. J. L. 52; *State v. Sparrow*, 3 Murph. (N. Car.) 487; *Keegan v. McCandless*, 7 Phila. (Pa.) 248; *Redman v. Ins. Co.*, 7 Phila. (Pa.) 167; *Lyons v. Lawrence*, 12 Ill. App. 531; *Vose v. Muller*, 23 Neb. 171; *Cottle v. Cottle*, 6 Me. 140; *Sexton v. Lelievre*, 4 Coldw. (Tenn.) 11; *McIntyre v. Hussey*, 57 Me. 493; *Perry v. Bailey*, 12 Kan. 539; *Mynatt v. Hubbs*, 6 Heisk. (Tenn.) 320.

The furnishing of food and drink to jurors when confined to the limits of ordinary hospitality, there being no design to influence the verdict, will not be a ground for a new trial. *Carlisle v. Town of Sheldon*, 38 Vt. 440; *Coleman v. Moody*, 4 Hen. & M. (Va.) 1.

Where the successful party paid for the dinner of a witness who was without

funds, it was held to be no ground for a new trial. *Grace v. Martin*, 83 Ga. 245.

Nor will treating jurors to soda water by the successful party after they are discharged, be such misconduct as will entitle the defeated party to a new trial. *Grace v. Martin*, 83 Ga. 245. See also *Pittsburgh etc. R. Co. v. Porter*, 32 Ohio St. 328.

In an action for damages to land, the court announced that if both or either of the parties would pay the expenses a view of the property by the jury would be allowed. The plaintiff refused to pay any part, and protested against the proceeding. The defendant agreed to pay all expenses. The jury were taken in defendant's conveyances and dined at his expense. A verdict in his favor was set aside. *Doud v. Guthrie*, 13 Ill. App. 653.

5. *Lyons v. Lawrence*, 12 Ill. App. 531; *Knight v. Freeport*, 13 Mass. 218; 3 Bouv. Inst. 507; *Smith v. Millingham*, 34 Ga. 200; *McIlvaine v. Wilkins*, 12 N. H. 474; *Heffron v. Gallupe*, 55 Me. 563; *Hawkins v. New Orleans Printing Co.*, 29 La. An. 134; *Brown v. Pipplin*, 12 Heisk. (Tenn.) 657; *Martin v. Morelock*, 32 Ill. 485.

Casual conversations between parties and jurors during recess of court have never been considered sufficient of themselves to set aside a verdict. *Borland v. Barrett*, 76 Va. 129. See also *Oswald v. Minneapolis etc. R. Co.*, 29 Minn. 5; *Chalmers v. Whittemore*, 22 Minn. 305; *Hoberg v. State*, 3 Minn. 262; *Wise v. Bosley*, 32 Iowa 34.

Where a juror spent the night at the house of one of the parties free of charge, a new trial was granted. *Walker v. Walker*, 11 Ga. 203; *McIntire v. Hussey*, 57 Me. 493. Compare *Morris v. Vivian*, 10 M. & W. 137. Or with the counsel of the successful party. *Walker v. Hunter*, 17 Ga. 364. See also *Springer v. State*, 34 Ga. 381; *Ensign v. Harney*, 15 Neb. 330.

posing counsel before trial, a new trial will not be granted.<sup>1</sup> The promise of a reward to induce a reluctant witness to testify in a particular way, will warrant a new trial,<sup>2</sup> or the hiring a witness to remain away from the trial.<sup>3</sup> To procure a judgment in the absence of the defendant, induced to stay away by a representation that the action would be dismissed, may be ground for a new trial.<sup>4</sup> Fraud and collusion between the magistrate and the successful party, whereby a fair trial was prevented, is ground for a new trial.<sup>5</sup>

**5. Misconduct of Jurors.**—The misconduct of jurors may afford ground for a new trial. This misconduct commonly relates to matters such as improper influence upon jurors by parties, counsel, or other persons, intended to affect the verdict; improper bias or prejudice; use by the jury of intoxicating liquors; giving or receiving communications after the jury has been sworn; separation of the jury after the cause has been committed to them and before a verdict is reached. In these and similar instances, the duties of the jury have been set out and explained under another title.<sup>6</sup> It is in authorities which have decided the question of the right to a new trial for misconduct of the jury, that what amounts to misconduct has been determined, and a repetition of these principles and authorities in a slightly different application under this title, is therefore, unnecessary.

**6. Misconduct of Court Officials.**—(a) **MISCONDUCT OF THE SHERIFF.**—It is misconduct for a sheriff to threaten a jury that they will be removed to another county unless they speedily agree upon a verdict, and to tell them that the court is making preparations for that purpose.<sup>7</sup> It is also misconduct for the sheriff to

If the complaining party participated in the juror's misconduct, a new trial will not be granted. *United States v. Salentine*, 8 Biss. (U. S.) 404.

1. *Turkle v. Dunivant*, 16 Lea. (Tenn.) 503; *Patton v. Hughesdale Mfg. Co.*, 11 R. I. 188.

So, objection after verdict to the behavior of defendant at a view had in an early part of the trial comes too late. *Tabor v. Judd*, 62 N. H. 88.

2. *Barron v. Jackson*, 40 N. H. 365; *Bostick v. State*, 10 Tex. App. 705.

3. *Crafts v. Union Mut. F. Ins. Co.*, 36 N. H. 44.

4. *Barkley v. Hanlan*, 55 Miss. 606.

5. *Lancaster v. Brady*, 4 Jones L. (N. Car.) 79.

6. **Jury and Jury Trial.**—12 Am & Eng. Encyc. of Law 371-379.

7. **Sheriff's Misconduct.**—*Gholston v. Gholston*, 31 Ga. 625; *Obear v. Gray*, 68 Ga. 182.

Where the officer in charge told the jury that unless they decided their case

in fifteen minutes they would be driven from the room they occupied by the order of the court, and that there was no other comfortable room for them, it was held insufficient to warrant a court of equity in setting aside the verdict and ordering a new trial. *Crafts v. Hall*, 4 Ill. 131.

It has been held that improper remarks to a jurymen by a sheriff, while rendering the latter subject to a fine, do not vitiate the verdict. *Reins v. People*, 30 Ill. 256.

Affidavits of jurors to show that the jury were influenced by the remarks of a bailiff in a jury room will not be received. *State v. Cowan*, 74 Iowa 53.

The fact that the bailiff told the jury that they would be detained until the next day if they did not agree upon a verdict, will not support a motion for a new trial. *Wiggins v. Downer*, 67 How. Pr. (N. Y.) 65. See also *Leach v. Wilbur*, 9 Allen (Mass.) 212.

leave a jury alone in company with other persons.<sup>1</sup> The presence of the bailiff in the jury-room with the jury, after it has been charged, is fatal to the verdict, and this, though he speaks no word to the jurymen.<sup>2</sup>

(b) MISCONDUCT OF PROSECUTOR.—It is misconduct, for which a new trial will be granted, for the prosecutor to exhibit papers bearing on a case to a jury out of court.<sup>3</sup> So, if the prosecutor furnishes liquors and cigars to the jurors during the trial, a new trial may be granted,<sup>4</sup> or if he furnishes entertainment to or bestows favors upon the jurors.<sup>5</sup>

7. **Misconduct of Bystanders.**—Unchecked demonstrations of applause at a trial, which may have influenced the verdict, may afford ground for a new trial.<sup>6</sup>

1. *Wormley's Case*, 8 Gratt. (Va.) 712; *People v. Hughes*, 29 Cal. 257; *Caleb v. State*, 39 Miss. 721.

That a person, not a sworn officer, was permitted to go to the jury room after the jury had retired to make up their verdict in a capital case, and to have charge of them in the absence of the bailiff, was held sufficient ground for a new trial. *Hare v. State*, 4 How. (Miss.) 187.

But where, after a jury had retired under the attendance of an officer, and, before the court adjourned, another officer was sworn to attend upon them, and after the adjournment a third was sworn by the clerk to supply the place of the second for a few minutes, it was held that this was according to usage, and no ground for a new trial. *Commonwealth v. Jenkins*, Thach. Cr. Cas. (Mass.) 118.

It was held in *Commonwealth v. Shields*, 2 Bush (Ky.) 81, that the failure of the court to administer to the sheriff the oath required by the Kentucky statute, that he will keep the jury together and suffer no person to communicate with them, was ground for a new trial. And so in *Spain v. State*, 8 Baxt. (Tenn.) 514; *Roberts v. State*, 72 Ga. 673. And see *Varnschen v. State*, 8 Tex. App. 45.

2. *People v. Knapp*, 42 Mich. 267; *Rickard v. State*, 74 Ind. 275. See also *Poole v. Chicago etc. R. Co.*, 2 McCrary (U. S.) 251; 12 Cent. L. J. 492; *State v. Snyder*, 20 Kan. 306; *Cole v. Swan*, 4 Greene (Iowa) 32; *McClary v. State*, 75 Ind. 260. Compare *Morningstar v. Cunningham*, 110 Ind. 328; *State v. Caulfield*, 23 La. An. 148.

However, if the counsel for the defendant knew of the presence of the bailiff in the jury room and made no

objection, a new trial will be refused. *Waterman v. State*, 116 Ind. 51.

Where the defendant, against whom a verdict has been rendered in a civil action, shows, upon a motion for a new trial, by the testimony of several jurors that the bailiff diverted their attention by talking of other matters, and took part in their deliberations as if a member of the jury, that he was a partisan of the plaintiff, the verdict should be set aside, although the plaintiff had no connection with the misconduct of the officer. *Barnett v. Eaton*, 62 Miss. 768.

Where the officer in charge carried reasonable refreshments into the jury room, but no conversation took place between such officer and the jurymen, it was held to afford no ground for a new trial. *Com. v. Roby*, 12 Pick. (Mass.) 496.

3. **Prosecuting Attorney's Misconduct.**—*State v. Hascall*, 6 N. H. 352.

4. *People v. Montague*, 71 Mich. 447.

5. *Springer v. State*, 34 Ga. 381.

6. *Owens v. State*, 64 Tex. 500.

In *Caswell v. Pitcher* (Me. 1887), 10 Atl. Rep. 453, it was held that ground for a new trial did not appear in the fact that a bystander remarked in the presence of the foreman of the jury during the recess on the first day of the trial, "that if they gave this girl the case, every girl in the county would sue her father," no injury appearing.

So in *Com. v. White*, 147 Mass. 76, it was held that the discretion of the trial court, in refusing a new trial in a criminal case on the ground of statements made by outsiders in the hearing of the jury, should not be interfered with.

In *Smith v. Millingham*, 44 Ga. 200, a new trial was held to have been properly granted where the father of one of

**V. MISTAKE AND SURPRISE—1. Surprise Defined.**—Surprise is any unexpected situation in which a party to an action may be placed, without any default on his part and which may be injurious to his interests.<sup>1</sup>

**2. General Principles.**—While a new trial is properly granted where a party is surprised, and no laches can justly be attributed to him,<sup>2</sup> in order that it may be granted for surprise, it must be shown that the surprise occurred in reference to a matter material to the issue, and that injury resulted therefrom;<sup>3</sup> and that the

the parties, who had been rejected as a witness, had talked to a witness in the hearing of the jury as to what would have been testified to had his testimony been allowed.

It was held in *Kerr v. Lunsford*, 31 W. Va. 659, that the court would not set aside a verdict merely because a newspaper, during the trial, stated that the case was dragging along, and that the general public opinion was that the jury would sustain the will or disagree.

**1. Mistake and Surprise.**—Hill's Annotated States Oreg., p. 319; Bouvier's Law Dict., tit. New Trial; *Oakley v. Sears*, 7 Robt. (N. Y.) 111; *Hatfield v. Macey*, 52 How. Pr. (N. Y.) 193; *Platt v. Munroe*, 34 Barb. (N. Y.) 291; *Dewey v. Frank*, 62 Cal. 343.

"Surprise, in its legal acceptation, denotes an unforeseen disappointment in some reasonable expectation against which ordinary prudence would not have afforded protection." *Peers v. Davis*, 29 Mo. 184; 3 Gra. & Wat. on New Trial 398; *Fretwell v. Laffoon*, 77 Mo. 26; *Dewey v. Frank*, 62 Cal. 343.

**2. Devo v. Reynolds**, 15 Ind. 233.

The general rule is that the party surprised on a trial must apply for relief at the earliest practicable moment, and in such method as to produce the least expense, vexation and delay. But this rule may be relaxed where the surprise is clearly established and the consequences of it can be avoided on another trial; and where it is further apparent that the party has not been guilty of laches, and has acted in good faith in omitting to apply for relief at an earlier stage of the proceedings. *Delmas v. Martin*, 39 Cal. 555.

In a suit for a mining claim, the plaintiff set forth his claim of title, which was denied in the answer. He was allowed to show a title made in a different way, and it was held, upon the defendant's affidavit of surprise, that he was entitled to a new trial. *Eagan v. Delaney*, 16 Cal. 85.

If, by any reasonable cause, a party has been unable to present the merits of his case to the jury, a new trial should be granted to him. *Jones v. Fennimore*, 1 Greene (Iowa) 134.

There may be surprise occasioned by a correct ruling for which a new trial should be granted, if injustice would result from its refusal. *Chinn v. Taylor*, 64 Tex. 385.

**3. Dorr v. Watson**, 28 Miss. 383; *Haber v. Lane*, 45 Miss. 608; *Todd v. State*, 25 Ind. 212; *Orthing v. Gundershelmer*, 12 Fla. 640; *Jackson v. Warford*, 7 Wend. (N. Y.) 62; *Holley v. Christopher*, 3 Mon. (Ky.) 14; *Merrick v. Britton*, 26 Ark. 496; *Blake v. Howe*, 1 Aik. (Vt.) 306; *Smith v. Morrison*, 3 A. K. Marsh. (Ky.) 81; *Butler v. Vassault*, 40 Cal. 74; *Cook v. De La Guerra*, 24 Cal. 237; *Brooks v. Douglass*, 32 Cal. 208; *Hartwright v. Badham*, 11 Price 383; *Beadle v. Graham*, 66 Ala. 102; *Holliday v. Holliday*, 72 Tex. 581.

In *Chicago etc. R. Co. v. Vosburgh*, 45 Ill. 311, WALKER, J., observed: "In applications for new trials on such ground (surprise), it is not only necessary that the party should have been surprised, but that it was in a matter material to the issue, and that it produced injury to the party; that it was not the consequence of neglect or inattention on the part of the party surprised; also that he used all reasonable efforts to overcome the evidence which worked the surprise, or that it was not within his power to have done so by the employment of reasonable diligence."

**Illness of Counsel.**—Where a motion for a new trial, on the ground of surprise by reason of illness of counsel during the trial, did not allege that such illness was of such a nature as to affect his faculties, a new trial was refused. *Simmons v. Murray*, 13 Daly (N. Y.) 477. See also *Whitworth v. Murphy*, 29 Iowa 470.

The surprise for which a new trial

applicant for the new trial has not been guilty of negligence or want of skill in providing against such surprise.<sup>1</sup> The first duty of counsel, surprised at the trial, is to secure delay by the proper legal method, but he cannot neglect this in the hope of securing a verdict in spite of the surprise, and then obtain a new trial.<sup>2</sup> A

may be granted must be in regard to a matter occurring before verdict, *People v. Mack*, 2 Park. Cr. (N. Y.) 673. See also *Oakley v. Sears*, 7 Robt. (N. Y.) 111.

A new trial will be granted where there was a substitution of a verbal for a written contract without notice in the pleadings. *Goldstein v. Lowther*, 81 Ill. 399. Or the introduction of an unrecorded deed of which the adverse party had no knowledge. *Delmas v. Martin*, 39 Cal. 555. Or the use of a false copy of a record. *Farnham v. Jones*, 32 Minn. 7; *Russell v. Reed*, 32 Minn. 45.

It must be shown that a different result would probably be the issue of the new trial. *Haber v. Lane*, 45 Miss. 608; *McClusky v. Gerhauser*, 2 Nev. 47.

One is not entitled to a new trial because, when testifying, he was so nervous, excited, and embarrassed that he forgot many important facts, and answered in such a manner as to prejudice his case. *Korte v. Hoffman*, 97 Mo. 284.

A new trial, applied for on the ground of surprise, should not be granted when it appears that the new testimony to be offered is merely cumulative. *State v. Wightman*, 27 Mo. 121.

Mere surprise at the result of a trial cannot entitle the party so surprised to a new trial. *Lane v. Brown*, 22 Ind. 239.

**Ignorance of Statute.**—Where the court ruled that the rights of the parties in a cause depended upon the interpretation of a statute which, as afterwards discovered but at the time unknown to all concerned, had been repealed, it was held that a new trial should be granted. *Belmont v. Morrill*, 69 Me. 314.

So where the court overlooked a statute under which certain rejected testimony should have been received. *Cooper v. Cooper*, 86 Ind. 75; and where the court, in an action of trespass, overlooked a certain clause in a local act bearing upon the question. *Tarrar v. Nunamaker*, 5 Rich. (S. Car.) 484.

1. *Rolf v. Rolf*, 10 Ga. 143; *Sheftall v. Clay*, R. M. Charl. (Ga.) 7; *Beachley v. McCormick*, 41 Kan. 485; *Haber*

*v. Lane*, 45 Miss. 608; *Dorr v. Watson*, 28 Miss. 383; *Thompson v. Williams*, 7 Smed. & M. (Miss.) 270; *Chicago etc. R. Co. v. Vosburgh*, 45 Ill. 311; *Walker v. Kretsinger*, 48 Ill. 502; *Merrick v. Britton*, 26 Ark. 496; *Fretwell v. Laffoon*, 77 Mo. 26; *O'Conner v. Duff*, 30 Mo. 595; *Goss v. McClaren*, 17 Tex. 107; *Burt v. Palmer*, 23 Vt. 244; *Jackson v. Warford*, 7 Wend. (N. Y.) 62; *Dodge v. Strong*, 2 Johns. Ch. (N. Y.) 228; *State v. Morgan* (Iowa, 1890), 45 N.W. Rep. 1070; *Carroll v. McCullough*, 63 N. H. 95; *Graham on New Trials*, 169; *Stewart Min. Co. v. Coulter*, 3 Utah 174; *Sayre v. King*, 17 W. Va. 562.

In *Schellhous v. Ball*, 29 Cal. 605, *SANDERSON, J.*, observed: "To entitle a party to a new trial on the ground of surprise, the same must be exclusively shown by the affidavits; and, moreover, it must appear that the fact or facts from which the surprise resulted had a material bearing upon the case, and that the verdict may be mainly attributed to their effect. (*Hartwright v. Badham*, 11 Price 383.) Upon this ground new trial should be granted with great caution, for in many cases it is used as a pretext and a cover for carelessness and inattention rather than a meritorious ground for relief. A party claiming to have been injured must show that the surprise has not resulted in any degree from his own fault or negligence, and must in addition claim his relief at the earliest opportunity. If he can relieve himself from his embarrassment in any mode, either by a nonsuit, or a continuance, or the introduction of other testimony, or otherwise, he must not take the chances of a verdict, but must at once fortify his position by resorting to all available means of present relief." Followed in *Doyle v. Sturla*, 38 Cal. 456. See also *Butler v. Vassault*, 40 Cal. 74; *Patterson v. Ely*, 19 Cal. 28.

A new trial will not be granted for accident or surprise which ordinary prudence could not have guarded against, where it does not appear that parties were diligent in preparing for trial. *Solomon v. Norton* (Ariz., 1886), 11 Pac. Rep. 108.

2. In *Shipp v. Suggett*, 9 B. Mon.



new trial has been refused for negligence of counsel in preparing the case for trial,<sup>1</sup> and a new trial will not be granted when the defeated party's surprise arose from a misapprehension of the law applicable to his case.<sup>2</sup> The particular facts which constitute the

(Ky.) 5, *SIMPSON, J.*, observed: "The correct practice in such a case is for the party at once, upon the discovery of the cause, during the progress of the trial, which operates as a surprise on him, to move a continuance or postponement of the trial, and not attempt to avail himself of the chance of obtaining a verdict on the evidence he has been able to introduce; and if he should fail, then to apply for a new trial on the ground of surprise. To tolerate such a practice would have the effect of giving to the party surprised an unreasonable and unfair advantage, and tend to an unnecessary and improper consumption of the time of the court."

In *Hurlburt v. Parker*, 43 Hun (N. Y.) 634, the party against whom a verdict was rendered had ample opportunity to state his surprise before verdict, but his counsel decided to take his chances on a favorable verdict. It was held that he was not entitled to a new trial. See also *Albert v. Seiler*, 31 Mo. App. 247; *Dewey v. Frank*, 62 Cal. 343; *Seaman v. Koehler*, 12 N. Y. St. Rep. 582; *Board of Regents v. Linscott*, 30 Kan. 240 and cases cited in brief; *People v. Mack*, 2 Park. Cr. (N. Y.) 673; *DeLever v. Michaels*, 5 Abb. Pr. (N. Y.) 203; *Bell v. Gardner*, 77 Ill. 319; *Devine v. Martin*, 15 Tex. 25; *Potter v. Padelford*, 3 R. I. 162; *Read v. Barker*, 30 N. J. L. 378; *Grant v. Popejoy*, 15 Ind. 311; *Shipp v. Suggett*, 9 B. Mon. (Ky.) 5; *Shellhous v. Ball*, 29 Cal. 605; *Doyle v. Sturla*, 38 Cal. 456.

An excuse which would have been a good reason for the continuance of a cause is not, necessarily, a good reason for a new trial. *Strippelmann v. Clark*, 11 Tex. 296.

1. **Negligence of Counsel.**—*Moody v. Dick*, 4 N. & M. 348; *Gwilt v. Crawley*, 8 Bing. 144; *Handy v. Davis*, 38 N. H. 411; *Commonwealth v. Benesch*, *Thatcher's Cr. Cas. (Mass.)* 684; *Westheimer v. Cooper*, 40 Kan. 370; *Shields v. Burns*, 31 Ala. 537; *Yates v. Monroe*, 13 Ill. 219; *United States v. Humason*, 7 Sawyer (U. S.) 252.

Where the applicant relied upon the statements of opposing counsel and failed to prepare for proving certain issues, a new trial was refused. *Smith*

etc. *Implement Co. v. Wheeler*, 27 Mo. App. 16; *Jackson v. Van Werp*, 8 Cow. (N. Y.) 273.

But where a failure to prepare for trial was the result of an attempt of the opposing counsel to mislead, the negligence is excusable. *Symons v. Bunnell*, 80 Cal. 330; *Chamberlain v. Lindsay*, 1 Hun (N. Y.) 231.

A failure to prepare for trial on account of a stipulation between counsel that the case should be postponed, will not prevent the injured party from having a new trial, when judgment was taken against him in violation of such stipulation. *Mordhorst v. Reynolds*, 23 Neb. 485; *Chicago etc. R. Co. v. Gillett*, 38 Iowa 434.

But it has been held that the proper way to meet a violated stipulation is to move for a postponement of the case. *Couillard v. Seaver*, 64 N. H. 614.

When a case has been placed on the calendar and was called in its order, a new trial will not be granted because plaintiff went on with the trial without giving defendant's attorney notice according to agreement, there being no affidavit of merits. *O'Keefe v. Leufest*, 35 Minn. 237. See also *Keeley v. O'Brien*, 66 Ill. 358. See also, *infra*, this title (2) **MISTAKES OF COUNSEL**.

2. **Counsel's Misapprehension of Law.**—*Phillips v. Wheeler*, 10 Tex. 536; *Hite v. Lenhart*, 7 Mo. 22; *Law v. Law*, 2 Gratt. (Va.) 366; *Legrand v. Baker*, 6 Mon. (Ky.) 235; *Root v. Catskill Mt. R. Co.*, 33 Fed. Rep. 858; *Russell v. Nelson*, 32 Iowa 215; *Anderson v. Market Nat. Bank*, 66 How. Pr. (N. Y.) 8; *Giraudat v. Korn*, 8 Daly (N. Y.) 406; *Morgan v. Houston*, 25 Vt. 570; *Beals v. Beals*, 27 Ind. 77; *Fuller v. Hutchings*, 10 Cal. 526; *Klockenbaum v. Pierson*, 22 Cal. 163.

In *Root v. Catskill Mt. R. Co.*, 33 Fed. Rep. 858, the defendant tried the case upon a certain theory as to the burden of proof and of contributory negligence, which theory was erroneous. It was held that he could not have a new trial on the ground of surprise. See also *Barrows v. Fox*, 39 Minn. 61; *Ferguson v. Gilbert*, 16 Ohio St. 88.

A surprise alleged to have been

surprise must be fully set up in the motion for the new trial,<sup>1</sup> and in case the application is made in behalf of the defendant, it must be alleged that he has a good defence to the action.<sup>2</sup> The granting of a new trial upon the ground of surprise rests in the discretion of the court.<sup>3</sup>

caused by the attorney supposing the law to have been different from what it was is no ground for a new trial. *Fuller v. Hutchings*, 10 Cal. 526; *Packer v. Heaton*, 9 Cal. 569; *Lawrence v. Fulton*, 19 Cal. 689; *Klockenbaum v. Pierson*, 22 Cal. 160.

A new trial will not be granted because the plaintiff was surprised by the ground of objection taken at the trial and did not come prepared to meet it. *Jackson v. Roe*, 9 Johns. (N. Y.) 77.

A new trial will not be granted to allow evidence to be admitted which had been supposed by the counsel to be immaterial in the first trial. *Northampton Nat. Bank v. Kidder*, 50 N. Y. Super. Ct. 246.

A new trial may be granted on the ground of surprise at a correct ruling of the court and as a result of the attorney's negligence, if the party has a meritorious defence and injustice would result from its refusal. *Chinn v. Taylor*, 64 Tex. 385; *Buford v. Bostick*, 50 Tex. 371; 1 Gra. & Wat. New Trials 187; 2 Gra. & Wat. New Trials 675.

In *Anderson v. Market Nat. Bank*, 66 How. Pr. (N. Y.) 8, *POTTER, J.*, remarks: "I observe, however, that the defendant's counsel does not state in his affidavit that he was surprised at the rulings, though perhaps he was, but is not willing to confess it. Still there need not be much delicacy about it, for I imagine that counsel, both the unlearned, and the learned, are frequently surprised at the judge's ruling; the former that so many of the rulings are sound, and the latter that so few of them are sound. But new trials are only granted where surprises arise in relation to the rulings of the judge upon points of law. If the latter practice should come to prevail, there would, indeed, be no end to litigation." See also, *infra*, this title (2) MISTAKES OF COUNSEL.

1. *Ballad v. Noaks*, 2 Ark. 45; *Theobald v. Hare*, 8 B. Mon. (Ky.) 43; *Thompson on Trials*, § 2761; *Brooks v. Lyon*, 3 Cal. 113; *Schellhaus v. Ball*, 29 Cal. 605; *Brooks v. Douglass*, 32 Cal. 208.

2. *Dow v. Town of Hinesburgh*, 1 Aik. (Vt.) 85. See also *Haber v.*

*Lane*, 45 Miss. 608; *Merrick v. Britton*, 26 Ark. 496; *Butler v. Vassault*, 40 Cal. 74; *Cook v. De La Guerra*, 24 Cal. 237.

3. *Dorr v. Watson*, 28 Miss. 383; *Todd v. State*, 25 Ind. 212; *Ferguson v. Gilbert*, 16 Ohio St. 88; *Mulford v. Yager*, 7 N. Y. Supp. 88; *Lawrence v. Ely*, 38 N. Y. 42; *Williams v. Montgomery*, 60 N. Y. 648; *Platt v. Monroe*, 34 Barb. (N. Y.) 291; *Hill v. Deusinger*, 61 Iowa 240; *Evans v. Rugee*, 63 Wis. 31; *Coker v. State*, 20 Ark. 53; *Missouri Pac. R. Co. v. Hays*, 15 Neb. 224; *Sultan v. Sherwood*, 18 Nev. 454; *Board of Regents v. Linscott*, 30 Kan. 240.

See also, *supra*, this title, DISCRETION OF THE COURT.

**Affidavit of Surprise.**—Something more than the party's unsupported allegation of surprise is necessary in an affidavit whereon a motion for a new trial is based. *Brooks v. Lyon*, 3 Cal. 113.

An affidavit in support of a motion for a new trial, on the ground of surprise and newly discovered evidence, which wholly fails to show any clear facts or circumstances showing that the party was surprised on the trial, or had used due diligence, gives no support to the motion. *Ballard v. Noaks*, 2 Ark. 45. See also *Meechum v. Judy*, 4 Mo. 361; *Schellhaus v. Ball*, 29 Cal. 605; *Brooks v. Douglas*, 32 Cal. 208.

On an application by a defendant for a new trial, on the ground of surprise, if the defence intended to be set up do not otherwise appear, it must be shown by affidavit that the counsel believes, or that the party believes, on the advice of counsel, that it is a good and valid one. *Dow v. Town of Hinesburgh*, 1 Aik. (Vt.) 35.

**Evidence.**—A party moving for a new trial, on the ground of surprise, must prove the surprise, and that he was injured thereby, as well as show how he can avoid it. *Blake v. Howe*, 1 Aik. (Vt.) 306; *Smith v. Morrison*, 3 A. K. Marsh. (Ky.) 81; *Cook v. De La Guerra*, 24 Cal. 237; *Holly v. Christopher*, 3 Mon. (Ky.) 14.

**Office of Pleadings in Preventing Sur-**

**3. Various Kinds of Surprise—(a) NOTICE OF TRIAL.**—Motions for a new trial based upon want of notice<sup>1</sup> are not favored, since, in the orderly and rapid transaction of business in court, the responsibility must rest upon counsel to see that the court's rules are complied with, and the parties and witnesses are ready when the case is reached. In many instances, therefore, new trials have been refused where lack of notice is assigned as the basis of the application.<sup>2</sup> In others, however, peculiar circumstances have been held to justify a new trial, but such cases furnish no rule of uniform application.<sup>3</sup>

**(b) ABSENCE FROM TRIAL—(1) Absence of Parties.**—It is obvious that no uniform rule can be stated to show under what circumstances the absence of a party from the trial will justify granting a new trial. In the following instances new trials demanded for absence of parties were refused: Where the same party had repeatedly obtained delay and at the pending term was absent on

**prise.**—Surprise as to the cause of action cannot be alleged as a ground for a new trial, if the declaration and exhibits give notice. *Smith v. Morrison*, 3 A. K. Marsh. (Ky.) 81; *Bitting v. Mowry*, 1 Miles (Pa.) 216; *Harrison v. Wilson*, 2 A. K. Marsh. (Ky.) 547; *Dodge v. Kendall*, 4 Vt. 31.

Where the plaintiff has simply proved the allegations of his pleadings, the defendant cannot complain of surprise. *Francisco v. Benepe*, 6 Mont. 243.

See also, *infra*, this title, SURPRISE AS TO EVIDENCE.

**1. Notice of Trial.**—*Compare* with this section, *infra*, this title (b) ABSENCE FROM TRIAL.

**2.** *Kitchen v. Crawford*, 13 Tex. 516; *Chase v. Brown*, 32 N. H. 130; *Bingley v. Mallison*, 3 Doug. (Mich.) 402; *Attorney General v. Stevens*, 3 Price 72; 3 Bouv. Inst. 504; *Buller's N. P.* 327.

Where there was no notice of a special term of court, the regular term having been adjourned, and for this reason a defendant failed to make a defence, a new trial was granted him. *Joslin v. Coffin*, 5 How. (Miss.) 539.

A new trial will be refused when the record shows such a notice of the pendency of the suit as to justify the court in overruling a motion to set aside a default. *Chapin v. Jackson*, 45 Ind. 153.

Where a defendant in several suits was served with process and destroyed the summons and afterward went with his attorney to the clerk of court to see the papers in one particular case,

which could not be found, a default was set aside and new trial granted on the ground of surprise. *McCall v. Hitchcock*, 9 Bush (Ky.) 66.

Plaintiff demanded a jury trial, but failed to pay the jury fee, and the case, though not stricken from the nonjury docket, was placed on the jury docket, which showed that the fee had not been paid. Defendants averred that they attended court until the judge announced that there was no jury for the following week; that they, having been informed by plaintiff and the clerk that the case was on the jury docket, and having found this true by inspection of the record, did not attend during that week, during which time judgment was rendered for plaintiff; and that they were able to produce material testimony. Held that defendants were entitled to a new trial, though the case should not have been placed on the jury docket until the fee had been paid. *Lanius v. Shuler*, 77 Tex. 24.

**3.** It is not ground for a new trial that the case came on for trial sooner than the party expected, on account of his mistaking the day when it was set for trial. *Stout v. Calver*, 6 Mo. 254.

Where the presiding judge had been counsel for the plaintiff, and the defendant did not expect he would sit and therefore did not prepare himself, this is not sufficient ground of surprise to grant a new trial. *Owings v. Gibson*, 2 A. K. Marsh. (Ky.) 515.

Where the defendant moved for a new trial on the ground that there was an understanding between him and the plaintiff that they would meet at court

account of the same accident;<sup>1</sup> because the party's counsel told him that the opposing counsel would take no advantage of his absence;<sup>2</sup> because he was intoxicated;<sup>3</sup> because he resided in another county and mistook the time of the trial;<sup>4</sup> because misled by the remark of an attorney in trying another case;<sup>5</sup> because the party relied upon his attorney to be present;<sup>6</sup> when guilty of culpable neglect;<sup>7</sup> where the case assumed an unexpected position during the voluntary absence of the party;<sup>8</sup> where he neglected to inform his counsel of important facts;<sup>9</sup> where he assumed that his case would not be reached;<sup>10</sup> that he did not know on what day of the term his cause would be tried;<sup>11</sup> where he inferred from the sickness of the judge that his own counsel would hold court.<sup>12</sup> Inferences drawn from remarks by a judge and counsel out of court are no excuse,<sup>13</sup> nor that his counsel named the wrong day.<sup>14</sup> Other miscellaneous cases are cited in the notes.<sup>15</sup>

In the following instances the excuses given by parties for absences were held to justify a new trial: Sickness of a party, or

and set the cause for trial on a particular day, and the agreement was not consummated before the regular call of the docket, when the defendant was not prepared for trial, a new trial will not be granted. *Moody v. Harper*, 53 Miss. 465. See also *Holburn v. Neal*, 4 Dana (Ky.) 120; *Wolfe v. Pruitt*, 7 La. An. 572.

1. **When New Trials for Absence of Parties Will be Denied.**—*Elmore v. McCrary*, 80 Ind. 544.

2. *Brock v. South*, etc. Ala. R. Co., 65 Ala. 79; *White v. Ryan*, 31 Ala. 400; *Hill on New Trials*, p. 422, § 55.

3. *Falkenburg v. Gorman*, 71 Wis. 8. See also *Turner v. Booker*, 2 Dana (Ky.) 334.

4. *Mayer v. Duke*, 72 Tex. 445.

5. *Green v. Bulkley*, 23 Kan. 130.

6. *Brown v. Warren*, 17 Nev. 417; *Geiger v. Burke*, 3 Smed. & M. (Miss.) 439; *Ferrill v. Marks*, 76 Ga. 21. Compare *Triplett v. Scott*, 5 Bush (Ky.) 81; *Sturgeon v. Hitchens*, 22 Ind. 107.

7. *Boshyshell v. Summers*, 40 Mo. 172.

8. *Davis v. Presler*, 5 Smed. & M. (Miss.) 459.

9. *Doat v. Maltby*, 2 La. An. 583.

10. *Gelton v. Hawkins*, 2 J. J. Marsh. (Ky.) 1.

11. *Brevard v. Graham*, 2 Bibb (Ky.) 177.

12. *Gater v. Mullen*, 23 Ind. 562.

13. *White v. Ryan*, 31 Ala. 400.

14. *Davis v. Winants*, 18 N. J. L. 306.

15. *Seifert v. Holt*, 82 Ga. 757; *Mayer*

*v. Duke*, 72 Tex. 445; *Halton v. Salmons* (Tex., 1886), 2 S. W. Rep. 753.

**Miscellaneous Instances.**—Where a party during a trial left the court room without asking the court to wait for his return, and went to a hotel three squares distant to procure the presence of a female witness indisposed, and on his return the evidence was closed, *held* that it was not a surprise entitling him to a new trial. *Thompson v. Updegraff*, 3 W. Va. 629.

A defendant who had been defaulted made affidavit that he was present in court and ready for trial on the day for which his case was set down; that his counsel advised him that a different case, then being tried, would take the rest of the week; that he accordingly left for that time, and in the interval was defaulted. *Held*, not to be sufficient ground for a new trial. *Desnoyer v. McDonald*, 4 Minn. 515.

A voluntary absence of a party from a trial will not entitle him to have a new trial for the purpose of using his testimony. *Thompson v. Anthony*, 48 Ill. 468.

An affidavit by an agent of the defendant corporation that he understood that certain attorneys had charge of the case taken to the circuit court by appeal, without showing whence he so understood, or that any preparation was made for trial, the attorneys denying that they were ever employed, *held*, to afford no ground for a new trial. *Singer Mfg. Co. v. May*, 86 Ill. 308.

Mere absence of the plaintiff is no

his immediate family;<sup>1</sup> sickness, combined with absence of an important witness;<sup>2</sup> unavoidable accident;<sup>3</sup> counsel's mistake as to the county to which the venue had been changed;<sup>4</sup> an erroneous supposition that the death of the plaintiff abated the action;<sup>5</sup> unavoidable absence of an agent employed to make proper showing for continuance;<sup>6</sup> irregular calling of the docket;<sup>7</sup> misleading statements of the court;<sup>8</sup> failure of clerk of court to send promised notice;<sup>9</sup> absence of defendant and witness from the Commonwealth, combined with sudden indisposition of counsel;<sup>10</sup> inability to reach court by reason of high water, being himself his own counsel;<sup>11</sup> accidental absence under peculiar circumstances.<sup>12</sup> A party to a civil action has an absolute and constitutional right to be present at all times on the trial. To exclude him because he was sensitive and nervous is reversible error.<sup>13</sup>

(2) *Absence of Counsel.*—The inexcusable absence of counsel

ground for setting aside the submission. It must appear that the absence was necessary. *Turpie v. Knowles*, 78 Ind. 221.

1. *Illness of Party as Ground for New Trial.*—*Stewart v. Durrett*, 3 Mon. (Ky.) 113; *Sherrard v. Olden*, 6 N. J. L. 344; *Whitworth v. Murphy*, 29 Iowa 470; *Cleveland Nat. Bank v. Reynolds*, 76 Ga. 834; *White v. Martin*, 63 Ga. 659.

But the affidavits must show freedom from negligence on the part of both attorney and client. *Whitworth v. Murphy*, 29 Iowa 470.

The sickness of the daughter of a party to a suit has been held to be a sufficient excuse for absence. *Peebles v. Ralls*, 1 Litt. (Ky.) 24.

It must be shown that the sickness was of such a nature that the party could neither be at the trial nor confer with his attorney. *Edwards v. McKay*, 73 Ill. 570. See also *White v. Martin*, 63 Ga. 659.

When the party to a suit, who is a material witness in his own behalf, is compelled to leave home even on account of his health, when his suit is liable to be called for trial, such absence will not afford good ground for a continuance or a new trial. *Schlesinger v. Nunan*, 26 Ill. App. 524.

A party applying for a new trial on the ground of his sudden illness, causing unavoidable absence, and claiming to be a material witness in his own behalf, must show that neither himself nor his attorney was guilty of negligence. *Whitworth v. Murphy*, 29 Iowa 470.

2. *Sherrard v. Olden*, 6 N. J. L. 344.

3. *When New Trials for Absence of Parties Will be Permitted.*—*Peebles v. Ralls*, 1 Litt. (Ky.) 24; *Vannerson v.*

*Pendleton*, 8 Smed. & M. (Miss.) 452; *Ricker v. Horru*, 74 Me. 289; *Smith v. Rawlings*, 83 Va. 674.

4. *Hannah v. Indiana Cent. R. Co.*, 18 Ind. 431.

5. *Broas v. Mersereau*, 18 Wend. (N. Y.) 653.

6. *Turner v. Booker*, 2 Dana (Ky.) 334.

7. *Donnallen v. Lenox*, 6 Dana (Ky.) 89.

8. *Edsall v. Ayres*, 15 Ind. 286; *Clark v. Jarrett*, 58 Tenn. 467.

9. *Thompson v. Sharp*, 17 Neb. 69. See also *Seymour v. Miller*, 32 Conn. 402.

10. *Honore v. Murray*, 3 Dana (Ky.) 31.

11. *Vannerson v. Pendleton*, 8 Smed. & M. (Miss.) 452.

12. A trustee, in an action returnable before a justice of the peace in New Hampshire, failed by accident to appear at the hour, and his default was entered, after which the justice left the place. The trustee appeared in the course of the same day, the justice and the plaintiff's attorney being present, and denied his liability and asked for a new trial, which was refused. On petition to the superior court for a new trial, the trustee denying under oath that he was indebted, or had any property of the principal, a new trial was granted, the costs of the petition to abide the result of the suit. *Rigney v. Hutchins*, 9 N. H. 257.

13. *Chandler v. Avery*, 47 Hun (N. Y.) 9.

*Affidavit of Surprise for Absence.*—Where a new trial is asked for on the ground that the defendant was absent from court on the day the case was

at the original trial furnishes no ground for a new trial.<sup>1</sup> An attorney is presumed to know the time of the meeting of the court and cannot allege his ignorance as an excuse.<sup>2</sup> Negligence of counsel employed by a party is the same as that party's own negligence, and the latter must suffer the consequences of it;<sup>3</sup> nor will it be sufficient simply to set up, in an application for a new trial, the illness of counsel, or his absence on other professional business; it must also be alleged that the judgment is con-

called and tried, because somebody had told him that the presiding judge had given public notice to all parties in cases that were litigated that they need not attend court on that day; it must be made affirmatively to appear from whom the defendant obtained such information, and that such public notice was in fact given. *Massey v. Allen*, 48 Ga. 21.

On a motion for a new trial it is not enough that the applicant account for his absence at the trial; he should also show due diligence in preparing, and that, because of his absence, his preparation was unavailing. *Mussin v. Collins*, 1 A. K. Marsh. (Ky.) 350.

The affidavit must show, in addition to the cause of absence, that the presence of the party would have produced a different result in the trial. *Ferrill v. Marks*, 76 Ga. 21.

1. *Freeman v. Weyland*, 23 Tex. 529; *Power v. Gillepsie*, 27 Tex. 370; *Star v. Torrey*, 22 N. J. L. 190; *Alexander v. Lewis*, 1 Metc. (Ky.) 407; *Mulholland v. Heyneman*, 19 Cal. 605; *Shields v. Burns*, 31 Ala. 535; *Holloway v. Holloway*, 97 Mo. 628; *Green v. Parker*, 85 Mo. 107; *Cogdell v. Barfield*, 2 Hawks (N. Car.) 332; *Blacketer v. House*, 67 Ind. 414; *Beal v. Codding*, 32 Kan. 107.

It is within the discretion of the trial court to refuse defendant's motion for a new trial on the ground of surprise in the withdrawal of his junior counsel from the case just before trial, where defendant not only failed to move for a continuance on that ground, but had notice of the withdrawal in time to employ, and did employ additional counsel. *Gaines v. White* (S. Dak. 1891), 47 N. W. Rep. 524.

Parties are bound to attend to their cases, and appear when they are reached. Therefore, where the defendant's attorney was, from necessity, absent when the case was reached, and it was defended by his partner, without the knowledge of defendant, who was

in the city with witnesses, *held*, that these facts constituted no ground for a new trial. *Hawthorne v. Bowman*, 3 Sneed (Tenn.) 524.

2. *Shields v. Launa*, 10 La. An. 193; *Allen v. Donnelly*, 1 McCord L. (S. Car.) 113; *Field v. Matson*, 8 Mo. 686; *Riley v. Louisville etc. R. Co.*, 2 La. An. 965; *Dwight v. Richard*, 4 La. An. 240; *Lockett v. Toby*, 10 La. An. 713; *Holloway v. Holloway*, 97 Mo. 628; *Walsh v. Walsh*, 114 Ill. 655; *Hartford etc. Ins. Co. v. Vanduzor*, 49 Ill. 489; *Warren v. Purtell*, 63 Ga. 428; *Simonton v. Buchanan*, 2 Baxt. (Tenn.) 279; but see *Mahalovitch v. Vaughn*, 1 Baxt. (Tenn.) 325.

A misunderstanding between the attorneys of the respective parties as to the day of trial will entitle the injured party to a new trial. *Symons v. Bunnett*, 80 Cal. 330. See also, *Robertson v. Williams*, 81 Cal. 268.

When it can be shown that the counsel could not by reasonable diligence ascertain the condition of the case and the time it was fixed for trial and be present, a new trial may be granted. *Riley v. Louisville*, 2 La. An. 965; *Lockett v. Toby*, 10 La. An. 713.

It seems that a party to the suit must know at his peril the day on which his case will be called. *Brevard v. Graham*, 2 Bibb (Ky.) 177; *Yelton v. Hawkins*, 2 J. J. Marsh. (Ky.) 1.

Where counsel relied upon court proceedings published in the daily newspaper for notice of the calendar upon which the cause to be tried was to have been placed, and was absent from the trial, a new trial was refused. *Miller v. McGraw*, 20 Ill. App. 203.

Although circumstances seemed to indicate that the case could not be reached, or, if reached, would not be tried, the absence of counsel will not afford a good ground for a new trial. *Warren v. Purtell*, 63 Ga. 428.

3. *Yates v. Monroe*, 13 Ill. 212.

If counsel's absence is accompanied by the least negligence of the party a

trary to law and evidence, or that justice requires its revision.<sup>1</sup> It must appear that there were probable merits in the cause which suffered prejudice from counsel's absence.<sup>2</sup> Appellate courts will hesitate to review a refusal of the trial court to grant a new trial for this cause, since the matter is largely one of discretion.<sup>3</sup> In some instances it has been held that the absence of counsel from a trial may, in the discretion of the court, be a good ground for a new trial.<sup>4</sup>

(3) *Absence of Witnesses.*—Where it is shown, by a party to a suit, that he was deprived of the benefit of a witness, who was excusably absent from the trial, and whose testimony was material, a new trial may be granted.<sup>5</sup> And it must appear that the

new trial may, in the court's discretion be denied. *Keeley v. O'Brien*, 66 Ill. 358; *Walsh v. Walsh*, 114 Ill. 655; *Renfo v. Merryman*, 71 Ala. 195.

1. *Garnett v. Kirkman*, 41 Miss. 94; *Hewlett v. Henderson*, 4 La. An. 333; *Holliday v. Holliday*, 72 Tex. 581; *Brock v. Richardson*, 9 Phila. (Pa.) 233; *Peacock v. Usry*, 52 Ga. 353; *Brock v. South etc. Ala. R. Co.*, 65 Ala. 79. See also *Sturgeon v. Hitchens*, 22 Ind. 107.

2. *Porter v. Triola*, 84 Ill. 325.

3. *Haight v. Green*, 19 Cal. 113; *Jacob v. McLean*, 24 Mo. 40; *Power v. Gillespie*, 27 Tex. 370; *Western Union Tel. Co. v. Brooks (Tex.)*, 14 S. W. Rep. 699. See also, *supra*, this title, DISCRETION OF THE COURT.

*Illness.*—To warrant granting a new trial on account of the sudden illness of the attorney of the defeated party, proof must be made, in support of the motion, that the applicant can, on another trial, make a better showing. *Porter v. Triola*, 84 Ill. 325.

Absence of counsel on account of the sickness of his wife was held to afford no ground for a new trial where it did not appear that he was free from negligence in notifying his colleague of his absence in time to move for a continuance. *Hart v. Thomas*, 61 Ga. 470.

Sickness of counsel is not a good ground for a new trial, when there is a manifest lack of diligence in not attending the court or providing other counsel. 1869, *Landrum v. Farmer*, 7 Bush (Ky.) 47.

4. *Anderson v. Scotland*, 17 Fed. Rep. 667; *Sturgeon v. Hitchens*, 22 Ind. 107; *Fraizer v. Williams*, 18 Ind. 416; *Hinman v. Hamilton Paper Co.*, 53 Wis. 169; *First Nat. Bank v. Harwick*, 74 Iowa 227; *Dodge v. Ridenour*, 62 Cal. 263; *Donnelly v. McAdams*

(R. I.), 13 Atl. Rep. 108. Compare *Board of Education v. Hoag*, 21 Ill. App. 588.

Where defendant, against whom judgment is had in his absence and his attorney's, swears that the evidence of his defense was in possession of his attorney, who was to have attended to the case, and whose absence was unexpected and unauthorized, and the affidavit is unimpeached, a new trial will be allowed. *Ivor v. Sullivan*, 2 La. An. 292.

*Instructions to Jury in Counsel's Absence.*—Additional instructions given to a disagreeing jury in counsel's absence furnishes no ground for a new trial. *Alexander v. Gardner*, 14 R. I. 15. See also *Blacketer v. House*, 67 Ind. 414.

*Absence of Counsel Because Not Paid.*—A new trial will be refused where it appears that counsel was absent because he had not received his fees. *Cobb v. State*, 78 Ga. 801. See also *State v. Walker*, 39 La. An. 19; *Goldstone v. Sperling*, 39 Cal. 447.

*Illness of Counsel and Neglect of Party.*—Sickness of counsel is not a sufficient excuse for his absence, when the client has been negligent in procuring other counsel. *Landrum v. Farmer*, 7 Bush (Ky.) 47. See also *Yeizer v. Burke*, 3 Smed. & M. (Miss.) 439.

5. *Absence of Witnesses.*—*Smith v. Chapel*, 36 Minn. 180; *Black v. State*, 27 Tex. App. 495; *Smith v. State Ins. Co.*, 58 Iowa 48. See also *Gallaudet v. Steinmetz*, 45 N. Y. Super. Ct. 239; *Cahill v. Hilton*, 31 Hun (N. Y.) 114.

It must be shown by affidavits what the absent witness would have sworn to. *Lillenthal v. Anderson*, 1 Idaho, N. S. 673; *Swartzell v. Rogers*, 3 Kan. 374. And that there is a good de-

testimony of such absent witness would probably affect the result.<sup>1</sup> But in order to have the advantage of a continuance or a new trial on the ground of absent witnesses, they must have been regularly summoned.<sup>2</sup> It is a general rule that a new trial should not be granted on account of the absence of witnesses when a continuance has not been asked for, or the absence of witnesses is caused by any form of neglect by the party applying for a new trial.<sup>3</sup>

fence to the action on its merits. *Flocks v. Marriott*, 11 W. Rep. 121.

If witnesses who have material testimony to offer, have been duly subpoenaed, fail to appear at the trial, their absence will entitle the injured party to a new trial. *Hyburn v. State*, 26 Tex. App. 668; *Tilden v. Gardinier*, 25 Wend. (N. Y.) 663; *Ruggles v. Hall*, 14 Johns. (N. Y.) 112.

If the testimony of the absent witness could have been procured previous to the trial, his absence will not afford a ground for a new trial. *Servis v. Cooper*, 33 N. J. L. 68.

Where a party during the trial went in search of witnesses, and returned with them while his adversary's counsel was addressing the jury, he should then have offered them as witnesses, and his failure to do so prevented him from having a new trial on account of their absence. *Dettman v. Zimmerman*, 53 Iowa 709. See also *Ketchum v. Breed* (Wis.), 26 N. W. Rep. 271.

**Illness of Witness.**—If a party to an action learns that a material witness is absent on account of sickness, he should move for a continuance. *Gee v. Moss*, 68 Iowa 318. See also *Watterson v. Watterson*, 1 Head (Tenn.) 1.

**Intoxication of Witness.**—Where a witness was excluded from testifying because of drunkenness application for a continuance should be made before a new trial will be granted and materiality of the witness's testimony must be shown. *Fox v. Territory*, 2 W. T. 297; *Land v. Miller*, 7 Tex. 463.

A party moved for a new trial on the ground that a material witness for him was incapacitated by intoxication to give evidence on the trial. For aught shown by the affidavits in support of the motion, the party might have previously known of the intoxication and have been instrumental in obtaining it. *Held*, that the motion was rightly overruled. *Iseley v. Lovejoy*, 8 Blackf. (Ind.) 462.

A refusal of the right to cross-ex-

amine a witness because of his intoxication is a sufficient ground for a new trial. *State v. McNinch*, 12 S. Car. 89.

**Absence of Witness Caused by Adversary.**—A new trial will be granted for disingenuous attempts on the part of the prevailing party to stifle or suppress evidence, or to thwart the proceedings, or to obtain an unconscionable advantage; and upon this ground a new trial was awarded to the plaintiff, where the defendant, by letters and persuasions, without the plaintiff's knowledge, induced a witness to absent himself from the town in which he lived, and in which the court was sitting, on the day on which the cause was set down for trial, in order to prevent the plaintiff from proving a material fact, known to the witness, which he knew was material, and which he had reason to believe could be proven by no one but himself. *Carey v. King*, 5 Ga. 75; *Crafts v. Union Mut. F. Ins. Co.*, 36 N. H. 44.

1. *Andrist v. Union Pac. R. Co.*, 30 Fed. Rep. 345.

2. *Kuhland v. Sedgwick*, 17 Cal. 123; *Tilden v. Gardinier*, 25 Wend. (N. Y.) 663; *Gawthrop v. Leary*, 9 Daly (N. Y.) 353; *Love v. Breedlove*, 75 Tex. 649.

The promises of witnesses to be present and testify have been held sufficient excuse for failure to *subpoena* them. *Cahill v. Hilton*, 31 Hun (N. Y.) 114; *People v. Brown*, 46 Cal. 103. But see *People v. Baker*, 1 Cal. 404; *Frank v. Brady*, 8 Cal. 48; *Lightner v. Menzel*, 35 Cal. 452; *Tigue v. Aunowski*, 24 N. Y. Ct. Rep. 931. Compare *Rogers v. Huile*, 1 Cal. 429. To the contrary, *Roach v. Cobern*, 76 Mo. 653; *Eich v. Taylor*, 17 Minn. 172.

Where the defendant's attorney wrote his principal witness to hold himself in readiness to attend the trial on notice by telegraph, which notice failed to reach him, a new trial was refused. *Gawthrop v. Leary*, 9 Daly (N. Y.) 353.

3. *Mays v. Deaver*, 1 Iowa 216; *Gee*



(c) SURPRISE AS TO EVIDENCE—(1) *General Principles*.—As in similar instances, elsewhere adverted to in this title, the party surprised by the introduction of evidence materially affecting his case, under circumstances where he is entitled to delay, must first have exhausted his other remedies before he is entitled to a new trial. One who has failed to apply for relief by a continuance, or similar remedy, cannot first raise the issue of surprise by evidence, on a motion for a new trial.<sup>1</sup> In like manner, as has been else-

*v. Moss*, 68 Iowa 318; *Dettman v. Zimmerman*, 53 Iowa 709; *Edwards v. Dignan*, 2 D. P. C. 642; *Young v. Commonwealth*, 4 Gratt. (Va.) 550; *Wells v. Sanger*, 21 Mo. 354; *Washer v. White*, 16 Ind. 136; *Lane v. State*, 27 Ind. 108; *Allington v. Tucker*, 38 Ala. 655; *McAuly v. Lockhart*, 4 Humph. (Tenn.) 229; *Rogers v. Huie*, 1 Cal. 429; *Carey v. King*, 5 Ga. 75; *Love v. Breedlove*, 75 Tex. 649.

**Depositions.**—The fact that witnesses, whose depositions are taken, reside within 40 miles of the place, is a fact of which the party taking such depositions can inform himself by ordinary diligence; if it be not known, the want of knowledge is to be attributed to his own laches, and surprise thus produced cannot be ground for a new trial. *Peers v. Davis*, 29 Mo. 184.

**Adversary as Witness.**—Either party may summon the other as a witness. If this is neglected, and that other suddenly and unexpectedly disappears when wanted, a continuance should be asked for the purpose of having him summoned. The party prejudiced cannot go to the jury, and then ask a new trial to let in his opponent's testimony. *Kellogg v. Ballard*, 10 Wis. 440.

**Requisites of Affidavit Alleging Absence of Witnesses.**—An affidavit for a new trial, because the first was had in the absence of material witnesses, must explain why a continuance was not asked for. *Jones v. Gaither*, 3 A. K. Marsh. (Ky.) 166.

Upon an application for a new trial on the ground of surprise arising from the sudden illness of a witness, what he would testify to must be shown, and the court is not bound to take the statement of the applicant or his counsel for the purpose. *Swartzell v. Rogers*, 3 Kan. 374.

An affidavit for a new trial, on the ground that a witness was absent, must show the facts to be proved by such witness. *Warren v. Ritter*, 11 Mo. 354.

Where two of the defendant's wit-

nesses, being present when the trial commenced, disappeared without leave or notice, and the party, in support of a motion for a new trial, filed the next day his own affidavit and that of another of the fact, *held*, that his affidavit ought to have been accompanied by the affidavit of the witnesses, showing the facts to which they would testify; it ought to have stated that the defendant could not prove the same facts by other testimony; and if the affidavits of the absent witnesses could not be procured, that fact should be stated. *Cotton v. State*, 4 Tex. 260; *S. P. Mann v. Clifton*, 3 Blackf. (Ind.) 304; *Ward v. Cobbs*, 14 Tex. 303.

1. *Dalton v. Shaffner*, 38 Mo. App. 165; *Millard v. Wetherbee*, 4 N. H. 118; *McClure v. King*, 15 La. An. 220; *Cotton v. State*, 4 Tex. 260; *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40; *Thompson v. Porter*, 4 Bibb (Ky.) 70; *Kirtley v. Kirtley*, 1 J. J. Marsh. (Ky.) 96; *Messenger v. Fourth Nat. Bank*, 6 Daly (N. Y.) 190.

**Remedy by Suffering Nonsuit.**—In *Helm v. First Nat. Bank*, 91 Ind. 44, in construing an Indiana statute regulating new trials and providing that new trials may be granted for "accident or surprise which ordinary prudence could not have guarded against" (Ind. R. S., 1881, § 559), *HAMMOND, J.*, observed: "But it seems to be quite well established that a plaintiff is not entitled to a new trial on account of surprise at any evidence given for the defendant, for the reason that he has it in his power to dismiss his case, without prejudice to his rights, and commence another suit. *Cummins v. Walden*, 4 Blackf. (Ind.) 307; *Atkisson v. Martin*, 39 Ind. 243. In the former case, *BLACKFORD, J.*, delivering the opinion of the court, said: 'It is a general rule, indeed, that the plaintiff, after a verdict against him, can have no claim to a new trial on account of his having been surprised by any evidence of the defendant. If the plaintiff finds himself unprepared to

where explained, such motions are addressed to the sound discretion of the trial court.<sup>1</sup>

While the party thus surprised will be permitted a new trial in a proper case (and there are numerous instances in which this relief has been granted),<sup>2</sup> the review of such applications has commonly shown that the party surprised, has, by his own conduct, barred himself from this remedy. The introduction of testimony by the adverse party, which could not reasonably be expected, and which operates as a surprise and brings about an

meet the defendant's evidence, he always has it in his power to suffer a nonsuit, which will leave him at liberty to sue again for the same cause of action. It would be giving the plaintiff too great an advantage to permit him to take the chance of a verdict, and when it is lost, relieve him from the verdict and give him chance with another jury, merely because the evidence against his claim was stronger on the first trial than he expected it would be." See also *Graeter v. Fowler*, 7 Blackt. (Ind.) 554; *Travis v. Barkhurst*, 4 Ind. 171; *Larrimore v. Williams*, 30 Ind. 18.

The same principle is sustained by cases in other States, without special reference to statutory provisions. *Bell v. Gardner*, 77 Ill. 319; *Savoni v. Brashers*, 46 Mo. 345; *Albert v. Seiler*, 31 Mo. App. 247; *Dalton v. Shaffner*, 38 Mo. App. 165; *Beckford v. Chipman*, 44 Ga. 543; *Sproul v. Resolute F. Ins. Co.*, 1 Lans. (N. Y.) 71; *Messenger v. Fourth Nat. Bank*, 6 Daly (N. Y.) 190. 1. *Nelson v. Waters*, 18 Ark. 570; *Reeger v. Bungan*, 10 Ind. 451.

See also, *supra*, this title, DISCRETION OF THE COURT.

2. *Texas etc. R. Co. v. Barron* (Tex. 1890) 14 S. W. Rep. 698; *Delmas v. Margu*, 25 Tex. 1; *Guffey v. Moseley*, 21 Tex. 408; *Colorado etc. R. Co. v. Bowles* (Colo. 1890), 23 Pac. Rep. 467; *Tomer v. Densmore*, 8 Neb. 384; *Keller v. Blasdel*, 2 Nev. 162; *Rodriguez v. Comstock*, 24 Cal. 85; *McFarland v. Clark*, 9 Dana (Ky.) 134; *Helm v. Jones*, 9 Dana (Ky.) 26; *Boyce v. Yoder*, 2 J. J. Marsh. (Ky.) 515; *Brick v. Campbell*, 50 N. J. L. 282; *Bowden v. Morris*, 1 Hugh. (U. S.) 378; *Tyler v. Hoombeck*, 48 Barb. (N. Y.) 107; *Parshall v. Klinck*, 43 Barb. (N. Y.) 203; *Jackson v. Warford*, 7 Wend. (N. Y.) 62; *Baynard v. Fisher*, 6 Pick. (Mass.) 355; *Niles v. Backett*, 15 Mass. 378 (compare *Dodge v. Kendall*, 4 Vt. 31); *Ricker v. Horn*, 74 Me. 289; *Alger v. Merritt*, 16 Iowa 121; *Bishop v. Lehman*, 9 Phila. (Pa.)

112; *Peterson v. Barry*, 4 Binn. (Pa.) 481; *State v. Williams*, 27 Vt. 724; *Starkweather v. Loomis*, 2 Vt. 573; *Ainsworth v. Sessions*, 1 Root (Conn.) 175; *Morrow v. Hatfield*, 6 Humph. (Tenn.) 108; *Libenintz v. Greenland*, 2 McCord L. (S. Car.) 313; *Barton v. Dunlop*, 2 Mill Const. (S. Car.) 140; *Wilson v. Brandon*, 8 Ga. 136; *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64; *Levy v. Brown*, 11 Ark. 16; *Nudd v. Home Inst. etc. Co.*, 25 Minn. 100; *Kansas City etc. R. Co. v. Hines*, 29 Kan. 498.

In *Holbrook v. Nichol*, 36 Ill. 161, where an affidavit for a new trial, in an action of ejectment, stated that the party had within the last five months examined the record of deeds in the county where the land was situated, and ascertained that the record of a power of attorney authorizing the conveyance, for which the opposite party claimed, failed to show anything indicating a notarial seal appearing in the notary's certificate, that being a material fact; that he had reason to believe that the letters "L. S." appearing upon the certified copy of the record given in evidence by his adversary had been affixed to the copy of the certificate furnished by the clerk after it had been given by that officer to the opposite party; that he anticipated the production of no such certificate, and was taken by surprise when it was produced at the trial in another county, and in consequence had subpoenaed no witness to prove the facts as they existed; and that he could prove, by the clerk and his deputy, that there was nothing appearing upon the record to indicate that a seal had ever been affixed to the notary's certificate—held, that the affidavit clearly showing that the party had been taken by surprise on the trial; that he had been vigilant and had used every reasonable precaution and effort to be prepared for trial, and had been guilty of no laches, the court erred in refusing a new trial.

The introduction, as evidence, of an

unfavorable verdict, is ground for a new trial.<sup>1</sup> Where one party is allowed to testify to facts which it could not have been anticipated that he would be permitted to testify to, a new trial should be granted when injury results.<sup>2</sup> The fact that the adversary's evidence is different from what it was supposed it would be, is not sufficient.<sup>3</sup> If there has been any want of diligence in ascertaining what the testimony of a witness would be, a new trial will be refused.<sup>4</sup> Surprise cannot be alleged where the evidence is within the issues framed by the pleadings.<sup>5</sup>

unrecorded deed, of which the opposite party had no notice or knowledge, at the close of the evidence on the trial, is a sufficient surprise to authorize the granting of a new trial. *Larrimore v. Williams*, 30 Ind. 18; *Sprout v. Resolute F. Ins. Co.*, 1 Lans. (N. Y.) 71.

A defendant, whose property was attached, filed an evasive answer, under oath, admitting the debt sued on. A subsequent attaching creditor intervened, and on the trial of the right to hold the property, the defendant in the first action, without any notice that he should do so, testified that the debt was not due. *Held*, that the plaintiff was entitled to a new trial on the ground of surprise. *Coghill v. Marks*, 29 Cal. 673.

1. **Surprise as to Evidence.**—*Holbrook v. Nichol*, 36 Ill. 161; *Egan v. Delaney*, 16 Cal. 87.

The filing a new account on an appeal and the testimony in support thereof is a surprise to opposite party entitling him to a new trial or a continuance. *Webb v. Lasater*, 5 Ill. 543. See also *Newhall v. Appleton*, 47 N. Y. Sup. Ct. 38.

Where a bill of particulars is filed, a party cannot be surprised at any evidence offered by his adversary to establish the items, even if such evidence were not offered at a former trial. *Rockford etc. R. Co. v. Rose*, 72 Ill. 183.

Where the plaintiff has confined his evidence to the pleadings, the defendant cannot complain of surprise. *Francisco v. Benepe*, 6 Mont. 243.

Where a defendant filed a deposition which contradicted the testimony of the plaintiff, which was alleged as a surprise, a new trial was refused. *Thompson v. Anthony*, 48 Ill. 468.

Where a party has it in his power to produce evidence that will contradict the testimony which is claimed to have been a surprise and fails to make use of it, his negligence will bar a new trial. *Rockford etc. R. Co. v. Rose*, 72 Ill.

183. See also *Mooney v. Kinsey*, 90 Ind. 33.

2. *Menk v. Commercial Ins. Co.*, 70 Cal. 585.

The fact that a witness was rejected on the trial of a case, as being incompetent through interest, is not a sufficient reason for granting a new trial as for a surprise. *Haskins v. Smith*, 17 Vt. 263.

At a trial before a referee, a witness for plaintiff, objected to as incompetent because interested, testified that he had no present or contingent interest in the result, and was thereupon permitted to testify to transactions with a decedent. On its afterwards appearing from the testimony of plaintiff that such witness was interested in the result, the referee excluded his testimony. *Held*, that plaintiff could not complain that he was surprised by such ruling, and was thereby prevented from introducing other testimony to the like effect. *Morrison v. Murphy*, 36 Mo. App. 36.

3. *Bell v. Gardner*, 77 Ill. 319; *Shotwell v. McElhenney*, 101 Mo. 677; *Martin v. Clark*, 1 Hempst. (U. S.) 259; *Johnson v. Blanchard*, 5 R. I. 24; *Pittsburgh etc. R. Co. v. Sponier*, 85 Ind. 165; *Fears v. Albea* (Tex.), 6 S. W. Rep. 286; *Travis v. Barkhurst*, 4 Ind. 171; *Cummins v. Walden*, 4 Blackf. (Ind.) 307; *Taylor v. California Stage Co.*, 6 Cal. 228; *Patrick v. Boonville Gas Light Co.*, 17 Mo. App. 462.

4. *O'Conner v. Duff*, 30 Mo. 595; *Crawford v. Georgia etc. R. Co.* (Ga. 1890), 12 S. E. Rep. 176.

**Absence, Surprise, etc.**—When a motion for a new trial on the ground of surprise is made, because witnesses have failed to testify as they represented before the trial they would testify, the question is, whether the evidence to be produced on another trial is such as will probably secure a different result. *Stellwagen v. American Life Assn.*, 14 Blatchf. (U. S.) 349.

5. *Cole v. Fall Brook Coal Co.*, 10 N. Y. Supp. 417; *Knapp v. Fisher*, 49

Overlooking material testimony,<sup>1</sup> or neglecting to secure valuable and accessible evidence,<sup>2</sup> does not warrant a new trial. The introduction of false but immaterial evidence, not passed upon, and not necessary to be passed upon, is not ground for a new trial;<sup>3</sup> nor is it a ground that the parties asking it were surprised by the impeachment of one of them.<sup>4</sup> A new trial will not be granted to enable a party to impeach his opponent's witnesses.<sup>5</sup>

(2) *Unexpected Evidence of Friendly Witness.*—Surprise arising from a party's own witnesses, testifying otherwise than was expected, is not, as a matter of course, a sufficient ground for a new trial.<sup>6</sup> But if he has used all the diligence necessary in ascertaining what the testimony would be, and it turns out to be different from what he has a right to expect, a new trial will be granted.<sup>7</sup> The truth of the testimony of a disappointing witness must be denied, or it must be shown that the party surprised will be able to supply the needed testimony on the new trial.<sup>8</sup> The evidence must be on a point material to the issue, and injury must result

Vt. 94; *Davis v. Ruggles*, 2 Chand. (Wis.) 152; *Bragg v. Moberly*, 17 Mo. App. 221; *McNeally v. Stroud*, 22 Tex. 229; *Anderson v. Duffield*, 8 Tex. 237; *Donnell v. Parrott*, 12 La. An. 690. Compare *Barreckman v. Girard*, 26 Kan. 284.

1. *The Francis Wight*, 7 Ben. (U. S.) 88; *Crowell v. Harvey* (Neb. 1890), 46 N. W. Rep. 709.

2. *Linard v. Crossland*, 10 Tex. 462.

One who, having reason to believe that his adversary will dispute a certain point in the case, summons only one witness to support it, will not be granted a new trial to enable him to re-enforce the testimony of his single witness. *Test v. Larsh*, 100 Ind. 563.

A party who is surprised on a trial by a witness testifying contrary to his expectation, and who, before the close of the trial, learns of other witnesses who will testify differently, cannot proceed with the trial, and after an adverse verdict obtain a new trial for the purpose of introducing such testimony. *Mehan v. Chicago etc. R. Co.*, 55 Iowa 305.

3. *Guy v. Hanly*, 21 Cal. 397.

4. *Jennings v. Howard*, 80 Ind. 214.

5. *Schultz v. Third Ave. R. Co.*, 47 N. Y. Super. Ct. 285; *Starin v. Kelly*, 47 N. Y. Super. Ct. 288.

6. *Schultz v. Third Ave. R. Co.*, 15 Jones & Sp. (N. Y.) 285; *Estate of Cartery*, 56 Cal. 470; *Guard v. Risk*, 11 Ind. 156; *Graeter v. Fowle*, 7 Blackf. (Ind.) 554; *Sproul v. Resolute F. Ins. Co.*, 1 Lans. (N. Y.) 71. See also *Wolf v. Brass*, 72 Tex. 133; *Oakley v. Sears*,

7 Rob. (N. Y.) 111; *Valentino v. Well*, 67 Ga. 15. Compare *Todd v. State*, 25 Ind. 212.

Where a party's own testimony was rejected because of a statutory prohibition, he will not be entitled to a new trial on the ground of surprise, having made no effort to secure corroboratory witnesses. *Bagnall v. Roach*, 76 Cal. 106.

The court may refuse to grant a new trial on the affidavit of a party that a witness swore differently at a former trial, and that the affiant had discovered only since the last trial that he could prove that the witness swore thus differently. *Judge v. Moore*, 9 Fla. 269.

7. *Todd v. State*, 25 Ind. 212; *Wilson v. Brandon*, 8 Ga. 136; *Rodriguez v. Comstock*, 24 Cal. 85; *Levy v. Brown*, 6 Engl. 167; *McFarland v. Clark*, 9 Dana (Ky.) 134.

Affidavits of persons who heard the testimony of the witness before trial are the best evidence of surprise. *Lillienthal v. Anderson*, 1 Idaho, N. S. 673.

Where a party to a suit has been misled by the statements of persons who were present at an alleged assault with intent to murder, and after conviction learned that they were willing to swear to his innocence, he will be entitled to a new trial. *Thomas v. State*, 52 Ga. 509.

8. *Estate of Cartery*, 56 Cal. 470; *Rodriguez v. Comstock*, 24 Cal. 85; *Schellhous v. Ball*, 29 Cal. 605; *Delmas v. Martin*, 39 Cal. 555; *Stellwagen v. American L. Assoc.*, 14 Blatchf. (U. S.) 349; *Mehan v. Chicago etc. R. Co.*, 55

therefrom to the party complaining.<sup>1</sup>

(3) *Unexpected Evidence of Hostile Witness*.—Surprise at the testimony of witnesses called by the adverse party will not afford a good ground for a new trial, unless the party against whom the testimony is given has been misled by previous statements of the witnesses.<sup>2</sup> But where such a witness has attempted to mislead the injured party, by stating that such hostile testimony would not be given, a new trial may be granted.<sup>3</sup> A party must be prepared to meet any material evidence which is competent under the issues, and has no right to assume that such evidence will not be introduced.<sup>4</sup> But the admission of new testimony-in-chief, after the case has been closed, and the exclusion of testimony offered in rebuttal, is a surprise.<sup>5</sup> The affidavit of a witness that his testimony at the trial was false would present a good ground for a new trial.<sup>6</sup> Only under extraordinary circumstances will a new

Iowa 305; *Mayfield v. State*, 44 Tex. 59.

1. *Rodriguez v. Comstock*, 24 Cal. 85.

2. *Taylor v. California Stage Co.*, 6 Cal. 228; *Rodriguez v. Comstock*, 24 Cal. 85; *Meakim v. Anderson*, 11 Barb. (N. Y.) 215; *Whiteman v. Leslie*, 54 How. Pr. (N. Y.) 494; *Clark v. Carter*, 12 Ga. 500; *Beckford v. Chipman*, 44 Ga. 543; *Beal v. Coddling*, 32 Kan. 107; *Gardner v. State*, 94 Ind. 489; *Helm v. First Nat. Bank*, 91 Ind. 44; *Delaney v. Brunette*, 62 Wis. 615; *Wolf v. Brass*, 72 Tex. 133; *Stiles v. McKibben*, 2 Ohio St. 588; *Theobald v. Hare*, 8 B. Mon. (Ky.) 39.

When a party is surprised at the testimony of the witnesses he should move for a continuance and not take his chances on a verdict. *Helen v. First Nat. Bank*, 91 Ind. 44; *Beckford v. Chipman*, 44 Ga. 543; *Beal v. Coddling*, 32 Kan. 107; *Mehan v. Chicago etc. R. Co.*, 55 Iowa 305. Compare *Rodriguez v. Comstock*, 24 Cal. 85.

Where a witness testified differently on a former trial and a continuance was denied, a new trial should be granted. *Withers v. State*, 23 Tex. App. 396. Compare *Lockwood v. Rose* (Ind. 1890), 25 N. E. Rep. 710; *Akles v. Cohen*, 8 Kan. 180.

3. *Haynes v. State*, 45 Ind. 424; *Gardner v. State*, 94 Ind. 489; *How. v. Bodman*, 1 Disney (Ohio) 115.

A party may be surprised at false testimony given at a trial and be unable to move for a delay because of his unavoidable absence. In such case he is entitled to a new trial. *Ricker v. Horn*, 74 Me. 289.

A party should be prepared to prove the real truth, and if he depends upon what the witnesses of his adversary say they will testify to he cannot complain if he is surprised at their testimony. *Armstrong v. Davis*, 41 Cal. 499; *Klockenbaum v. Pierson*, 22 Cal. 163; *Pittsburgh etc. R. Co. v. Sponier*, 85 Ind. 165; *Fagan v. State*, 3 Tex. App. 400.

Or if he failed by proper cross-examination to make a witness recall and correct a former contradictory statement he will not be allowed a new trial. *Webb v. Barnard*, 36 Minn. 336; *Howell v. Howell*, 37 Mo. 124.

4. *Gardner v. State*, 94 Ind. 489; *Pauley v. Short*, 41 Ind. 180; *Hill v. Sutton*, 47 Ind. 592; *Chamberlain v. Reid*, 49 Ind. 332; *Armstrong v. Davis*, 41 Cal. 499; *Foster v. Easton*, 2 N. Y. Supp. 772. Even if the testimony be false. *Bragg v. Moberly*, 17 Mo. App. 221. See also *Gardner v. Stottles*, 94 Ind. 489.

It is not ordinary prudence to rely upon the unsworn statement of a witness for the opposite party as to what will be his testimony, and surprise resulting from such reliance, whereby a party goes to trial without witnesses to prove the real truth, is not cause for a new trial. *Pittsburgh etc. R. Co. v. Sponier*, 85 Ind. 165.

5. *Sanders v. Hutchinson*, 26 Ill. App. 633.

6. *Sholtz v. People*, 121 Ill. 560.

But the mere statement of a witness after trial in conflict with some portion of his testimony at the trial will not furnish a sufficient ground for a new trial. *Sholtz v. People*, 121 Ill. 560.

trial be granted on the ground that a witness was mistaken in his testimony.<sup>1</sup>

(4) *Loss of Documents and Records*.—If material and important evidence be missing at the trial, a continuance should be asked, or a nonsuit taken.<sup>2</sup> Where an account book was in possession of

An affidavit, by a witness in the former trial, that he was surprised on his examination, and explaining and correcting a mistake in his testimony, is not sufficient to warrant the granting of a new trial. *Steinbach v. Columbian Ins. Co.*, 2 Cal. (N. Y.) 129.

A new trial will not be granted for the false swearing of the witnesses of the prevailing party when such perjury is denied by the witnesses. *Dexter v. Handy*, 13 R. I. 85.

In general the witness should be convicted of perjury before a new trial will be granted for his false testimony. *Holtz v. Schmidt*, 44 N. Y. Super. Ct. 327. See also *Dexter v. Handy*, 13 R. I. 85.

1. *O'Kelly v. Felker*, 71 Ga. 775.

**Miscellaneous**.—The mere fact that a witness used at a former trial of a case was not used at the final trial, gives the adverse party no reason for asking for a new trial on the ground of surprise, where the court are satisfied that all the testimony which he thereby lost the opportunity of using, could only have been used by him as impeaching testimony, if the witness had been introduced. *Shepherd v. Hayes*, 16 Vt. 486.

A new trial will not be granted on the ground of surprise, where surprise arose from the production of an unexpected witness to certain facts, to impeach whom no preparation had been made, and the omission to call an anticipated witness whose impeachment had been prepared for. *Beach v. Tooker*, 10 How. Pr. (N. Y.) 297.

A new trial will not be granted to a party upon an affidavit that he was taken by surprise, by the testimony of a witness whom he alleges to have been mistaken, unless it be shown by what evidence the mistake can be established, and a sufficient reason is given why it was not introduced on the trial. *Ellis v. Kelly*, 33 Miss. 695.

A new trial cannot be demanded as a right, because a witness was sworn in the cause who is since found to have been convicted of an infamous crime. *Commonwealth v. Green*, 17 Mass. 515. See also *Haughton v. Haughton*, 11 La. An. 200.

Unexpected evidence, impeaching the character of a witness is not a surprise for which a new trial ought to be granted. *Bell v. Howard*, 4 Litt. (Ky.) 117, *Den v. Geiger*, 9 N. J. L. 225; *Shumway v. Fowler*, 4 Johns. (N. Y.) 425. But see *Wilson v. Clarke*, 27 Miss 270.

Where a party called his adversary's witness, thus making him his own, he cannot allege surprise at his evidence, as a ground for a new trial. *Higden v. Higden*, 2 A. K. Marsh. (Ky.) 42. Especially where the witness has since died. *Duryee v. Dennison*, 5 Johns. (N. Y.) 248.

The fact that a defendant in an action had forgotten at the trial that before suit brought he had, through his attorney, tendered a certain amount of money to the plaintiff in satisfaction of his claim which was refused, and which was less than the verdict, is no ground for a rehearing after final judgment, on the ground of accident or surprise, under section 2408 of Alabama Code. *Allington v. Tucker*, 38 Ala. 655.

A want of recollection of a fact, which, by due attention, might have been remembered, is not a ground for granting a new trial. *Watts v. Johnson*, 4 Tex. 311; *Cochrane v. Middleton*, 13 Tex. 275.

A new trial will not be granted merely because a witness was not sworn. *Sheeks v. Sheeks*, 98 Ind. 288.

2. *Lost Papers*.—*Kilgore v. Jordan*, 17 Tex. 341; *Linard v. Crossland*, 10 Tex. 462; *McClure v. King*, 15 La. An. 220; *Cotton v. State*, 4 Tex. 260; *Farnham v. Jones*, 32 Minn. 7.

**Failure to ask for a continuance** is not always a bar to granting a new trial. *Farnham v. Jones*, 32 Minn. 7.

If lack of diligence appears a new trial will not be granted for loss of documentary evidence. *Tefft v. Marsh*, 1 W. Va. 38; *Chapman v. Moore*, 107 Ind. 223.

Where a deposition had been taken and filed, but was not called for on the trial, a new trial was refused, on the ground that the deposition contained material matter and had been lost. *Chapman v. Chapman*, 4 Call (Va.) 430.

the defendant, who denied its existence, but who afterward produced it in another trial, a new trial was granted.<sup>1</sup> The unexpected production of written testimony by the opposite party, supposed to have been lost, will entitle the defeated party to a new trial.<sup>2</sup> Loss of an original record, and the introduction by the adverse party of what purports to be a copy, but which is not, there being no reason for supposing it not to be, is ground for a new trial.<sup>3</sup>

(5) *Rejection of Expected Evidence.*—The rejection at the trial of evidence, which the party had a right to believe to be admissible, is good ground for a new trial.<sup>4</sup> So, too, if documents which had been allowed to be read at a former trial are rejected, a new trial may be granted.<sup>5</sup> But the rejection of incompetent expected testimony is not ground for a new trial.<sup>6</sup>

A new trial will be granted when a judgment is rendered upon a supplied record which is not a true copy, where the original papers have been found and reinstated. *Thomas v. Hutchinson*, 25 Ark. 558. See also *Farnham v. Jones*, 32 Minn. 7.

*Stenographer's Notes.*—The loss of a stenographer's notes before settling a bill of exceptions is not a ground for a new trial. *Golden Terra Min. Co. v. Smith*, 2 Dak. 377.

A new trial was granted on payment of costs, on account of the loss of papers in the custom house, and because it was doubtful whether the truth of the transaction appeared on the trial, for the want of the proper preparation of the defence. *Boker v. Bronson*, 4 Blatchf. (U. S.) 472; *S. P. Wilkinson v. Martin*, 13 La. An. 479.

1. *Blackburn v. Crowder*, 110 Ind. 127.

Where defendant supposes an instrument to be lost, and at the trial plaintiff, who is not entitled to its possession, unexpectedly produces it, and an alteration on its face appears, which defendant cannot explain for want of time, a new trial may be granted him. *Russell v. Reed*, 32 Minn. 45.

Where evidence was introduced of the items of an account without objection, and on cross-examination defendant said he got them from his book, but afterwards said it was lost, *held*, the loss was not such surprise as to be ground for a new trial. *Sullivan v. O'Conner*, 77 Ind. 149.

2. *Russell v. Reed*, 32 Minn. 45.

*Lost Request for Instructions.*—The loss of the instructions requested in a case before the overruling of a motion for a new trial is no ground for grant-

ing a new trial. *Addems v. Suver*, 89 Ill. 482.

3. *Farnham v. Jones*, 32 Minn. 7.

4. *Boyce v. Yoder*, 2 J. J. Marsh. (Ky.) 515.

5. *Helm v. Jones*, 9 Dana (Ky.) 26.

Where evidence was held admissible under a previous decision of the court, and was ruled out by an overruling decision at the trial, a new trial was granted. *Starkweather v. Loomis*, 2 Vt. 573.

If evidence has been offered and received on a former trial, the plaintiff cannot urge that he is taken by surprise if it be offered again. Nor can the defendant urge such objection in case the plaintiff has offered evidence which has been received on the former trial. And the rule applies with equal force to both plaintiff and defendant. *Rabun v. Cage*, 23 La. An. 675.

6. *Morgan v. Marshall*, 7 J. J. Marsh. (Ky.) 316; *Lawrence v. Fulton*, 19 Cal. 683; *Sanford Mfg. Co. v. Wiggin*, 14 N. H. 441; *Turnley v. Evans*, 3 Humph. (Tenn.) 222; *Morgan v. Winston*, 2 Swan (Tenn.) 472; *Nane v. Simpson*, 5 Sneed (Tenn.) 612; *Curry v. Kurtz*, 33 Miss. 24; *Dorsey v. Maury*, 10 Smed. & M. (Miss.) 298; *Dunnahoe v. Williams*, 24 Ark. 264.

*Depositions.*—Where a deposition is ruled out on the ground of irregularity, such ruling cannot be a surprise, which will entitle the defeated party to a new trial. *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479. See also *Dorsey v. Mawry*, 10 Smed. & M. (Miss.) 298; *Lawrence v. Fulton*, 19 Cal. 683; *Lee v. Banks*, 4 Litt. (Ky.) 11; *Gentry v. McKeken*, 5 Dana (Ky.) 34; *Blair v. Childs*, 10 Heisk. (Tenn.) 199.

(6) *Suppression of Evidence by Adversary*.—If the adverse party deprives his opponent of material testimony for the purpose of gaining an advantage over him, a new trial will be granted.<sup>1</sup> But the failure of one party to produce material testimony in favor of his adversary is not a ground for a new trial.<sup>2</sup> So, if a witness purposely withholds material testimony with intent to injure a party, a new trial will be granted.<sup>3</sup>

(d) SURPRISE ARISING FROM MISTAKE—(1) *Mistake of Parties*.—A failure to make a defence to an action, through the mistake of a party to the suit arising from negligence, will not be a good ground for a new trial.<sup>4</sup> But where the mistake arises from a misleading remark or ruling by the court, a new trial will

But where the irregularity consists in lack of authority of the lawyer who attended the taking of the deposition in behalf of the defendant a new trial was granted to allow it to be regularly taken. *Bank of Tennessee v. Cowan*, 7 Humph. (Tenn.) 70.

So the suppression of a deposition that would be of no benefit to the complaining party will not entitle him to a new trial. *Hirsch v. Patterson*, 23 Ark. 112.

When the court, after granting a motion for the suppression of a deposition as containing matter irrelevant to the issue, permits the matter to go to the jury without a reasonable notice to the party making the motion, the latter is entitled to a new trial. *The S. B. Violet v. McKay*, 23 Ark. 543.

Where the defendant tries the case upon a certain theory as to the burden of proof and of contributory negligence, he cannot demand a new trial on the ground that the theory was erroneous. *Root v. Catskill Mt. R. Co.*, 33 Fed. Rep. 858.

1. *Crafts v. Union Mut. F. Ins. Co.*, 36 N. H. 44; *Carey v. King*, 5 Ga. 75; *Lyons v. Lawrence*, 12 Ill. App. 531; *Chicago City R. Co. v. McMahon*, 103 Ill. 485.

Positive evidence must be shown that the adverse party has been implicated in keeping the witness away from the trial. *Marsh v. Monckton*, 1 Tyr. & G. 34.

Where a material witness for the defendant concealed himself in the plaintiff's house to avoid the service of a *subpoena*, a new trial was granted the defendant. *Buller's N. P.* 328.

An interference by one party to defeat the service of a *subpoena* on behalf of the other by inducing the witnesses to avoid will ordinarily be good cause

for a new trial. *Barron v. Jackson*, 40 N. H. 365.

The fact that the plaintiff and his counsel led defendant to believe that certain facts would be admitted, or not seriously disputed, at the trial, and so he was induced to omit preparing evidence of them, is not —there being no fraud—such surprise as calls for a new trial. *Taylor v. Harlow*, 11 How. (N. Y.) Pr. 285.

On a motion for a new trial on the ground of surprise and mistake, the applicant's attorney made affidavit to the effect that he was surprised and mistaken at the trial because he relied on the statements of opposing counsel, and therefore failed to prepare to prove certain issues; but the affidavit failed to allege definitely what the opposing counsel's statements were, and it did not appear that they were relied on. *Held*, error to grant a new trial. *Smith etc. Implement Co. v. Wheeler*, 27 Mo. App. 16.

A new trial is properly refused on the ground of surprise and mistake where the applicant avers that, relying on the statements of opposing counsel, he failed to prepare to prove certain issues, the statements of the opposing counsel not being definitely averred, being oral, and it not appearing with certainty that they were relied on even. *Smith etc. Implement Co. v. Wheeler*, 27 Mo. App. 16.

2. *Chiles v. Dedman*, 3 A. K. Marsh. (Ky.) 463; *Gentry v. McKehen*, 5 Dana (Ky.) 34.

3. *King v. Gray*, 17 Tex. 62.

4. *Mistake of Parties*.—*Bergeron v. Dartmouth Sav. Bank*, 62 N. H. 655; *Carroll v. McCullough*, 63 N. H. 95; *Rolfe v. Rolfe*, 10 Ga. 143; *French's Petition*, 17 N. H. 472; *Holton v. Olcott*, 58 N. H. 598; *Matthews v. Fogg*,



be allowed.<sup>1</sup> So it has been held that where, by honest mistake of party or counsel, material evidence has been omitted, a new trial may be granted.<sup>2</sup> Where a party supposed that he would be allowed to testify regarding a claim against a decedent's estate, he cannot have a new trial in order to produce other testimony.<sup>3</sup>

(2) *Mistake of Counsel*.<sup>4</sup>—The power to grant new trials will not be extended to relieve against mistakes and errors of judgment of counsel.<sup>5</sup> Thus, where the mistake arose from counsel mistaking

35 N. H. 289; *Bates v. Bate*, 71 Cal. 307.

The mistake or negligence of the attorney appearing for the party to a suit is the mistake or negligence of the party, and no new trial will be allowed where such mistake arises from negligence or lack of skill. *Handy v. Davis*, 38 N. H. 411; *Heath v. Marshall*, 46 N. H. 40.

Where a party authorized his attorney to settle a suit, and supposing it had been so settled, gave no further attention to it, *held*, that the above facts constituted no ground for a new trial. *Patchin v. Wegman*, 19 Mo. 151.

A mistake of law coupled with negligence will not entitle a party to a new trial. *Russell v. Nelson*, 32 Iowa 215.

A surety cannot have a new trial on the ground of ignorance of a good defence known to the principal where he has been negligent in preparing the case. *Sayre v. King*, 17 W. Va. 562.

1. *Parks v. Nichols*, 20 Ill. App. 143.

In *Parks v. Nichols*, 20 Ill. App. 143, the court says: "A court should be particularly careful not to mislead the parties by its own course of action, and when it seems likely to have done so, it should afford prompt and adequate relief."

2. *Rolfe v. Rolfe*, 10 Ga. 143; *Wilson v. Brandon*, 8 Ga. 136; *D'Agrilan v. Tobin*, 4 E. C. L. 363; *Browning v. Huff*, 2 Bailey L. (S. Car.) 178.

Where no request is made to introduce further testimony, a motion for a new trial on the ground that important testimony was omitted will be denied, as it will be presumed that counsel and party were satisfied to let the evidence go to the jury. *Eigenbrun v. Smith*, 98 N. Car. 207.

Where important evidence, as the existence of an enabling statute of another State is inadvertently omitted, such inadvertence will not defeat a

valid defence. *Brick v. Campbell*, 50 N. J. L. 282.

Where, on trial for selling a mule as auctioneer without a licence, defendant's report of sale bore date after the expiration of his licence, and he moved for a new trial on the ground of surprise at the introduction of said report, which he swore he could show was post-dated by mistake, *held*, that the motion should have been granted. *Anderson v. State*, 41 Ark. 229.

3. *Bagnall v. Roach*, 76 Cal. 106.

4. *Mistake of Counsel*.—With this section should be compared various preceding sections in which it will appear that the mistakes of counsel are important factors in deciding cases elsewhere classified.

5. *Witters v. Sowles*, 31 Fed. Rep. 5; *India Rubber Comb. Co. v. Phelps*, 8 Blatchf. (U. S.) 85; *Hitchcock v. Tremaine*, 9 Blatchf. (U. S.) 550; *Prevost Gratz, Pet.* (C. C.) 364; *Livingston v. Hubbs*, 3 Johns. Ch. (N. Y.) 124; *Webster Loom Co. v. Higgins*, 13 Blatchf. (U. S.) 349; *De Florez v. Reynolds*, 16 Blatchf. (U. S.) 397; *Legrand v. Baker*, 6 Mon. (Ky.) 235; *Winchester v. Grosvenor*, 48 Ill. 517; *Dame v. Dame*, 38 N. H. 429-434; *Heath v. Marshall*, 46 N. H. 40; *Handy v. Davis*, 38 N. H. 411; *Endress v. Nelph*, 1 Disney (Ohio) 411; *Ratcliff v. Hicks*, 23 Tex. 173; *Southwestern R. Co. v. Craig*, 62 Ga. 361; *Anderson v. Market Nat. Bank*, 66 How. Pr. (N. Y.) 8; *Re Quinn's Estate*, 1 Connolly (N. Y.) Surrogate Rep. 381.

In *Dame v. Dame*, 38 N. H. 429-434, the court say: "It is not necessary to discuss the question whether a new trial will be granted where the party had due notice of the suit, and employed counsel, and was defaulted with the knowledge and assent of his counsel, but through some fault or mistake of the counsel. It would seem that a very clear case of accident, mistake or misfortune must be shown to induce the court to interfere."

the competency of a witness,<sup>1</sup> or the relevancy or materiality of certain evidence,<sup>2</sup> or the effect of a certain law upon the case at bar,<sup>3</sup> a new trial will not be granted. In certain instances, however, new trials have been permitted where, owing to peculiar facts in the case, it has appeared that the mistake of counsel was excusable.<sup>4</sup>

(3) *Mistake of Witnesses.*<sup>5</sup>—Where it clearly appears that a witness has made a mistake in giving his testimony, which is material to the issue, and which probably affected the verdict, a new trial will be granted.<sup>6</sup> The testimony by which it is proposed

In *Cutler v. Rice*, 14 Pick. (Mass.) 494, the attorney for the defendant in a real action, in consequence of perturbation of mind caused by dangerous illness in his family, neglected to make any claim for an allowance for betterments. Upon the proper showing, it was held that the court could, in its discretion, grant a new trial for the furtherance of justice.

Plaintiff's counsel brought suit for another client against the same defendant, which suit came to such a point that it should have been dropped from the docket, but this was not done. Plaintiff's suit was taken up on exceptions, which were sustained, and the case remanded, whereupon it should have been re-entered on the docket for new trial, but, when plaintiff's counsel looked at the docket, he saw the other case against the same defendant, and, mistaking it for plaintiff's case, failed to re-enter the latter. *Held*, that there was enough mistake to entitle plaintiff to a new trial, under Pub. St. R. I., ch. 221, § 2. *Burrough v. Hill*, 15 R. I. 190.

The defendant having been defaulted by reason of a mistake in his attorney, who had informed him of a change of the venue of the case as being to H county instead of D county, the judgment was set aside on the ground of surprise. *Hannah v. Indiana Cent. R. Co.*, 18 Ind. 431.

1. *Packer v. Heaton*, 9 Cal. 568.

2. *De Florez v. Reynolds*, 16 Blatchf. (U. S.) 397; *Northampton Bank v. Kidder*, 50 N. Y. Super. Ct. 246.

3. *Webster Loom Co. v. Higgins*, 13 Blatchf. (U. S.) 349.

4. *Price v. M'Ilvain*, 3 Brev. (S. Car.) 419; *McCune v. Northern Pac. etc. R. Co.*, 18 Fed. Rep. 875; *Symons v. Bunnell*, 80 Cal. 330. *Compare* *Birdwell v. Cox*, 18 Tex. 535.

An appellant from a judgment of a justice of the peace was allowed until the opening of court on the second day

of the term to enter his appeal. The entry was made by him on the first day, but was inserted by the clerk in an unusual place on the docket. The appellee's attorney, after examining the docket for the case without success on the first day, left a memorandum with the clerk, requesting him to enter his appearance if the appeal should be entered. The clerk assented, but inadvertently neglected to do so, and the appellee was defaulted. He had no knowledge of the fact until an officer called on him with an execution issued upon the judgment. *Held*, that he was entitled to an injunction and a new trial. *Seymour v. Miller*, 32 Conn. 402.

5. *Mistake of Witnesses.*—*Compare* with this section, *supra*, this title, SURPRISE AS TO EVIDENCE.

6. *Coddington v. Hunt*, 6 Hill (N. Y.) 595; *Mersereau v. Pearsall*, 6 How. Pr. (N. Y.) 293; *Wilson v. Brandon*, 8 Ga. 136; *Hewey v. Nourse*, 54 Me. 256; *Spillars v. Curry*, 10 Tex. 143; *Huson v. Egan*, 6 N. Y. Supp. 661; *Scofield Rolling Mills v. State*, 54 Ga. 635; *Richardson v. Fisher*, 7 Moore 546; *i. Bing*, 145.

Where a witness was so disconcerted that he was unable to give his evidence as to matters material to the issue, a new trial will be granted. *Ainsworth v. Sessions*, 1 Root (Conn.) 175. But see *Korte v. Hoffman*, 97 Mo. 284.

But if the mistake would not by correction decide the controversy, there being no explanation why the fact in regard to which the mistake was made was not proven by other witnesses, a new trial may be refused. *Brinson v. Faircloth*, 82 Ga. 185. See also *O'Kelly v. Felker*, 71 Ga. 775.

The mere statement of the witness that he was mistaken in his testimony will not afford a good ground for a new trial. *Jossey v. Stapleton*, 57 Ga. 144; *O'Kelly v. Felker*, 71 Ga. 775. But see *Mann v. State*, 44 Tex. 642.

to prove a mistake of a witness must be shown in the affidavit for a new trial, and also the reason why it was not introduced at the trial.<sup>1</sup> An affidavit of the mistaken witness must be produced showing that the testimony will be different in the next trial and that it is material.<sup>2</sup>

**VI. OBJECTIONS TO VERDICT—1. In General.**—A new trial is often the best and perhaps the only remedy for such irregularities in verdicts—as disregarding the court's instructions, reaching the verdict by irregular methods, and finding verdicts irregular in form. In such instances, however, the principles of law applied have only this relation to such a title as new trial, that, having first determined what was the duty of court or jury in the premises, the new trial is granted or refused as a result of the application of legal principles, either properly classified under other titles<sup>3</sup> or as varied as is the wide range of jurisprudence.<sup>4</sup>

**2. Verdict Contrary to Court's Instructions.**—Where the verdict is clearly contrary to the court's instructions, it will be set aside and a new trial granted.<sup>5</sup> It has been held that if the verdict is con-

The mistake of a witness testifying in her own behalf, which is the result of ignorance, inadvertence, or negligence, will not entitle her to a new trial. *Valentino v. Weil*, 67 Ga. 15; *Graham on N. T.* 187.

Mistake of witness in matters immaterial to the issue does not furnish a ground for a new trial. *Magnay v. Knight*, 1 M. & G. 944.

A new trial will not be granted because a witness did not use language to convey the meaning he intended. *Shelf v. Mullin*, 28 Minn. 251.

It is only in extreme cases that a mistake of witnesses should be allowed to afford a ground for a new trial. *O'Kelly v. Felker*, 71 Ga. 771. In this case the court say: "It will not do, except in extraordinary cases, to make such mistake a rule for granting a new trial. It is too tempting to parties to get affidavits of mistake from witnesses, and the temptation and tendency would be too great to bribery and perjury." See also *Trevor v. McKay*, 15 Ga. 550; *Scofield Rolling Mill Co. v. State*, 54 Ga. 635.

1. *Ellis v. Kelly*, 33 Miss. 695.

2. *Spillars v. Curry*, 10 Tex. 143.

3. See **JURY AND JURY TRIALS**, 12 Am. & Eng. Encyc. of Law, 371, where is set out the duty of a jury while deliberating, and what constitutes misconduct. Under **VERDICT** will be found treated what are regular and what irregular verdicts, and other matters closely allied thereto.

4. See **INSTRUCTIONS**, 11 Am. & Eng.

Encyc. of Law 236. It is evident that the correctness of the instructions of a court, which may be called upon in the same charge to deal with several branches of law, cannot be determined by applying abstract principles of law apart from the facts of particular cases, and that any attempt to deal with even one such principle here and away from the title under which it is properly classified might mislead if not accompanied by the full explanation to be found there. Instead, however, of entirely omitting the cases often classified in digests under this title new trials, it was thought better to insert some instances with the warning just given.

5. *Farley v. Budd*, 14 Iowa 289; *Sullivan v. Otis*, 39 Iowa 328; *Morss v. Johnson*, 38 Iowa 430; *Hayward v. Ormsbee*, 7 Wis. 11; *Dent v. Bryce*, 16 S. Car. 14; *Thompson v. Lee*, 19 S. Car. 489; *Gavin v. Lowry*, 7 Smed. & M. (Miss.) 24; *Freeman v. Price*, 1 Y. & J. 402; *Emerson v. Santa Clara Co.*, 40 Cal. 543; *Dillingham v. Snow*, 5 Mass. 547; *Howard Express Co. v. Wile*, 64 Pa. St. 201; *Levi v. Milne*, 2 Bing. 195; *Gainsford v. Blatchford*, 6 Price 36.

In *Cunningham v. Magoun*, 18 Pick. (Mass.) 13, *SHAW, C. J.*, said: "The great principle, which is at the basis of jury trial, is never to be lost sight of, that to all matters of law the court are to answer; to all controverted facts, the jury. The verdict of a jury is practically to be taken for truth."

trary to instructions it will be set aside, although the instructions do not state the law correctly; but other decisions oppose this view.<sup>1</sup> A verdict contrary to the law and the evidence will be set

"Formerly this distinction was effectually preserved by special pleading, whereby juries were compelled to answer yes or no to a precise fact averred on one side and denied on the other, and by attainments and other expedients where juries departed from the truth, through prejudice or corrupt motives. But by the prevailing use, in modern practice, of general declarations and general issues, the jury is in most cases left to find a general verdict, which necessarily embraces the whole matter of law and fact. The mode of trial, therefore, necessarily is, when the evidence is out, for the court to direct the jury hypothetically, adapting the instructions in the point of law to the state of evidence, putting it to the jury to return a verdict for the plaintiff or defendant, as they shall find certain facts proved to their satisfaction or otherwise by the evidence. The consequence obviously is that the jury, in finding a general verdict, do in form return a verdict embracing the matter of law as well as fact; and, therefore, as they may mistake the instructions of the court or may take the law into their own hands, imagining it to be severe and inequitable, they may return a verdict manifestly against the law and truth of the case. To render such a mode of trial safe and tolerable, there must exist a power somewhere to re-examine verdicts with some freedom, and when it is manifest that juries have been warped from the direct line of their duty, by mistake, prejudice, or even by an honest desire to reach the supposed equity, contrary to the law of the case, it will be the duty of the court to set the verdict aside. When, therefore, the evidence is clear, plain and strong, and the law has been clearly and explicitly stated to the jury, and they decide against the law, it imposes upon the court the duty of interfering, because it must be apparent that the jury has either unintentionally erred, by mistaking the terms of their instructions, or misapprehending the weight of the evidence, or that they have mistaken their duty or abused their trust . . . But where the question is purely matter of fact, where there is evidence for the minds of the jury actually and fairly to weigh and balance—where presumptions are to be raised and inferences

drawn, and the jury may be presumed fairly to have exercised their judgment, a court will not feel at liberty to set a verdict aside, although upon the same evidence they would have decided the other way."

Where a verdict of \$100 was rendered in favor of the plaintiff, when the jury had been instructed to find a verdict for \$200 or for the defendant, a new trial was granted. *Wehringer v. Ahlemeyer*, 23 Mo. App. 277.

Where the judge who tries a cause recommends a verdict for the plaintiff, with nominal damages, but the jury give substantial damages, such verdict cannot be treated as perverse. *Chilvers v. Graves*, 5 M. & G. 305.

When a verdict is found contrary to the direction of the judge, in which he stated that he considered the evidence on one side to preponderate, a new trial may be granted. *Coke v. Green*, 11 Price 736.

Where the court lays down the proper rule for the measurement of damages, which instruction is disregarded by the jury, a new trial will be granted. *Hoffman v. Bosch*, 18 Nev. 360.

When a verdict is in conflict with the instructions of the court and the evidence, the court may, upon its own motion, set the verdict aside. *Allen v. Wheeler*, 54 Iowa 628.

And if the evidence and instructions are not pertinent to the issues presented by the pleadings, overruling a motion for a new trial on the ground that the verdict is against such evidence and instructions, is not error. *Scott v. Morse*, 54 Iowa 732.

An appellate court will not reverse an order of the trial court granting a new trial on account of the jury disregarding instructions. *Howell v. Pugh*, 25 Kan. 96.

1. *Caffrey v. Gpome*, 10 Iowa 548; *Sullivan v. Otis*, 39 Iowa 328; *Cobb v. Illinois etc. R. Co.*, 38 Iowa 601; *Farley v. Budd*, 14 Iowa 289; *Browne v. Hickie*, 68 Iowa 530; *Rogers v. Murray*, 3 Bosw. (N. Y.) 357; *Dent v. Bryce*, 16 S. Car. 14; *Thornton v. Lane*, 11 Ga. 459; *Paul v. Casselberry*, 12 Phila. (Pa.) 313.

**Contrary Decisions.**—However, this doctrine has been very seriously questioned. *Brock v. Garret*, 16 Ga. 487;

aside;<sup>1</sup> or where it is contrary to law.<sup>2</sup> An order of the trial court granting a new trial on account of the jury disregarding instructions will not be disturbed by the appellate court.<sup>3</sup>

**3. Verdict Contrary to Weight of Evidence.**—(a) **DEFINITION OF WEIGHT OF EVIDENCE.**—Weight of evidence is a phrase used to signify that there is proof on one side greater than that on the other.<sup>4</sup> But it does not consist wholly in volume, nor in the number of witnesses sworn.<sup>5</sup> The weight of evidence is for the jury.<sup>6</sup>

(b) **GENERAL PRINCIPLES AS TO WEIGHT OF EVIDENCE.**—When a verdict is clearly against the weight of evidence, it is the duty of the court to set it aside and order a new trial.<sup>7</sup> But the

*Peck v. Land*, 2 Ga. 1; *Wellborn v. Weaver*, 17 Ga. 267; *Armstrong v. Keith*, 3 J. J. Marsh. (Ky.) 153; *Van Vacter v. Brewster*, 1 Smed. & M. (Miss.) 400; *Campbell v. Sproat*, 1 Yeates (Pa.) 327; *Keller v. Dillon*, 26 Ga. 701. See also *McCall v. Seever*, 5 Ind. 187; *Clifton v. Shannon*, 4 Ind. 498; *Roberts v. Nod-wiit*, 8 Ind. 339; *McLachlan v. Wright*, 3 Wend. (N. Y.) 348.

In the case of *Thompson v. Lee*, 19 S. Car. 489, it was held that a jury are bound to take the law of the case from the court, and whenever they disregard their instructions as to the law their verdict should be promptly set aside and a new trial granted. See also *Dent v. Bryce*, 16 S. Car. 14.

Although the instructions of the court are binding upon the jury, yet when the court, by a clerical error, used the word "defendants" where "plaintiff" was meant, and the error and intent were manifest, and the jury followed the intent and not the language, the verdict should not be set aside on the ground that the verdict is contrary to the instructions. *Eldridge v. Bell*, 64 Iowa 125.

1. *Mann v. Williamson*, 70 Mo. 661; *Hearne v. Keath*, 63 Mo. 84; *Hartt v. Leavenworth*, 11 Mo. 629; *Robbins v. Phillips*, 68 Mo. 100; *Moore v. Hutchinson*, 69 Mo. 429; *City Council v. Hollenback*, 3 Strobb. (S. Car.) 355; *State v. Sims*, *Dudley* (Ga.) 213; *Yarborough v. Tate*, 14 Tex. 483; *Walker v. Smith*, 1 Wash. (U. S.) 152.

In *Indiana* and *California* it is not a ground for a new trial that the judgment is contrary to the law or evidence, the statutes of those States not making this a ground. *Rosenzweig v. Frazer*, 82 Ind. 342. See also *Rodefer v. Fletcher*, 89 Ind. 563; *Martin v. Matfield*, 49 Cal. 43.

2. *Pace v. Mealing*, 21 Ga. 464; *Thomas v. Brown*, 1 McCord (S. Car.) 557; *Dillingham v. Snow*, 5 Mass. 547; *Ross v. Eason*, 1 Yeates (Pa.) 14; *Marr v. Johnson*, 9 Yerg. (Tenn.) 1. See also *Bank of Newbern v. Pugh*, 2 Hawks (N. Car.) 389; *Cook v. United States*, 1 Greene (Iowa) 56.

If it appears that the jury acted under a misapprehension of the law, the verdict may be set aside, in the discretion of the court, although against neither the law nor evidence. *Todd v. Boone Co.*, 8 Mo. 431; *State v. Ross*, 26 N. J. L. 224. See also *Higgins v. Lee*, 16 Ill. 495.

If the verdict be in accordance with justice it will stand, though the ruling on a point of law may have been doubtful. *Ingraham v. South Carolina Ins. Co.*, 1 Treadw. Const. (S. Car.) 707; *Rogers v. Page*, *Brayt* (Vt.) 169; *Breckinridge v. Anderson*, 3 J. J. Marsh. (Ky.) 710; *Pearson v. Burditt*, 26 Tex. 157.

3. *Howell v. Pugh*, 25 Kan. 96. See also *Allen v. Wheeler*, 54 Iowa 628.

If the instructions which are disregarded by the jury are not pertinent to the issues presented by the pleadings, an order of the trial court overruling a motion for a new trial therefor will not be reversed. *Scott v. Morse*, 54 Iowa 732.

**4. Verdicts Contrary to Evidence.**—2 *Bouv. L. Dict.* 658.

5. *Green v. Taney*, 7 Colo. 278.

6. *Cruikshank v. Fourth Nat. Bank*, 26 Fed. Rep. 584.

7. *Green v. Taney*, 7 Colo. 278; *Aspley v. Thomas*, 17 Tex. 220; *Willis v. Lewis*, 28 Tex. 185; *Lake Shore etc. R. Co. v. Kuhlman*, 18 Ill. App. 222; *Ohio etc. R. Co. v. Schiebe*, 44 Ill. 460; *Gibson v. Webster*, 44 Ill. 483; *Boudreau v. Boudreau*, 45 Ill. 480; *Gaster v. Hodgins*, 21 Ark. 468; *Branch v. Wil-*

son, 12 Fla. 543; *Sanderson v. Hagan*, 7 Fla. 318; *Iron Mountain Bank v. Armstrong*, 11 West Rep. (Ind.) 93; *Edwards v. O'Brien*, 2 Wyoming 474; *Granger v. Lewis*, 2 Wyoming 231; *Long v. Lewis*, 16 Ga. 154; *Cook v. Jones*, 28 Ga. 589; *Stancell v. Kenan*, 33 Ga. 56; *Irving v. Cunningham*, 58 Cal. 306; *Wells v. Waterhouse*, 22 Me. 131; *Wait v. McNeil*, 7 Mass. 261; *Curtis v. Jackson*, 13 Mass. 507; *State v. Miller*, 10 Minn. 313; *Corlies v. Little*, 14 N. J. L. 373; *New Jersey Flax Co. v. Mills*, 26 N. J. L. 60; *Young v. Wilson*, 24 Miss. 694; *Manyz v. Zeigler*, 49 Ill. 303; *Blake v. McMullen*, 91 Ill. 32; *Monarch Gas etc. Co. v. McLaughlin*, 1 Idaho, N. S. 617; *Armour v. McFadden*, 9 Ill. App. 508; *Meinhard v. Lilienthal*, 17 Fla. 501.

Although the jury are the judges of the weight of evidence they have no right to disregard competent evidence that is unimpeached. *New Jersey Flax Co. v. Mills*, 26 N. J. L. 60; *Chicago etc. R. Co. v. Stumps*, 69 Ill. 409; *Blake v. McMullen*, 91 Ill. 32; *Wood v. Barker*, 49 Mich. 295; *Rankin v. Thompson*, 7 Colo. 381; *McAfee v. Robertson*, 41 Tex. 355. *Compare* *Facey v. Forrester*, 3 D. P. C. 668; *Cann v. Facey*, 5 N. & M. 405.

Even if a witness is impeached but whose testimony is corroborated, his testimony cannot be disregarded by the jury. *Yundt v. Hartrunf*, 41 Ill. 9; *Chittenden v. Evans*, 41 Ill. 251; *Huddle v. Martin*, 54 Ill. 258; *Crabtree v. Hagenbaugh*, 25 Ill. 233.

And the fact that the jury had a view presents no insuperable obstacle to granting a new trial, on the ground that the verdict is against the evidence. *Davis v. Jenney*, 1 Metc. (Mass.) 221; *Tully v. Fitchburgh R. Co.*, 134 Mass. 499. *Compare* *Chicago etc. R. Co. v. Hopkins*, 90 Ill. 316. If the case is tried by the court and his decision is contrary to the evidence, the finding will be set aside. *Benedict v. Lawson*, 5 Ark. 514; *Wiegble v. Thomsen*, 102 Ill. 156; *Irving v. Cunningham*, 58 Cal. 306.

Great weight is attached to the findings of the trial court because it has the witnesses before it; but this rule does not hold when the decision is based on depositions. *Baker v. Rockawand*, 118 Ill. 365; *McCormick v. Miller*, 102 Ill. 208; *Knisele v. Sampson*, 100 Ill. 573; *Sherman v. Mitchell*, 46 Cal. 576.

If the verdict of the jury is regarded by the trial court to be against the

weight of evidence, an appellate court will set aside the judgment based upon the verdict, although the trial court deferred to the judgment of the jury. *Turner v. Turner*, 85 Tenn. 387; *England v. Burt*, 4 Humph. (Tenn.) 401; *Mount Edgecombe v. Symonds*, 1 Price 278. 4 Chitty Gen. Prac. 74.

However, this principle of law is most emphatically denied by other courts. COLBURN, J., says: "The contention of the defendant, that he was entitled to a new trial, upon the statement of the judge that he was of the opinion that the verdict was against the weight of evidence, cannot be sustained. A judge has a right to set aside a verdict, which, in his opinion, is against the weight of evidence, and in some cases it is his duty to do so; but whether he shall do so in any given case is a question addressed to his judicial discretion. To require him as a matter of law to set aside every verdict, which is in his opinion against the weight of evidence, would result practically in the trial of facts by the court instead of the jury." *Reeve v. Dennett*, 137 Mass. 315. See also *Cunningham v. Magoun*, 18 Pick. (Mass.) 13; *Muskegon Nat. Bank v. North West Mut etc. Co.*, 10 Daly (N. Y.) 540; *Miller v. Citizens' etc. Ins. Co.*, 12 W. Va. 116; *Monarch Gas etc. Co. v. McLaughlin*, 1 Idaho, N. S. 650; *Swain v. Hall*, 3 Wils. 45. See also *Allaway v. Bennett*, 6 Jur., N. S. 347 exch.

Courts generally exercise the power to set aside a verdict as being contrary to the evidence not only with caution but with a certainty that the jury has acted with passion or prejudice, or with some motive other than awarding impartial justice to the parties. *Reese v. Third Ave. R. Co.*, 16 Fed. Rep. 368; *McAlexander v. Puryear*, 48 Miss. 420; 2 Bouv. L. Dict. 658; *Schultz v. Pacific Ins. Co.*, 14 Fla. 73; *Green v. Taney*, 7 Colo. 278; *Barth v. Jones*, 7 Colo. 464; *Graham v. People*, 115 Ill. 566; *Lake Shore etc. R. Co. v. Kuhlman*, 18 Ill. App. 222; *Needham v. People*, 98 Ill. 275; *Willis v. Lewis*, 28 Tex. 185; *Bacon v. Parker*, 12 Conn. 212; *Murray v. Wells*, 57 Iowa 26; *Bryant v. Glidden*, 39 Me. 458; *Friesz v. Fallon*, 24 Mo. App. 439; *Price v. Evans*, 49 Mo. 396; *Spohn v. Missouri Pacific R. Co.*, 87 Mo. 74-84; *Whitsett v. Ransom*, 79 Mo. 258; *Baker v. Stonebraker*, 36 Mo. 338; *Holland v. Griffith*, 13 Neb. 472; *Gartanati v. Hinton*, 2 Wyo. 271; *Colt v. Sixth*

preponderance of evidence against the verdict must be very strong.<sup>1</sup> If the weight of evidence on any one point essential to sustain the verdict, is clearly against the verdict, a new trial should be granted.<sup>2</sup> Although the verdict may be against the weight of evidence, a new trial will not be accorded the plaintiff who is only entitled to nominal damages,<sup>3</sup> unless some question

Ave. R. Co., 33 N. Y. Super. Ct. 189.

1. *Johnson v. Blanchard*, 5 R. I. 24; *Barth v. Jones*, 7 Colo. 464; *Murray v. Basnett*, 18 Fla. 609; *Bust v. Cornell Steamboat Co.*, 24 Fed. Rep. 188; *Potvin v. Curran*, 13 Neb. 302; *Harrington v. Chambers*, 3 Utah 94; *Davey v. Aetna L. Ins. Co.*, 20 Fed. Rep. 494; *Cheney v. New York Cent. etc. R. Co.*, 16 Hun (N. Y.) 415; *Wakeman v. Hungerford*, 16 Fed. Rep. 741; *Waldo v. Beckwith*, 1 N. Mex. 97; *Deacle v. Hancock*, 13 Price 226; *Singleton v. Mann*, 3 Mo. 465; *Reddick v. Long Island R. Co.*, 50 N. Y. Super. Ct. 657.

Although the appellate court may consider the verdict as contrary to the one they would have rendered, they will not set it aside unless it is clearly against the evidence. *Long v. Fox*, 100 Ill. 43; *McNeil v. Ross*, 44 Wis. 539; *Churchill v. Price*, 44 Wis. 540; *Tolford v. Tolford*, 44 Wis. 547; *Mackey v. New York Cent. R. Co.*, 27 Barb. (N. Y.) 528; *Lavigne v. Lewiston Mills Co.* (Me. 1887), 10 Atl. Rep. 62; *Nash v. Somes* (Me. 1887), 10 Atl. Rep. 447; *Muskegon Bank v. Northwestern Mut. L. Ins. Co.*, 19 Fed. Rep. 405; *Harrington v. Chambers*, 3 Utah 94; *Chamberlain v. Raymond*, 3 Utah 117; *Swain v. Hall*, 3 Wils. 45; *McBurney v. Hollingsworth*, 40 Ga. 197; *Picquet v. Gibbs*, 40 Ga. 455; *Minturn v. Bliss*, 77 Cal. 90; *Sharp v. Huffman*, 79 Cal. 404; *Pacific etc. Rolling Mills v. Telegraph Hill Co.*, 79 Cal. 340.

When a preponderance of evidence is in favor of the verdict, the court has no discretion to set it aside as unsustainable by the evidence. *Sparlock v. West*, 80 Ga. 302. But if the only evidence be that of the plaintiff, and it is in some respects contradictory and inconsistent, the court may, in its discretion, set the verdict aside. *Conklin v. Dubuque*, 54 Iowa 571.

Where the verdict is fairly sustained by the evidence on every material point, it will not be disturbed in the supreme court on the weight of evidence. *DuSouchet v. Dutcher*, 113 Ind. 249; *Rudolph v. Lane*, 57 Ind. 115; *Fort Wayne*

*etc. R. Co. v. Husselman*, 65 Ind. 73; *Campbell v. Indianapolis etc. R. Co.*, 110 Ind. 490; *Barnes v. Gragg*, 28 Kan. 51.

Every reasonable presumption is made in support of a verdict fairly rendered, which cannot be set aside as against the evidence, unless the evidence is plainly insufficient to warrant the finding. *Jones v. Rixey*, 79 Va. 656; *Blair v. Willson*, 28 Gratt. (Va.) 165; *McCann v. Meehan*, 53 Wis. 541.

2. *Lyle v. Rollins*, 25 Cal. 437; *Johnson v. Burns*, 29 Kan. 81; *Chesley v. King*, 74 Me. 164; *Mitchell v. Brown*, 88 N. Car. 156; *Timon v. San Patricio Co.*, 58 Tex. 263.

In ejectment, upon a plea of the statute of limitations the court instructed the jury that good faith entered into the question of adverse holding. The jury found specially that the possession of the defendant was not upon a claim of right in good faith; they also found that his possession was adverse to plaintiff, and had continued five years. *Held*, that if good faith was material the verdict was contradictory, and if not the instructions were erroneous and a new trial should be granted. *Cattle v. Morris*, 57 Cal. 317.

In an action upon a note the defence was based upon alleged fraud, false representations, duress and want of consideration, none of which defences were sustained by the evidence. *Held*, that a verdict against the plaintiff should be set aside. *Perkins v. Trinka*, 30 Minn. 241.

3. *Macrow v. Hull*, 1 Burr. 11; *Farewell v. Chaffey*, 1 Burr. 54; *Tripp v. DuVal*, 33 Ark. 811; *Jennings v. Loring*, 5 Ind. 250; *State v. Miller*, 5 Blackf. (Ind.) 381; *Black v. Coan*, 48 Ind. 385; *State v. Cloud*, 94 Ind. 174; *Futch v. Walker*, 1 Bailey (S. Car.) 98; *Elwell v. Bradham*, 2 Spears (S. Car.) 186; *Cooke v. Barr*, 39 Conn. 206; *Jones v. King*, 33 Wis. 422; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558; *Briggs v. Morse*, 42 Conn. 258; *Brantingham v. Fay*, 1 John. Cas. (N. Y.) 255; *Ex parte Bailly*, 2 Cow. (N. Y.) 479; *Rundell v. Butler*, 10 Wend. (N. Y.) 119;

of right is involved.<sup>1</sup> Nor will a new trial be granted to a defendant against whom the jury have found a less sum than the evidence showed to be due, if anything were due;<sup>2</sup> and if the verdict be for the defendant, against evidence, a new trial will not be granted if the plaintiff has received no real injury.<sup>3</sup> A verdict will not be set aside on account of difference of opinion of the trial judge and the jury upon the merits of the case, unless the court can clearly say that the jury were not justified in their findings.<sup>4</sup>

(c) **WEIGHT OF EVIDENCE AND CONFLICTING EVIDENCE.**—As a general rule, where the evidence is conflicting, a court will not grant a new trial, even though the weight of evidence is against the verdict,<sup>5</sup> especially if there is only a preponderance of evi-

*Harris v. Jones*, 1 M. & Rob. 173; *Warner v. Lockerby*, 1 Minn. 421; *Harris v. Kerr*, 37 Minn. 537.

When the court ordered the jury to find only nominal damages against the defendant and they gave a verdict for substantial damages, the verdict was allowed to stand. *Chilvers v. Greaves*, 4 M. & G. 578; *Chilvers v. Greaves*, 6 Scott N. R. 539.

1. *Ross v. Thompson*, 78 Ind. 90; *Watson v. Van Meter*, 43 Iowa 76; *Tripp v. DuVal*, 33 Ark. 811.

2. *Alderman v. Cox*, 74 Mo. 78.

In a conspiracy case the jury rendered a large verdict against two of the defendants and only \$100 against the third, who sought to have the verdict set aside on the ground that the small amount of the verdict indicated that the jury did not find the issues against him. *Held*, that the verdict should stand. *Fisher v. Meyer*, 20 Blatchf. (U. S.) 512.

3. *Burton v. Thompson*, 2 Burr. 664.

If the verdict be for the plaintiff upon a presumption contrary to evidence, the court will not grant a new trial if the plaintiff is entitled to recover in conscience and equity. *Wilkinson v. Payne*, 4 Duff. & East, 468. See also *Deerly v. Duchess of Mazarine*, 2 Salk. 646; *Smith v. Payn*, 2 Salk. 644.

In hard actions a verdict for the defendant will rarely be set aside. *Dunkly v. Wade*, 2 Salk. 653; *Sparks v. Spicer*, 2 Salk. 648.

If the court can see that substantial justice has been done and that a new trial would result in the same verdict, a new trial will not be granted on the ground that the verdict was against the evidence. *Boulton v. Pritchard*, 1 B. C. Rep. 173; *Boulton v. Pritchard*, 4 D. & L. 117; *Pennsylvania v. McLaughlin*, 36 Iowa 538.

4. *Gilmer v. Grand Rapids*, 16 Fed. Rep. 708; *Oregon etc. R. Co. v. Oregon Steam Nav. Co.*, 3 Oreg. 178; *Muskegon Nat. Bank v. Northwestern Mut. L. Ins. Co.*, 19 Fed. Rep. 405; *Galther v. Kansas City etc. R. Co.*, 27 Fed. Rep. 544; *Walker v. Smith*, 1 Wash. (U. S.) 152; *Nash v. Somers* (Me. 1887), 10 Atl. Rep. 447; *State v. Tarrant*, 24 S. Car. 593; *Reeve v. Dennett*, 137 Mass. 315; *Stickney v. Atwood*, 6 Dane Ab. 251.

5. *Morgan v. Ryerson*, 20 Ill. 343; *Cross v. Casey*, 25 Ill. 562; *Robinson v. Parish*, 62 Ill. 130; *Clifford v. Luhring*, 69 Ill. 401; *Kightlinger v. Egan*, 75 Ill. 141; *Miller v. Balthasser*, 78 Ill. 302; *Lennon v. Goodspeed*, 89 Ill. 438; *Hull & Co. v. Alexander*, 26 Iowa 569; *Crawford v. Wolf*, 29 Iowa 567; *Boggs v. Chicago etc. R. Co.*, 29 Iowa 577; *Phillips v. Wilpers*, 2 Lans. (N. Y.) 389; *Hall v. Henline*, 9 Ind. 256; *Treadwell v. Phinizy*, 41 Ga. 63; *Newton v. Price*, 41 Ga. 186; *Thompson v. State*, 55 Ga. 47; *McAlexander v. Puryear*, 48 Miss. 420; *Lindsay v. Wayland*, 17 Ark. 385; *Palmer v. People*, 4 Neb. 68; *People v. Simpson*, 50 Cal. 304; *Milo v. Gardiner*, 41 Me. 549; *Dollman v. Munson*, 90 Mo. 85; *Murray v. Washington etc. R. Co.*, 2 McArthur (D. C.) 195; *Morss v. Sherrill*, 63 Barb. (N. Y.) 21; *Branch v. Dever*, 18 Tex. 611; *Rees v. Lawless*, 1 A. K. Marsh. (Ky.) 58; *Sibley v. Easton*, 1 A. K. Marsh. (Ky.) (551) 410; *Cheney v. New York Cent. R. Co.*, 16 Hun (N. Y.) 415.

WARNER, J., says: "When there is evidence on both sides in relation to the matter in controversy between the parties and a verdict of the jury is not decidedly and strongly against the weight of evidence, this court will not control the discretion of the court below, in re-



fusing to grant a new trial." *Treadwell v. Phinizy*, 41 Ga. 63. See also *Holmes v. Booher*, 41 Ga. 125; *Sherman v. Mitchel*, 46 Cal. 576; *Marble v. Fay*, 49 Cal. 585; *Atlantic etc. R. Co. v. Holcombe*, 76 Ga. 590; *People v. Ah Tl*, 9 Cal. 16. But when it is clear that justice has not been done, the appellate court will control the discretion of the trial court. *Vincent v. Chicago etc. R. Co.*, 29 Iowa 592. And in such cases conflict of testimony should not prevent the trial court from setting aside the verdict. *Dewey v. Chicago etc. R. Co.*, 31 Iowa 373; *Sherman v. Mitchel*, 46 Cal. 576; *Mullins v. Wieland*, 68 Cal. 231, and cases cited.

Although the evidence is conflicting, it is not necessarily an abuse of discretion for the trial court to grant a new trial on the ground that the verdict is against the weight of evidence. *Mullins v. Wieland*, 68 Cal. 231. See also *Bander v. Tyrrel*, 59 Cal. 99; *Marble v. Fay*, 49 Cal. 585.

In *Hull & Co. v. Alexander*, 26 Iowa 569, the court says: "Without seeing and hearing the witnesses testify, but looking alone to the evidence as we have it in this record, we should find the other way. But there is a direct conflict in the testimony, and many of the witnesses on either side are directly or indirectly interested. In such cases the jury are peculiarly fitted to determine the credibility of the witnesses and weight of testimony, and the case must be very strong indeed to justify the reversal of a judgment on this ground by an appellate court." See also *Hall v. Hodge*, 2 Tex. 323.

After two concurring verdicts upon conflicting testimony the court will not set aside the verdict the second time on the weight of evidence, when there has been no attempt to show new evidence. *Milliken v. Ross*, 4 Woods (U. S.) 69.

If the case is tried by the court without a jury, a verdict based upon conflicting evidence will not be disturbed. *Rowan v. Teague*, 24 Ind. 304; *Tuten v. Stone*, 12 Rich. L. (S. Car.) 448; *Paul v. Perez*, 7 Tex. 338. See also *Sawin v. Izard*, 26 Ark. 371; *Hamilton v. Iowa City Nat. Bank*, 40 Iowa 307; *Sisters of Visitation v. Glass*, 45 Iowa 154; *Murray v. Wells*, 57 Iowa 26.

A verdict supported by some evidence will stand, though it may be against the weight of evidence. *Buck v. Steffey*, 65 Ind. 58; *Frank v. Purkhiser*, 83 Ind. 496; *Addems v. Suver*, 89 Ill. 482; *Buchanan v. McLennan*, 105 Ill. 56;

*Shevalier v. Seager*, 121 Ill. 564; *Kansas Pac. R. Co. v. Kunkel*, 17 Kan. 51; *Barnes v. Gragg*, 28 Kan. 51; *Osborne v. Ehrhard*, 37 Kan. 413; *Warren v. Cummings*, 37 Wis. 81; *Davey v. Aetna L. Ins. Co.*, 25 Fed. Rep. 494; *Rogers v. King*, 12 Ga. 229; *Bennet v. State*, 13 Ark. 694; *Maims v. State*, 13 Ark. 285; *Lindsay v. Wayland*, 17 Ark. 385; *Hawkins v. Haynes*, 71 Ga. 40; *Matthis v. State*, 33 Ga. 24; *Tiller v. Spradley*, 39 Ga. 35; *Harger v. Spofford*, 46 Iowa 11; *Cole v. Coskery*, 63 Iowa 526; *Witter v. Little*, 66 Iowa 431.

Courts should be reluctant to set aside a verdict where there is evidence to support it, or the evidence is of doubtful interpretation. *Gore v. Moses*, 1 W. Ter. 7.

When the evidence is voluminous and conflicting and of such a nature that it would support a verdict either way, the verdict will not be disturbed by the supreme court. *Buchanan v. McLennan*, 105 Ill. 56; *Calvert v. Carpenter*, 96 Ill. 63.

But in a criminal case, where the evidence is conflicting and contradictory, so that if the jury had been properly instructed the supreme court would not have felt justified in interfering with the verdict, yet if there be enough of evidence for the defendant to arouse a reasonable doubt whether the jury would have returned such verdict if properly instructed, and they have not been so instructed, a new trial will be granted. *Chambers v. People*, 105 Ill. 409.

Where there is evidence on both sides, though the verdict be against the weight of evidence, it will not be disturbed for that cause alone. *Higgin v. Higgin*, 2 A. K. Marsh. 500; *McC Campbell v. McC Campbell*, 2 A. K. Marsh. 551; *Berry v. Elliott*, 25 Ark. 89; *Thompson v. Anthony*, 48 Ill. 468; *O'Brien v. Palmer*, 49 Ill. 72; *Miller v. Balthasser*, 78 Ill. 302.

Where the evidence is so conflicting that a verdict for the defendant might be sustained, a new trial will not be granted because the verdict is contrary to the evidence. *Owens v. Missouri Pac. R. Co.*, 67 Tex. 679; *McCarthy v. Mooney*, 49 Ill. 247; *Berry v. Elliott*, 25 Ark. 89; *Barth v. Jones*, 7 Cal. 464; *Buchanan v. McLennan*, 105 Ill. 56.

In the case of *Fort Wayne etc. R. Co. v. Husselman*, 65 Ind. 73, it was held that the appellate court would not disturb the verdict on the mere

weight of evidence. *HAWK, J.*, in giving the opinion of the court, says: "How can this court or its judges possibly know that the evidence in support of the verdict or finding has been 'clearly and overwhelmingly, or conclusively contradictory?' To arrive at such a conclusion, must we not weigh the evidence? If so, how can we, as an appellate court, by merely reading the written evidence, without any personal knowledge of the intelligence or character of the witnesses, or any of those living *indicia* before us by which men ordinarily judge of the truthfulness and credibility of evidence, determine that the evidence in support of the verdict or finding has been 'clearly and overwhelmingly, or conclusively contradictory?' When a jury have passed upon this question, and returned their verdict, and when the court under whose eye and within whose hearing the evidence has been introduced and the cause has been tried, has refused to disturb the verdict upon the weight or sufficiency of the evidence, we are clearly of the opinion that it is neither our province nor our duty to reverse the judgment of the trial court, merely because it may seem to us from our reading of the record that the evidence is clearly and overwhelmingly or conclusively contradicted." See also *Evansville etc. R. Co. v. Smith*, 65 Ind. 92; *Atherton v. Allen*, 65 Ind. 240; *Dooley v. Jennings*, 6 Mo. 61. Compare *Toledo etc. R. Co. v. Goddard*, 25 Ind. 185.

In negligence cases, if there be a presumption of negligence and the evidence is conflicting, the supreme court will not disturb a verdict which is satisfactory to the trial court. *Georgia R. Co. v. Cox*, 64 Ga. 619.

Where there is a conflict of testimony and correct instructions the verdict must stand. *Powers v. Cavanaugh*, 17 Ill. App. 77; *Knightlinger v. Egan*, 75 Ill. 141; *Hewett v. Estelle*, 92 Ill. 218; *Chicago etc. R. Co. v. Olson*, 12 Ill. App. 245; *Halland v. Brooks*, 40 Ga. 94.

Where there is a conflict of evidence and the evidence of the plaintiff standing by itself is sufficient to support the verdict, the appellate court will not reverse the decision of the trial court. *Calvert v. Carpenter*, 96 Ill. 63. See also *Sparks v. Etheredge*, 82 Ga. 294; *McCann v. Meehan*, 53 Wis. 541; *Merrell v. Nightingale*, 39 Wis. 247; *Harrington v. Chambers*, 3 Utah 94; *Grove v. Kansas*, 75 Mo. 672.

Where a verdict of the jury is founded upon the testimony of a witness directly contradicted by another witness, and the trial court sets the verdict aside, the supreme court will not reverse the order granting a new trial. *McCreary v. Hart*, 39 Kan. 216. See also *Pearce v. Vaughn*, 25 Ga. 27; *Georgia R. Co. v. Cox*, 64 Ga. 619.

If there be a conflict of testimony upon material points the verdict will not be disturbed. *Pinschower v. Hanks*, 18 Nev. 99; *Holland v. Brooks*, 40 Ga. 94; *Lyle v. Rollins*, 25 Cal. 437.

If the court is satisfied that the jury has failed to comprehend the force of the evidence or the charge of the court, a new trial will be granted. *Gaither v. Kansas City etc. R. Co.*, 27 Fed. Rep. 544. Compare *Chicago etc. R. Co. v. Bock*, 17 Ill. App. 17; *Gregory v. Tuffs*, 1 C. M. & R. 300; 2 D. P. C. 711; 4 Tyr. 820.

A general verdict will stand if there be sufficient evidence to support it on one of the issues. *Crosett v. Whelan*, 44 Cal. 200; *Missouri etc. T. R. Co. v. Weaver*, 16 Kan. 456. And the general verdict will not be disturbed, if in proper form, because the jury failed to answer the interrogatories. *Redford etc. R. Co. v. Rainbolt*, 99 Ind. 551.

Nor will the fact that special findings are indefinite, uncertain, conflicting or merely expressions of opinions, or are not within the issues, or are not sufficient answer to the questions put, be a ground for a new trial, the verdict being general. *Keesling v. Ryan*, 84 Ind. 89. Compare *Union Pac. R. Co. v. Fray*, 31 Kan. 739; *McCarty v. James*, 62 Iowa 257; *Atchison etc. R. Co. v. Brown*, 33 Kan. 757.

Where the special findings are inconsistent and contradictory a new trial will be granted. *Aultman v. Mickey*, 41 Kan. 348; *Stoss v. Allman*, 64 Cal. 47; *Chicago etc. R. Co. v. Townsend*, 38 Kan. 78; *Burns v. North Chicago Rolling Mill Co.*, 60 Wis. 541; *Cottrell v. Nixon*, 109 Ind. 378; *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 472; *The Minneapolis Harvester Works Co. v. Cummings*, 26 Kan. 367; *Porter v. Western etc. R. Co.*, 97 N. Car. 66; and cases cited; *Ellsworth etc. R. Co. v. Maxwell*, 39 Kan. 651.

When a special verdict is defective because it does not find all the facts necessary to cover the issues, a new trial may be refused if the error alleged does the complaining party no injury. *Harness v. Harness*, 81 Ind. 160. See

dence against the verdict.<sup>1</sup> But if the verdict is manifestly against the weight of evidence it may be set aside, notwithstanding the evidence is conflicting;<sup>2</sup> and also if it appear that the jury have been influenced by partiality, passion, or some undue bias,<sup>3</sup> and if there be not sufficient evidence to support it.<sup>4</sup>

also *Aunas v. Milwaukee etc. R. Co.*, 67 Wis. 46.

1. *Bloom v. Crane*, 24 Ill. 48; *Medler v. State*, 26 Ind. 171; *McDonald v. Maudlin*, 29 Ind. 87; *Kaufman v. Bott*, 29 Ind. 521; *Hull & Co. v. Alexander*, 26 Iowa 566; *Glidden v. Dunlap*, 28 Me. 379; *State v. Burnside*, 37 Mo. 343; *Branch v. Dever*, 18 Tex. 611; *Howard v. Ruy*, 25 Tex. 88; *Phillips v. Wilpers*, 2 Lans. (N. Y.) 389; *Morss v. Sherrill*, 63 Barb. (N. Y.) 21; *Newell v. Wheeler*, 4 Robt. (N. Y.) 190; *Trinity Church v. Higgins*, 4 Robt. (N. Y.) 372; *Coddington v. Carnley*, 2 Hilt. (N. Y.) 528; *Tonstall v. Blshong*, 2 A. K. Marsh. (Ky.) 522; *Flournoy v. Newton*, 8 Ga. 306.

2. *Bush v. Kindred*, 20 Ill. 93; *Hammond v. Wadhams*, 5 Mass. 353.

It has been held that when the verdict is plainly against the weight of evidence, although the latter may have been conflicting, it is the duty of the court to set aside the verdict and order a new trial. *Dickey v. Davis*, 39 Cal. 565; *People v. Baker*, 39 Cal. 686. See also *Williams v. Townsend*, 15 Kan. 563. In this case *VALENTINE, J.*, says: "It is unquestionably the duty of the district court to set aside a verdict and grant a new trial whenever the jury have manifestly mistaken the evidence. And the district court cannot shirk their responsibility by saying that the jury are the exclusive judges of all questions of fact." See also, *Chicago etc. R. Co. v. Stumps*, 69 Ill. 409.

3. *Glidden v. Dunlap*, 28 Me. 379; *Gordon v. Gilman*, 48 Me. 473; *Housatonic R. Co. v. Knowles*, 30 Conn. 313; *Bolton v. Howell*, 18 Ind. 181; *Schultz v. Pacific Ins. Co.*, 14 Fla. 73; *Murray v. Basnett*, 18 Fla. 609; *Price v. Evans*, 49 Mo. 396; *Morss v. Sherrill*, 63 Barb. (N. Y.) 21; *Armour v. McFadden*, 9 Ill. App. 508; *Lake Shore etc. R. Co. v. Kuhlman*, 18 Ill. App. 222; *Holland v. Griffith*, 13 Neb. 472; *Melhop v. Doan*, 36 Iowa 630; *Moore v. Moore*, 39 Iowa 461; *First Nat. Bank v. Charter Oak Ins. Co.*, 40 Iowa 572; *Hall v. Ballou*, 58 Iowa 585; *Gibson v. Fischer*, 68 Iowa 29; *Woodward v. Squires*, 39 Iowa 435.

Where there is a special finding against the express admission of the party who obtains the verdict, it will be presumed that the jury were governed by passion and prejudice. *Jeffrey v. Keokuk etc. R. Co.*, 51 Iowa 439.

4. *Colt v. Sixth Ave. R. Co.*, 33 N. Y. Super. Ct. 489; *Indianapolis etc. R. Co. v. Stout*, 53 Ind. 143; *Waldo v. Beckwith*, 1 N. Mex. 97; *Leavingsworth v. Fox*, 2 Bay (S. Car.) 520; *Crulkshank v. Fourth Nat. Bank*, 26 Fed. Rep. 584; *Hall v. Page*, 4 Ga. 428; *City of Seymour v. Town of Seymour*, 64 Wis. 16; *Howard v. Coshov*, 33 Mo. 118; *Hickey v. Chicago etc. R. Co.*, 64 Wis. 649; *Cummins v. Scott*, 20 Cal. 83; *Willson v. Hawkeye Ins. Co.*, 70 Iowa 91; *Hicks v. Maness*, 19 Ark. 701; *Bowen v. Cook*, 14 Ark. 202; *McCarroll v. Stafford*, 24 Ark. 224; *Easterling v. Power*, 12 Cal. 88; *Fresno Land Co. v. McCarty*, 59 Cal. 309; *Brassfield v. Brown*, 4 Rich. L. (S. Car.) 298; *Means v. Means*, 6 Rich. L. (S. Car.) 1; *McNair v. South Carolina R. Co.*, 10 Rich. L. (S. Car.) 284; *Swan v. Hyde*, 9 Mo. 849; *Morris v. Barnes*, 35 Mo. 412; *State v. Schneider*, 35 Mo. 533; *Ophir Min. Co. v. Carpenter*, 4 Nev. 534; *Smith v. Tiffany*, 36 Barb. (N. Y.) 23; *Woodbury v. Larned*, 5 Minn. 339; *White v. Claves*, 32 Ill. 325; *Southworth v. Haag*, 42 Ill. 446; *Bevan v. Tomlinson*, 25 Ind. 253; *Ermul v. Kullok*, 3 Kan. 499; *Brightman v. Eddy*, 97 Mass. 478; *Drake v. Surget*, 36 Miss. 458; *Field v. Reid*, 21 Ga. 314; *Hook v. Stovall*, 21 Ga. 69; *Pool v. Huff*, 20 Ga. 671; *Hampton v. Thomas*, 11 Ga. 317; *Newbill v. Whitfield*, 63 Cal. 81; *Sibley v. Haslam*, 75 Ga. 490; *Finney v. Northern Pac. R. Co.*, 3 Dak. 270; *Caulfield v. Bogle*, 2 Dak. 464; *Wilson v. Hawk-eye Ins. Co.*, 70 Iowa 91.

A failure or defect of evidence on any point material to the issue will entitle the defeated party to a new trial. *Johnson v. McDaniel*, 15 Ark. 109; *Field v. Ringo*, 7 Ark. 435; *Pollock v. Kittrell*, 2 Taylor (N. Car.) 153; *Watkins v. Rogers*, 21 Ark. 208; *Hall v. Wight*, 9 Rich. L. (S. Car.) 392;

Wetzlar v. N. W. Ill. Co., 9 Cal. 176; Gyle v. Shoenbar, 23 Cal. 538; Ryan v. Copes, 11 Rich. L. (S. Car.) 217; Holland v. Chambers, 22 Ga. 193; Peoria Bridge v. Loomis, 20 Ill. 235; Spicely v. True, 14 Ind. 437; Backus v. Clark, 1 Kan. 287; McGrath v. Herndon, 4 B. Mon. (Ky.) 480; Warren v. Gilman, 15 Me. 70; Dyer v. Haley, 29 Me. 277; Eaton v. Jacobs, 49 Me. 559; Parr v. Gibbons, 27 Miss. 375; Osborne v. Huntington, 37 Minn. 275.

Where there is a failure of proof upon an issue raised by the pleadings, a verdict in favor of the party who should produce the evidence should be set aside. Hammond v. Jewett, 22 Neb. 363. See also Moore v. Missouri Pac. R. Co., 28 Mo. App. 622.

Where a defence to a suit is supported by no evidence, a verdict for the defendant should be set aside. Perkins v. Trinka, 30 Minn. 241; McAfee v. Robertson, 41 Tex. 355.

When the verdict cannot be sustained by any impartial or intelligent consideration of the evidence, it should be set aside. Albion Consolidated Min. Co. v. Richmond Min. Co., 19 Nev. 225. See also Friesz v. Fallon, 24 Mo. App. 439; Lakeshore etc. R. Co. v. Kuhlman, 18 Ill. App. 222; Hickey v. Chicago etc. R. Co., 64 Wis. 649; Murray v. Wells, 57 Iowa 26.

Appellate courts will set aside a verdict where it is not supported by evidence upon a material point. Johnson v. Burns, 29 Kan. 81; Cummins v. Scott, 20 Cal. 83; Gatlin v. Wilcox, 26 Ark. 309; Blosser v. Harshbarger, 21 Gratt. (Va.) 214; Carlin v. Chicago etc. R. Co., 37 Iowa 316. And also findings of the trial court when not supported by the evidence. Stringer v. Northwestern Mut. L. Ins. Co., 82 Ind. 100; Fresno Land Co. v. McCarthy, 59 Cal. 309.

If it clearly appear that substantial justice has been done, a new trial will not be granted on the ground that the verdict is not supported by sufficient evidence. Christy v. Holness, 57 Ind. 314; Kelsey v. Hanmer, 18 Conn. 311, and cases cited.

If there be no evidence to support a special finding on material points, both the general and special verdict will be set aside. McCarty v. James, 62 Iowa 257.

A verdict based upon the unsupported evidence of a plaintiff whom the jury disbelieved in one particular must

be set aside. Clark v. Mechanics' etc. Bank, 11 Daly (N. Y.) 239.

When there is no substantial conflict in the evidence as to a material fact, and the jury find contrary thereto, it will be assumed that they misunderstood the evidence or misapprehended its scope and effect. Rankin v. Thompson, 7 Colo. 381. See also Stringer v. Northwestern Mut. L. Ins. Co., 82 Ind. 100.

Appellate courts will set aside an order refusing a new trial when there is no evidence to sustain the verdict. Bowen v. Cook, 14 Ark. 202; Cummins v. Scott, 20 Cal. 83; Hicks v. Maness, 19 Ark. 701; McCarroll v. Stafford, 24 Ark. 224; Easterling v. Paver, 12 Cal. 88.

A motion to dismiss the complaint or to petition the court to take the case from the jury is the proper practice when there is no evidence or insufficient evidence. Rowe v. Stevens, 34 N. Y. Super. Ct. 436; Peake v. Bell, 14 Hun (N. Y.) 454; Halpin v. Third Ave. R. Co., 40 N. Y. Super. Ct. 175; Kelly v. Frazier, 27 Hun (N. Y.) 314.

Insufficiency of evidence to justify a judgment, or that it is against the law, is not a ground of motion for a new trial. Martin v. Matfield, 49 Cal. 43. See also Rosenzweig v. Frazier, 82 Ind. 342.

Where the case is tried by the court without a jury, it is not necessary to make a motion for a new trial in order to raise the question of the sufficiency of the evidence to support the finding. Village of Hyde Park v. Cornell, 4 Ill. App. 602.

Appellate courts will grant a new trial when the verdict is so opposed to the evidence and to the probabilities arising from all the circumstances that it can only be accounted for on the supposition that the jury were prejudiced or wholly disregarded the instructions of the court. Friesz v. Fallon, 24 Mo. App. 439; Spohn v. Missouri Pac. R. Co., 87 Mo. 74.

A judgment rendered by the court without the aid of a jury will not be reversed on the ground of want of evidence to support it, unless there be such absence of proof as to authorize the conclusion that the decision of the trial court was the result of passion or prejudice. Murray v. Wells, 57 Iowa 26.

When, however, the proof of a fact is clear and convincing, and yet the trial court has found the contrary without

**4. Verdict Irregular in Form.**—If a jury return special findings, so inconsistent with each other and with the general verdict that judgment cannot be entered, a new trial will be granted.<sup>1</sup> If the verdict contain but one finding, when other questions of fact are necessary to enter up judgment, it is defective.<sup>2</sup> Ungrammatical findings of a jury do not vitiate the verdict when the sense is clear.<sup>3</sup> A verdict defective in form which, by correction, makes another and different verdict, will be set aside.<sup>4</sup> It is the duty of the court to see that improper and informal verdicts are not entered upon its records.<sup>5</sup> Where the verdict is so uncertain that the real intent cannot be determined by it, a new trial should be granted.<sup>6</sup>

any evidence fairly tending that way, the finding, though against the party who had the burden of proof, will be set aside by the appellate court, especially when the witnesses were numerous and their testimony harmonious, and no attempt was made to impeach them or refute their statements by opposing evidence. *Stringer v. North Western Mut. L. Ins. Co.*, 82 Ind. 100; *Fresno Land Co. v. McCarthy*, 59 Cal. 309.

**1. Irregular Verdicts.**—See generally VERDICT. *Chicago etc. R. Co. v. Townsdlin*, 38 Kan. 78; *St Louis etc. R. Co. v. Shoemaker*, 38 Kan. 723; *Elsworth etc. R. Co. v. Maxwell*, 39 Kan. 651; *Mitchel v. Printup*, 27 Ga. 469; *Doe v. Northern*, 1 Wash. (Va.) 282; *Groselp v. Holmes*, 3 Cal. (Va.) 424; *Carver v. Carver*, 83 Ind. 368; *Bunnell v. Bunnell*, 93 Ind. 595; *Pint Bauer*, 31 Minn. 4; *Mitchel v. Brown*, 88 N. Car. 156.

If the jury should answer "Don't know" to a special question which should be answered, the appellate court will grant a new trial on the refusal of the trial court to compel a proper answer. *Leavenworth etc. R. Co. v. Jacobs*, 39 Kan. 204; *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 472; *Darling v. West*, 51 Iowa 259.

If one special finding is set aside, a new trial should be granted, unless it is shown that the finding was wholly immaterial. *Aunas v. Milwaukee etc. R. Co.*, 67 Wis. 46.

**2. People v. Doesbury**, 17 Mich. 135; *Robertson v. Netherton*, 2 Overt. (Tenn.) 326; *Schmitz v. Lauferty*, 29 Ind. 400; *Sick v. Michigan Aid Assoc.*, 49 Mich. 50; *Ridenour v. Miller*, 83 Ind. 208; *Sloss v. Allman*, 64 Cal. 47; *Alderman v. Manchester*, 49 Mich. 48. Where the jury, in an action for damages, failed to assess the damages,

and the verdict was in the form, "We, the jury, find for the plaintiff," a new trial should be granted. *Broeck v. Wabash etc R. Co.*, 13 Ill. App. 556. See also *Long v. Linn*, 71 Ill. 152; *Thompson v. Watterston*, 14 La. An. 239; *Clement v. Lewis*, 3 Brad. & Bing. 297; *Ridenour v. Miller*, 83 Ind. 208.

Where issues are framed in such a manner that the material facts of the case as found by the jury are confused and unsatisfactory, the verdict should be set aside and a new trial ordered. *Turrentine v. Richmond & Danville Railroad*, 96 N. Car. 638; *Bunnell v. Bunnell*, 93 Ind. 595.

**3. Pepper v. Harris**, 78 N. Car. 71. See also *Jones v. Julian*, 12 Ind. 274; *Campbell v. Queen*, 11 Ad. & Ell., N. S. 799; *Vaden v. Ellis*, 18 Ark. 355; *Meade v. Smith*, 16 Conn. 346; *Battles v. Town of Braintree*, 14 Vt. 348.

Where the verdict is senseless and contradictory, a new trial will be granted. *Alderman v. Manchester*, 49 Mich. 48.

**4. Kenney v. Habich**, 137 Mass. 421. Irregularities in receiving verdicts may be waived by stipulation of counsel. *Bedal v. Spurr*, 33 Minn. 207.

**5. Cattell v. Dispatch Publishing Co.**, 88 Mo. 356; *Harrison v. Jaquess*, 29 Ind. 208; *Haycock v. Greup*, 57 Pa. St. 438.

A mistake of the court in reading the verdict which is assented to by the jury, consisting of pronouncing the wrong Christian name of one of the parties, will not vitiate the verdict. *Sheeks v. Sheeks*, 98 Ind. 288.

The fact that a verdict is not in writing will not support a motion for a new trial under Ohio Crim. Code, § 192; *Hardy v. State*, 19 Ohio St. 579.

**6. Where the verdict in an action**

**5. Verdict Not Regularly Found.**—A new trial will be granted when a jury has arrived at their verdict by some process out of the common course, which leads to the conclusion that they have not discharged the legal functions of a jury. There are many varieties of ways in which this principle is applied, but the commonest examples are where the jury have cast lots, or followed any gambling process.<sup>1</sup> Although it has been held that in a claim for unliquidated damages, the average judgment of the jurors may be taken,<sup>2</sup> a similar process has been permitted to decide the length of a term of imprisonment;<sup>3</sup> although in the last case the jury cannot previously agree to stand by the result.<sup>4</sup> It has been stated

to reform a deed was in the form, "We the jury, find for complainant, and recommend that the deed be reformed," it was held too uncertain, and a new trial was ordered. *Payne v. Elyea*, 50 Ga. 395.

1. *Compare* JURY AND JURY TRIAL, 12 Am. & Eng. Encyc. of Law 371. See also VERDICT. *East Tennessee etc. R. Co. v. Winters*, 85 Tenn. 240; *Joyce v. State*, 7 Baxt. (Tenn.) 273; *Gilman v. State*, 1 Humph. (Tenn.) 59; *Rose v. Lane*, 3 Humph. (Tenn.) 218; *McMurdock v. Kimberlin*, 23 Mo. App. 523; *Sawyer v. Hannibal etc. R. Co.*, 37 Mo. 241; *Merseve v. Shine*, 37 Iowa 253; *Ruble v. McDonald*, 7 Iowa 90; *Obear v. Gray*, 68 Ga. 182; *Donner v. Palmer*, 23 Cal. 40; *Thompson v. Perkins*, 26 Iowa 486; *Birchard v. Booth*, 4 Wis. 67; *Hale v. Cove*, Str. 642; *Mitchell v. Ehle*, 10 Wend. (N. Y.) 595; *Goodman v. Cody*, 1 Wash. Ter. 329; *Warner v. Robinson*, 1 Root (Conn.) 194; *Manix v. Malony*, 7 Iowa 81; *Denton v. Lewis*, 15 Iowa 301; *Forbes v. Howard*, 4 R. I. 364.

Where the verdict was arrived at by an agreement that one juror should add \$400 to the amount he was for, and then each one of the jury should reduce the amount he was for \$400, and that the sums there obtained should be added together and divided by twelve, which result should be their verdict, it was held to be a gambling verdict and good ground for a new trial. *East Tennessee etc. R. Co. v. Winters*, 85 Tenn. 240.

Where a subsequent ballot is but a ratification of a verdict by lot it will not be valid. *Thompson v. Perkins*, 26 Iowa 486.

2. *McMurdock v. Kimberlin*, 23 Mo. App. 523; *St. Louis etc. R. Co. v. Myrtle*, 51 Ind. 566; *Forbes v. Howard*, 4 R. I. 364; *Papineau v. Belgarde*, 81

Ill. 61; *Guard v. Rish*, 11 Ind. 156; *Dunn v. Hall*, 8 Blackf. (Ind.) 32; *Cowperthwait v. Jones*, 2 Dall. (U. S.) 56; *Dorr v. Fenno*, 12 Pick. (Mass.) 521; *Gunnell v. Phillips*, 1 Mass. 530; *Harvey v. Rickett*, 15 Johns. (N. Y.) 87; *Tinkle v. Dunivant*, 16 Lea (Tenn.) 503; *Johnson v. Perry*, 2 Humph. (Tenn.) 569; *Harvey v. Jones*, 3 Humph. (Tenn.) 157. *Compare* *East Tennessee etc. R. Co. v. Winters*, 85 Tenn. 240.

The finding of a paper in the jury room upon which it appears that the verdict arrived at was found by dividing the sum of the amounts by twelve is not sufficient evidence to show a gambling verdict. *McMurdock v. Kimberlin*, 23 Mo. App. 523; *Willey v. Belfast*, 61 Me. 569.

The fact that one of the jurors admitted that the verdict had been found by dividing by twelve the aggregate of twelve different sums is not a ground for a new trial. *St. Clair v. Missouri Pac. R. Co.*, 29 Mo. App. 76.

3. *Leverett v. State*, 3 Tex. App. 213; *Thompson's Case*, 8 Gratt. (Va.) 637.

4. *Dana v. Tucker*, 4 Johns. (N. Y.) 487; *Harvey v. Jones*, 3 Humph. (Tenn.) 157; *Bennett v. Baker*, 1 Humph. (Tenn.) 399; *Ellege v. Todd*, 1 Humph. (Tenn.) 43; *Dorr v. Fenno*, 12 Pick. (Mass.) 521; *Tinkle v. Dunivant*, 16 Lea (Tenn.) 503; *Cowperthwait v. Jones*, 2 Dall. (U. S.) 55; *Chandellier v. Barker*, 2 Harr. (Del.) 387; *Heath v. Conway*, 1 Bibb (Ky.) 398; *Grinnell v. Phillip*, 1 Mass. 530; *Dunn v. Hall*, 8 Blackf. (Ind.) 32; *Manix v. Malony*, 7 Iowa 81; *Schanler v. Porter*, 7 Iowa 482; *Hendrickson v. Kingsbury*, 21 Iowa 379; *Denton v. Lewis*, 15 Iowa 301; *East Tennessee etc. R. Co. v. Winters*, 85 Tenn. 240; *Hale v. Cove*, 1 Str. 642;

that even though a verdict was irregularly reached, if it is correct in itself, it may be permitted to stand.<sup>1</sup>

**VII. NEWLY DISCOVERED EVIDENCE—1. General Principles.**—Where, since the trial, the unsuccessful party has discovered new evidence which would, in all probability, have changed the result, he may move for a new trial on the ground of newly discovered evidence. But such an application is looked upon by the courts with distrust and disfavor,<sup>2</sup> and is only granted under the following restrictions:

1. The evidence must have been discovered since the former trial.
2. The party must have used due diligence to procure it on the former trial.
3. It must be material to the issue.
4. It must go to the merits of the cause, and not merely to impeach the character of a witness.
5. It must not be merely cumulative.
6. It must be such as ought to produce on another trial an opposite result on the merits.<sup>3</sup>

Harry v. Rickett, 15 Johns. (N. Y.) 87; State v. Branstetter, 65 Mo. 149; Boynton v. Trumbull, 45 N. H. 408; 13 Cent. L. J. 64.

1. Fillmore v. Union Pac. R. Co., 2 Wyo., 94.

2. 4 Minor's Inst. 758; citing Thompson's Cas., 8 Gratt. (Va.) 637; Read's Cas., 22 Gratt. (Va.) 946; St. John v. Alderson, 32 Gratt. (Va.) 143; Wynne v. Newman, 75 Va. 817; Wharton on Crim. Law, § 3101. See also Hobler v. Cole, 49 Cal. 250; People v. Sutton, 73 Cal. 243; Wallace v. Kumlin, 42 Ga. 462.

A new trial for newly discovered evidence is rarely granted the second time, and the showing must be unusually strong and satisfactory. Hines v. Driver, 100 Ind. 319; Miller v. Ross, 43 N. J. L. 552; People v. Sackett, 14 Mich. 320.

3. People v. Super. Ct. of N. Y., 10 Wend. (N. Y.) 291; Jackson v. Kinney, 14 Johns. (N. Y.) 186; Pike v. Evans, 15 Johns. (N. Y.) 210; Guyot v. Butts, 4 Wend. (N. Y.) 579; Moore v. Philadelphia Bank, 5 S. & R. (Pa.) 41; Bond v. Cutler, 7 Mass. 205; Evans v. Rogers, 2 Nott & M. (S. Car.) 503; Stone v. Clifford, 5 La. 11; Drayton v. Thompson, 1 Bay (S. Car.) 263; Jones v. Lollieopper, 2 Hawks (N. Car.) 492; Smith v. Shultz, 2 Ill. 491; Schlencker v. Risley, 3 Scam. (Ill.) 487; Knox v. Work, 2 Binn. (Pa.) 582; Obler v. Eller, 2 Binn. (Pa.) 582 n.

Turnbull v. O'Hara, 4 Yeates (Pa.) 446; Walm v. Wilkins, 4 Yeates (Pa.) 461; First Nat. Bank v. Heaton, 6 Thomp. & C. (N. Y.) 37; Geneva etc. R. Co. v. Sage, 35 Hun (N. Y.) 95; White v. State, 17 Ark. 404; Aiken v. Bemis, 3 Woodb. & M. (U. S.) 348; Brooks v. Lyon, 3 Cal. 113; Bartlett v. Hogden, 3 Cal. 55; Arnold v. Skaggs, 35 Cal. 684; Glover v. Woolsey, Dudley (Ga.) 85; Giles v. State, 6 Ga. 276; Clark v. Carter, 12 Ga. 500; Moore v. Ulm, 34 Ga. 565; Simpson v. Wilson, 6 Ind. 474; Swift v. Wakeman, 9 Ind. 552; Bronson v. Hickman, 10 Ind. 3; Ruger v. Bungan, 10 Ind. 451; Beard v. First Presbyterian Church, 10 Ind. 568; State v. Clark, 16 Ind. 97; Pelamourges v. Clark, 9 Iowa 1; Lisher v. Pratt, 9 Iowa 59; Millard v. Singer, 2 Greene (Iowa) 114; Reeves v. Royal, 2 Greene (Iowa) 451; Richards v. Nuckalls, 19 Iowa 555; State v. Locke, 26 Mo. 603; Goff v. Mulholland, 33 Mo. 203; Howard v. Winters, 3 Nev. 539; Commonwealth v. Murray, 2 Ashm. (Pa.) 41; Commonwealth v. Williams, 2 Ashm. (Pa.) 69; Smith v. Matthews, 6 Mo. 600; Robins v. Fowler, 2 Ark. 133; Madden v. Shapard, 3 Tex. 49; State v. Ray, 53 Mo. 345; Bryan v. Walton, 33 Ga. Supp. 11; Crozier v. Cooper, 14 Ill. 139; Crafts v. Union Mut. F. Ins. Co., 36 N. H. 44; Wingfield v. Rhea, 77 Ga. 84; Goins v. State, 41 Tex. 334; Town of Kirby v. Waterford, 14 Vt. 414; Raphaelaky v. Lynch,

As these requisites are strictly demanded by the courts they will be considered severally.

**2. Restrictions — (a) MUST HAVE BEEN DISCOVERED SINCE TRIAL.**—The testimony upon which a new trial is asked, must have been discovered since the trial.<sup>1</sup> Thus, if testimony be

34 N. Y. Super. Ct. 31; *Martin v. Garver*, 40 Ind. 381; *Hupp v. McInturf*, 4 Ill. App. 449.

1. *Com. v. Schoeppe*, Leg. Gaz. R. (Pa.) 450; *O'Barr v. Alexander*, 37 Ga. 195; *Hines v. Driver*, 100 Ind. 319; *Sexton v. Lamb*, 27 Kan. 432; *Boot v. Brewster* (Iowa, 1888), 36 N. W. Rep. 649 note; *Den v. Winternute*, 13 N. J. L. 177; *State v. Adams*, 39 La. An. 238; *Oakley v. Sears*, 7 Robt. (N. Y.) 111; *Barrow v. State*, 80 Ga. 191; *Griffith v. Eliot*, 60 Tex. 334; *State v. Hanks*, 39 La. An. 234; *Macy v. De Wolf*, 3 Woodb. & M. (U. S.) 193; *Parsons v. Platt*, 37 Conn. 563; *Palmer v. Fiske*, 2 Curt. (U. S.) 14; *Ham v. Ham*, 39 Me. 263; *Gardner v. Gardner*, 2 Gray (Mass.) 434; *People v. Mack*, 2 Park. Cr. (N. Y.) 673; *Watts v. Johnson*, 4 Tex. 311; *Holeman v. State*, 13 Ark. 105; *Wright v. Central R. Co.*, 21 Ga. 335; *Tillman v. Hatcher*, 1 Rice (S. Car.) 271; *Shaw v. State*, 27 Tex. 750; 1874, *Marden v. Jordan*, 65 Me. 9; 1876, *Blake v. Madigan*, 65 Me. 522; *Gautier v. Douglass Mfg. Co.*, 52 How. Pr. (N. Y.) 325; *Wilson v. Plank*, 41 Wis. 94; *Robinson v. Veal* (Ga. 1887), 7 S. E. Rep. 159.

Suit on a promissory note by the payee against the makers. Answer, general denial. Finding and judgment for the plaintiff. Complaint for a new trial, alleging that one of the defendants was surety for the other defendant, and that since the term at which the cause was tried he had discovered that, after the maturity of the note, his principal and the payee had, upon a consideration stated, agreed for an extension of the time of payment, without his knowledge or consent. *Held*, that said complaint stated newly discovered matter, not newly discovered evidence, and was bad on demurrer. *Rich v. Starbuck*, 50 Ind. 126.

A motion for a new trial on the ground of newly discovered evidence will not be sustained where it appears that the testimony relied upon is that of the party's wife, and it does not appear that her evidence was unknown until after the trial. *Richards v. Smith*, 67 Tex. 610. And it was held

in the same case that a motion will not be granted on the ground of newly discovered evidence where the party himself, who was present at the trial and heard the witnesses of the opposite party, is to give the testimony relied upon.

Where the party is simply not apprised of the fact that certain evidence was material to his cause, he cannot obtain a new trial upon the ground that such evidence is newly-discovered. *Robinson v. State*, 15 Tex. 311.

It has been held that a new trial will not be granted on the ground of newly discovered evidence where the party has once had a continuance, in order to procure the testimony of the witness whose evidence is now relied upon to obtain the new trial. *State v. Ginger* (Iowa, 1890), 46 N. W. Rep. 657.

Where husband and wife were plaintiffs upon a cause of action belonging to the wife, and for which she might have sued alone, new trial was refused where it was not averred that the newly discovered evidence was not fully known to the husband at the time of the trial, but merely that the wife had since discovered it. *Berry v. Daily*, 30 Ind. 183.

Where a party is aware that two or more persons know facts important to be proved by him, and goes to trial without calling such witnesses, he cannot obtain a new trial on the ground of newly discovered evidence, because after the trial he discovers another person who could testify to the same facts. *Hanley v. Life Assoc. of America*, 69 Mo. 380.

A record in a public office cannot be newly discovered evidence on account of which a new trial will be granted, for the parties must be presumed to be acquainted with it. *Vardeman v. Edwards*, 21 Tex. 737.

A new trial on the ground of newly discovered evidence will not be granted to the assignee of a cause of action ten years after the rendition of final judgment against his assignor, and nine years after the evidence was known to the assignor. *Evans v. United States L. Ins. Co.*, 21 Abb. N. Cas. (N. Y.) 315



discovered just before the close of the trial, even after the argument of counsel, it will not be a ground for a new trial as "newly discovered evidence." The proper course in such a case being to ask the court to allow the testimony to go to the jury; or, if the witnesses are not at hand, for a continuance.<sup>1</sup> And a mere belief that new evidence exists is not a discovery,<sup>2</sup> nor is evidence newly discovered which was known to a party, but not to his attorney, or *vice versa*.<sup>3</sup> As a general rule, it may be said that a new trial will not be granted on the ground of newly discovered evidence, where the new evidence is that of a witness who has been examined on the former trial. But this proposition might more properly be considered under the next head, for it may well be considered negligent to fail to examine a witness upon a material point;<sup>4</sup> and where no negligence is shown on the part of

A petition to the supreme court for a new trial, where the reason assigned is the discovery of new evidence, must, under the statute of Vermont, be preferred, and the citation be served on the adverse party within two years from the rendition of final judgment in the county court; and though the case may have passed to the supreme court on exceptions, and the citation be served within two years from the time the judgment was affirmed in that court, it is not sufficient if it exceed two years from the time of the judgment in the county court. *Mower v. Warner*, 16 Vt. 495.

A petition for a new trial on the ground of newly discovered evidence filed more than four years after trial will be refused without considering whether or not the application is a meritorious one. *Fisher v. Corwin*, 35 Hun (N. Y.) 253.

Where a party sought a new trial on the ground of newly discovered evidence, because he did not know that his wife was competent as a witness until after trial, it was refused. *Gibson v. Williams*, 39 Ga. 660.

If the witness who is offered as newly discovered was incompetent before the trial, but has since become competent, his evidence will not be regarded as newly discovered. *Sawyer v. Merrill*, 10 Pick. (Mass.) 16.

1. *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.) 219; *Baily v. Landingham*, 52 Iowa 415; *Higden v. Higden*, 2 A. K. Marsh. (Ky.) 42; *United States v. Gilbert*, 2 Sumn. (U. S.) 19; *People v. Vermilyea*, 7 Cow. (N. Y.) 369; *Berry v. Metzler*, 7 Cal. 418; *Jackson v. Malin*, 15 Johns. (N. Y.) 293; *Codman v.*

*Vermont etc. R. Co.*, 17 Blatchf. (U. S.) 1.

Evidence discovered by and within reach of a party, after the close of the evidence, but before the completion of the trial and the submission of the case to the jury, is not newly discovered evidence, on account of which a new trial will be granted at special term. *Dodge v. New York & Washington Steamship Co.*, 6 Abb. Pr., N. S. (N. Y.) 451; 37 How. Pr. (N. Y.) 524.

2. *Alger v. Merritt*, 16 Iowa 121.

A new trial will not be granted because a man declares to a bystander that he knows more of the matter than all the witnesses examined, and then leaves the court before a subpoena can be served on him. *Lester v. Goode*, 2 Murph. (N. Car.) 37.

3. *Isaacs v. People*, 118 Ill. 538; *Pace v. State*, 63 Ga. 159; *Fikes v. Bentley*, 1 Hempst. (U. S.) 61; *Russell v. Oliver*, (Tex. 1890), 13 S. W. Rep. 264; *Broat v. Moore* (Minn. 1890), 47 N. W. Rep. 55.

4. *Fanning v. McCraney*, 1 Mon. (Iowa) 398; *Wright v. Alexander*, 11 Smed. & M. (Miss.) 411; *Duignan v. Wyatt*, 3 Blackf. (Ind.) 385; *Milner v. State*, 30 Ga. 137; *State v. Ginger*, 46 N. W. 657; *King v. Gray*, 17 Tex. 62; *Houston v. Smith*, 2 Smed. & M. (Miss.) 597; *Beck v. State*, 65 Ga. 766; *Smith v. Clews*, 14 Abb. N. Cas. (N. Y.) 465.

A new trial will not be granted upon the affidavit of a witness who was examined in the cause, in which he shows he will greatly strengthen his testimony. It would show negligence on the part of the party introducing him, and, if touching matters about which

the party seeking a new trial, it may be granted though the witness had testified at the former trial.<sup>1</sup>

(b) **DUE DILIGENCE MUST HAVE BEEN USED.**—It is not enough that the evidence should have been discovered since the former trial, but it must appear that the evidence is such, that, by the exercise of due diligence on the part of the applicant, it could not have been procured for the first trial.<sup>2</sup> Thus, as has been seen in the last

he testified, would be cumulative. *Martin v. Nance*, 3 Head (Tenn.) 649.

The fact that a witness on a trial forgot to state a material fact on account of intoxication, is no ground for a new trial. *McQueen v. Stewart*, 7 Ind. 535.

1. *King v. Gray*, 17 Tex. 62.

On petition for a new trial, a witness used at the former trial may be admitted as new as to what has come to his knowledge since. *Foster v. Hough*, 1 Root (Conn.) 173.

A witness, being called to prove a receipt a forgery, pronounced it genuine, but failed to disclose his knowledge of the fact that it was given for more money than was received, supposing that he would not be permitted to give such evidence. The court, on affidavit to this effect, granted a new trial, there being no conflicting testimony, and the plaintiff being an administrator, without any personal knowledge of the matter. *Fitzgibbon v. Kinney*, 3 Harr. (Del.) 72.

2. **Arkansas.**—*Bourland v. Skinner*, 11 Ark. 671; *Holeman v. State*, 13 Ark. 105.

**California.**—*Stoakes v. Monroe*, 36 Cal. 383; *Baker v. Joseph*, 16 Cal. 173; *Butler v. Vassault*, 40 Cal. 74.

**Colorado.**—*Russell v. Dennison*, 45 Colo. 337.

**Connecticut.**—*Noyce v. Huntington*, Kirby (Conn.) 282; *Barber v. Brall*, 3 Conn. 9; *Lester v. State*, 11 Conn. 415; *Norwich etc. R. Co. v. Cahill*, 18 Conn. 484; *Parsons v. Platt*, 37 Conn. 563; *Waller v. Graves*, 20 Conn. 305.

**Delaware.**—*McCombs v. Chandler*, 5 Harr. (Del.) 423.

**Georgia.**—*Wright v. Central R. Co.*, 21 Ga. 335; *O'Barr v. Alexander*, 37 Ga. 195; *Wise v. State*, 24 Ga. 31; *Spurlock v. West*, 80 Ga. 302; *McAfee v. State*, 31 Ga. 411; *Avery v. State*, 26 Ga. 233; *Roberts v. State*, 3 Ga. 310; *Beard v. Simmons*, 9 Ga. 4; *Wright v. State*, 34 Ga. 110; *Arnett v. Paulett*, 59 Ga. 856.

**Illinois.**—*Brown v. Luehrs*, 95 Ill.

195; *Tobins v. The People*, 101 Ill. 121; *Chicago etc. R. Co. v. Sullivan*, 21 Ill. App. 580; *Union Rolling Mill Co. v. Gillen*, 100 Ill. 52; *Dyke v. De Young*, 113 Ill. 82.

**Iowa.**—*Town of Manson v. Ware*, 63 Iowa 346; *Mays v. Deaver*, 1 Iowa 216; *Stuckslager v. McKee*, 140 Iowa 212; *Goddard v. Leffingwell*, 40 Iowa 249; *First Nat. Bank v. Charter Oak Ins. Co.*, 40 Iowa 572; *Clark v. Nelson*, 40 Iowa 678.

**Indiana.**—*Mason v. Palmerton*, 2 Ind. 117; *McIntire v. Young*, 6 Blackf. (Ind.) 496; *Coe v. Givan*, 1 Blackf. (Ind.) 367; *Fort Wayne etc. R. Co. v. Phalar*, 51 Ind. 485; *Johnson v. Herr*, 88 Ind. 280; *Du Souchet v. Dutcher*, 113 Ind. 249; *Lewis v. Crow*, 69 Ind. 434; *Allen v. Bond*, 112 Ind. 523; *Schmurr v. Stults*, 119 Ind. 429; *Bartholomew v. Lay*, 44 Ind. 393; *Test v. Larsh*, 100 Ind. 563; *Kochel v. Bartlett*, 88 Ind. 237; *Bowman v. Clemmer*, 50 Ind. 10; *Cook v. Hare*, 49 Ind. 268.

**Kansas.**—*Sexton v. Lamb*, 27 Kan. 432; *Clark v. Norman*, 24 Kan. 515; *Carson v. Henderson*, 34 Kan. 404; *Olathe v. Horner*, 38 Kan. 312; *Smith v. Williams*, 11 Kan. 103.

**Louisiana.**—*Wilson v. Churchman*, 4 La. An. 452; *State v. Bradley*, 6 La. An. 555; *Berger v. Spalding*, 13 La. An. 580; *Stone v. Rose*, 2 La. An. 225.

**Maine.**—*Howard v. Grover*, 28 Me. 97; *Potter v. Sewall*, 54 Me. 142; *Titcomb v. Potter*, 11 Me. 218; *Atkinson v. Conner*, 56 Me. 546; *Ham v. Ham*, 39 Me. 263.

**Massachusetts.**—*Gardner v. Gardner*, 2 Gray (Mass.) 434.

**Minnesota.**—*Nininger v. Knox*, 8 Minn. 140; *Austin v. Northern Pac. R. Co.*, 34 Minn. 351.

**Mississippi.**—*Vanderburg v. Campbell*, 64 Miss. 89; *Lee v. Hooker*, 7 Smed. & M. (Miss.) 601; *Dean v. Young*, 13 Smed & M. (Miss.) 118.

**Missouri.**—*Johnson v. Shortridge*, 93 Mo. 227; *Smith v. Matthews*, 6 Mo. 600; *Sturdy v. St. Charles Land etc.*

Co., 33 Mo. App. 44; Barry v. Blumenthal, 32 Mo. 29; Tilford v. Ramsey, 43 Mo. 410; Hanly v. Blanton, 1 Mo. 49.

**Nebraska.**—Heady v. Fishburn, 3 Neb. 265.

**New Jersey.**—Miller v. Ross, 43 N. J. L. 552; Servis v. Cooper, 33 N. J. L. 68; Sheppard v. Sheppard, 10 N. J. L. 250; Deacon v. Allen, 4 N. J. L. 338; Den v. Geiger, 9 N. J. L. 225.

**New York.**—People v. Mack, 2 Park. Cr. (N. Y.) 673; 10 How. Pr. (N. Y.) 261; Albert v. Sweet, 9 N. Y. Supp. 86; Meyer v. Fiegel, 38 How. Pr. (N. Y.) 424; Whitney v. Saxe, 2 N. Y. Supp. 653; People v. Superior Ct. of N. Y., 5 Wend. (N. Y.) 114, 121; 10 Wend. (N. Y.) 285, 291; Geneva etc. R. Co., v. Sage, 35 Hun (N. Y.) 95; Campbell v. Genet, 2 Hilt. (N. Y.) 290; Leavy v. Roberts, 2 Hilt. (N. Y.) 285; 8 Abb. Pr. (N. Y.) 310; Williams v. Baldwin, 18 Johns. (N. Y.) 488; Gould v. Moore, 40 N. Y. Super. Ct. 387; First Nat. Bank v. Heaton, 6 Thomp. & C. (N. Y.) 37; Reese v. Stadler, 54 How. Pr. (N. Y.) 492; Barteau v. Phoenix Mut. L. Ins. Co., 67 Barb. (N. Y.) 354; Oakley v. Sears, 7 Rob. (N. Y.) 111; Hatfield v. Macy, 52 How. Pr. (N. Y.) 193; Palmer v. Mulligan, 3 Cal. (N. Y.) 307; Gautier v. Douglass Mfg. Co., 52 How. Pr. (N. Y.) 325; Weston v. New York Elevated R. Co., 42 N. Y. Super. Ct. 156; Price v. Price, 33 Hun (N. Y.) 432, 434; 1 How., N. S. (N. Y.) 142, 145.

**North Carolina.**—McDonald v. Carson, 95 N. Car. 377.

**Pennsylvania.**—Fey v. Ryan, 3 Phila. (Pa.) 406; Turnbull v. O'Hara, 4 Yeates (Pa.) 446; Waln v. Wilkins, 4 Yeates (Pa.) 461; McLaughlin v. Maybury, 4 Yeates (Pa.) 534; Knox v. Works, 2 Binn. (Pa.) 582; Aubel v. Ealer, 2 Binn. (Pa.) 582, note.

**South Carolina.**—Durant v. Philpat, 16 S. Car. 116; Drayton v. Thompson, 1 Bay (S. Car.) 263; State v. Gordon, 1 Bay (S. Car.) 491; Tillman v. Hatcher, 1 Rice (S. Car.) 271.

**Tennessee.**—Harbour v. Rayburn, 7 Yerg. (Tenn.) 432; Tabler v. Connor, 1 Baxt. (Tenn.) 195.

**Texas.**—Waples v. Oseraker, 77 Tex. 7; Richards v. Smith, 67 Tex. 610; Watts v. Johnson, 4 Tex. 311; Shaw v. State, 27 Tex. 750; McVey v. State, 23 Tex. App. 659; White v. State, 10 Tex. App. 167; Harrell v. Hill, 15 Tex. 270; Burnley v. Rice, 21 Tex. 171; Cleveland v. Sims, 69 Tex. 153; Sabine etc. R. Co. v. Wood, 69 Tex. 679.

**Vermont.**—Stearns v. Allen, 18 Vt. 119.

**Virginia.**—Delina v. Glassett, 4 Hen. & M. (Va.) 369; Gordon v. Harvey, 4 Call (Va.) 450; Arthur v. Chavis, 6 Rand. (Va.) 142, 152; Thompson's Case, 8 Gratt. (Va.) 637.

**West Virginia.**—Snider v. Myers, 3 W. Va. 195; Carder v. Bank of West Virginia (W. Va. 1890), 11 S. E. Rep. 716; Zickefoose v. Kuykendall, 12 W. Va. 23; Teff v. Marsh, 1 W. Va. 38; Dower v. Church, 21 W. Va. 23.

**Wisconsin.**—Weiting v. Town of Millston (Wis. 1890), 46 N. W. Rep. 879; Sawyer v. La Flesh, 65 Wis. 659; Herman v. Mason, 37 Wis. 273; Edmister v. Garrison, 18 Ois. 594.

**United States Courts.**—Chandler v. Thompson, 30 Fed. Rep. 38; Rose v. Stephens etc. Transp. Co., 20 Blatchf. (U. S.) 465; Whetmore v. Murdock, 3 Wood. & M. (U. S.) 380; Washburn v. Gould, 3 Story (U. S.) 122; Palmer v. Fiske, 2 Curt. (U. S.) 14; Garrison v. United States, 2 Ct. of Cl. 382; Fiskes v. Bentley, 1 Hempst. (U. S.) 61; Dickson v. Mathers, 1 Hempst. (U. S.) 65; Coote v. Bank of the United States, 3 Cranch (C. C.) 95.

In an action on a policy which had been lost, the plaintiff showed that he had made diligent search. Subsequent to a verdict for the plaintiff, the policy was found in an unusual place, and showed that it was payable to another than the plaintiff, whose receipt was on it. *Held*, that a new trial should be granted. *Protection L. Ins. Co. v. Dill*, 91 Ill. 174.

Evidence which counsel did not, on a trial, think would be material, and did not know of and so did not obtain, although it might easily have been discovered, will not, generally, be allowed to furnish ground for a new trial, although its materiality may arise from the views of the court in deciding the cause. *Codman v. Vermont etc. R. Co.*, 17 Blatchf. C. Ct. 1.

Although a witness, whose evidence would have been material, was present in court during the trial of the cause, and although the defeated party might, possibly have been led to suspect, from what was stated on the trial, that the witness could give evidence in his favor, yet if he had no knowledge that the witness could give such testimony, he will not be deemed guilty of laches because he failed to discover and avail himself of such a possibility. *Bonyng v. Waterbury*, 12 Hun (N. Y.) 534.

One who seeks a new trial on the ground of newly discovered evidence must rebut all presumptions against him, and when a witness is subpoenaed but fails to attend, it is the duty of the party to show that he took steps to secure his attendance by compulsory process. *Marks v. State*, 101 Ind. 353.

Counter affidavits on the question of diligence will be heard. *Zeller v. Griffith*, 89 Ind. 80; *Finch v. Green*, 16 Minn. 355; 3 Gra. & Wat. N. T. 1869.

A statement in an affidavit for new trial, on the ground of newly discovered evidence, that the party made enquiries among such persons as would be likely to know about the facts in the case, and that he did not know and did not learn that said witnesses knew or would swear to the facts stated until after the trial, is too general and indefinite to show proper diligence to discover the evidence. *Pemberton v. Johnson*, 113 Ind. 538.

A new trial will not be granted on account of newly discovered evidence, where it appears that the witnesses were known at the time of the former trial, but could not be found, and that no delay was asked on that account. *State v. Lamothe*, 37 La. An. 43.

Where the plaintiff knew the connection of a witness to the subject matter of an action, his affidavit that such witness had found some memoranda which would enable him to testify more fully as to the details, will not support a motion for a new trial on the ground of newly discovered evidence. *Mercantile Bank v. Hawe*, 33 Mo. App. 214.

A new trial was refused where, after verdict had been rendered for the value of a lot of oats, the defendant had them weighed and found them to be of less value than was found by the jury, it being held that their weight should have been ascertained before the trial. *Norris v. Hix*, 74 Iowa 524. See also *Heathcote v. Haskins*, 74 Iowa 566.

The question whether or not proper diligence has been used in seeking for evidence before trial is one for the trial court to decide, and its decision will stand. *Smith v. State*, 81 Ga. 479.

Diligence, or the want of it, in discovering testimony in a particular case, depends in so great a degree upon the various circumstances surrounding the parties, and the conduct of the cause, which are peculiarly within the knowledge of the trial court, that its determination on the matter of granting a

new trial made in view of them will rarely be disturbed. *Jones v. Singleton*, 45 Cal. 92. See also *Anderson v. State*, 43 Conn. 514.

Upon the question of reasonable diligence, the physical and pecuniary condition of the party, his knowledge as to the essential facts of the case, and the difficulty of establishing them by competent testimony, are all proper to be considered. *Detroit Savings Bank v. Truesdail*, 38 Mich. 430. Compare *Ready Roofing Co. v. Taylor*, 15 Blatchf. (U. S.) 94; *Hunter v. Randall*, 69 Me. 183; *Rollins v. State*, 61 Ga. 430; *Etna Ins. Co. v. Sparks*, 62 Ga. 187.

Where a party forgets the presence of a witness at an important conversation until after the trial, he cannot obtain a new trial on the ground of newly discovered evidence, where the testimony of such witness is relied upon. *Munn v. Worrall*, 16 Barb. (N. Y.) 321. See also *Wilcox v. Joslin*, 10 N. Y. Supp. 342. See, however, *Huebner v. Roosevelt*, 7 Daly (N. Y.) 111.

Where before trial a party had his suspicions aroused as to the circumstances of the taking of a deposition, where the deponent has since died, that evidence has been newly discovered with regard to such deposition, is not a ground for a new trial if he neglected to make inquiries. *Parker v. Chambers*, 24 Ga. 518.

Where a witness was summoned by the applicant and was present at a former trial, but was not interrogated, his testimony cannot be relied upon as ground for a new trial. *State v. Dorsey* (La. 1890), 7 So. Rep. 326.

Where a party is allowed a new trial to prove a fact by a witness, and he is not produced nor his absence accounted for, no other trial will be granted to prove the same fact by a different witness. There is a want of due diligence. *Valega v. Broussard*, 3 La. An. 145.

A complaint for a new trial, upon the ground of newly discovered evidence, alleging that the plaintiff's attorney had made careful search for the witness in the city of his last known place of residence, as shown by the evidence therein set out, more than two months prior to the trial, and had then learned that he was in Switzerland, does not sufficiently show due diligence, especially as it is not shown that the plaintiff moved promptly to obtain the relief sought after the evidence first came to his knowledge. *Allen v. Bond*, 112 Ind. 523.

A new trial on the ground of newly discovered evidence is properly refused when the only reason given for not having the proposed witness present at the trial was that the moving party did not and could not anticipate that his adversary would testify as he did. *Hawxhurst v. Hennion*, 9 N. Y. Supp. 542.

Want of diligence cannot be charged against a party who fails to procure existing testimony to disprove a fact of which he is not advised by the pleadings. *Guman v. Maquoketa Sav. Bank*, 38 Iowa 368. See also *Menk v. Commercial Ins. Co.*, 70 Cal. 585; *Dunham v. State*, 3 Tex. App. 465.

**United States Court of Claims.**—Under the authority given to the court of claims to grant a new trial upon the motion of the United States, in a case to which the United States is a party, where it appears that injustice has been done to the United States, the measure of diligence to which parties ordinarily are held does not apply. Where the new trial is asked upon the ground of newly discovered evidence, the question is whether the evidence was known to the attorney general or his assistants at the time of trial. Knowledge by other officers, or want of diligence, will not defeat the motion. If the evidence was not presented because not deemed material, a new trial will not be granted. (*Overruling Silvey v. United States*, 7 Ct. of Cl. 305.) *Ford v. United States*, 18 Ct. of Cl. 62.

Where it was shown that the prevailing party had introduced false testimony upon a material issue which the defeated party could not then contradict, but could upon a new trial prove to be false, a new trial was rightly granted. *First Nat. Bank etc. v. Wabash etc. R. Co.*, 61 Iowa 700.

Where the evidence is an account book kept by the opposite party, which is shown to have been in his possession, allegations in the complaint for a new trial that enquiries concerning a new book had been made of such party upon the trial when he was testifying as a witness and that he had denied that such a book was ever in existence, show diligence. *Blackburn v. Crowder*, 110 Ind. 127.

In support of a motion for a new trial for newly discovered evidence, it appeared by affidavit that the new witness was a boy of fifteen of whom enquiries had been made before the trial, to which he answered that he knew

nothing about the cause, believing that what he did know had no bearing thereon. It was held that proper diligence had been shown. *Kochel v. Bartlett*, 88 Ind. 237.

The fact that the moving party had forgotten the evidence he seeks to introduce in the trial, is not a sufficient excuse for his negligence. *Moan v. Abbey*, 63 Cal. 56. See also *Duignan v. Wyatt*, 3 Blackf. (Ind.) 385; *Hatfield v. Nevey*, 52 How. Pr. (N. Y.) 193; *Bond v. Cutler*, 7 Mass. 205; *Gregg v. Bankhead*, 22 Tex. 245; *Sawyer v. La Flesh*, 65 Wis. 659; *Chamberlain v. Lindsay*, 1 Hun (N. Y.) 231; *Johnson v. Blanchard*, 5 R. I. 24.

The affidavit of the attorney that he had no information of the evidence, and could not by reasonable diligence have discovered it, is not sufficient to support the motion for a new trial. The affidavit must show that the party himself had no such information. *Morgan v. Bell*, 41 Kan. 345.

That a witness had refreshed his memory since the trial by reference to a document which could have been obtained before, is not such newly discovered evidence as to be a ground for new trial. *Hendy v. Desmond*, 62 Cal. 261; *Richards v. Hunt*, 65 Ga. 342; *Shields v. State*, 45 Conn. 266.

Where a party is denying the validity of a marriage alleged to have been performed by a named minister in a certain city at a specified time, and knows before the trial that the testimony of such minister is important, he cannot, after the term, obtain a new trial on the ground of newly discovered evidence, unless he excludes negligence on his part in ascertaining the whereabouts of the minister, shows that he moved promptly to obtain his testimony, and that he could not by the exercise of reasonable diligence procure the same at the trial. *Allen v. Bond*, 112 Ind. 523.

**Where the Evidence Relied Upon Is That of a Co-party.**—"The evidence offered as newly discovered, under the motion for a new trial, appears to have been known to the officers of the bank at the time of the trial. But one of the witnesses introduced to support the motion, was a stockholder in the bank at the time, and was not called upon to testify. He has since sold his stock to the bank. It was incumbent on the bank, if it had desired his testimony, to have caused his interest to be removed

subdivision, if a party had an opportunity to examine a witness at the trial, he cannot, in general, obtain a new trial on the ground of newly discovered evidence, where the evidence relied upon is that of such witness.<sup>1</sup> When the evidence relied upon is matter of record, the applicant must show a very strong case, indeed, to remove the presumption of negligence which must attach to his failure to produce such evidence at the former trial.<sup>2</sup> And, if

at the time of the trial, or to forego the benefit of it. And such interest may generally be removed in season, by ordinary exertion; but if it cannot be, the witness is excluded when offered, by a well established rule of law, and a subsequent removal of it does not furnish any legal ground for disturbing a verdict." *Franklin Bank v. Pratt*, 31 Me. 501.

Where the alleged new evidence is that of a codefendant, and it does not appear that a severance was asked for previous to the trial, nor that application was made before it was ended that a verdict of acquittal might be found against such party in order that she might testify on behalf of her codefendants; nor that the applicants became aware after the trial of the fact that the witness would testify in their behalf, it was held that there was not due diligence on the part of the applicant, and a new trial would be refused. *State v. Woodworth*, 28 La. An. 89. See also *State v. Bean*, 36 N. H. 122.

Where an accomplice pleads guilty, and his evidence which is relied upon to obtain the new trial was known to the applicant on his trial, a new trial will not be granted, as the accomplice's evidence was available at the former trial. *Hudgins v. State*, 61 Ga. 182.

1. *Poullain v. Poullain*, 79 Ga. 11.

A and B were jointly indicted for a crime. A, being tried separately, was found guilty. It appeared that A had reason, if innocent, to believe that B was guilty, and had opportunity on the trial to examine B, but neglected to do so. Held, a new trial would not be granted on the ground of newly discovered evidence. *People v. Miller*, 33 Cal. 99.

A general allegation that a party used due diligence to obtain testimony, is not sufficient on an application for a new trial on the ground of newly discovered evidence of a witness, who was subpoenaed by the party moving, and in court at the trial. "And a very strong case, indeed, should be made to justify

a new trial on this ground when the witness relied upon was subpoenaed and in court." Diligence must be conclusively shown. *Carson v. Cross*, 14 Iowa 463.

Where the witness relied upon to furnish new evidence was the intimate friend and physician of the accused, and was examined touching the *res gestæ*, but failed to disclose this new matter, a new trial was refused. *Collins v. State*, 6 Tex. App. 72.

Where the corporation is the applicant and the new evidence relied upon is that of its officers, who were examined at the former trial, and the books of the corporation, a new trial will not be granted. *Cheney v. Nebraska etc. Stone Co.*, 41 Fed. Rep. 740.

2. *Robinoe v. Doe*, 6 Blackf. (Ind.) 85; *Simpkins v. Wilson*, 11 Ind. 541; *Fuller v. Harris*, 29 Fed. Rep. 814; *Johnson v. Flint*, 75 Tex. 379; *Morgan v. Houston*, 25 Vt. 570; *Weimer v. Lowery*, 11 Cal. 104. See also *Bogert v. Simons*, 1 Mill. Const. (S. Car.) 143; *Peyton v. Kruger*, 77 Ind. 486.

Newly discovered testimony, consisting of deeds on record affecting the very lands in dispute, will not warrant the granting of a new trial, for such records are always accessible to both parties, and diligence would examine and procure them in time for the trial. *Shields v. Lamar*, 58 Ga. 590.

Where, in a suit to recover for beer sold, a verdict was directed for defendant because there was no proof that plaintiff had a permit to sell from the board of supervisors, as required by Code Iowa, § 1526, a new trial was properly granted, on the ground of newly discovered evidence, where it appeared that before the trial, diligent search was vainly made in the auditor's office for the record of the application for and granting of the permit, but that after the trial a new search was instituted, and the original papers found in a room formerly occupied by the auditor's department, but which had for some time been used as a janitor's

the same facts could have been proven at the trial by other evidence than that newly discovered, a new trial will not be granted, unless the applicant can satisfactorily explain why he did not attempt to use the evidence at his hand.<sup>1</sup>

(c) **MUST NOT GO MERELY TO THE IMPEACHMENT OF A WITNESS.**—When the new evidence only tends to discredit or impeach an opposing witness, it will not avail as ground for a new trial.<sup>2</sup>

room. *Grotte v. Schmidt* (Iowa, 1890), 45 N. W. Rep. 771.

Where a deed has been lost and could not be procured at the time of trial, but which was subsequently found, and it being shown that the index in the register's office was so mutilated that the record of the deed could not be found without searching the deed books leaf by leaf, a new trial was granted. *Elliott v. Harris*, 81 Ky. 470.

1. *Nixon v. Christie*, 84 Ga. 469; *Herman v. Mason*, 37 Wis. 273; *McLain v. Lawson*, 25 Iowa 279.

It is not a sufficient ground for a new trial that a witness resident in another State was discovered in the county too late to have him examined, unless it be shown that his deposition could not have been taken. *Conwell v. Anderson*, 2 Ind. 122.

Any affidavit that the affiant had supposed the subscribing witness to a deed to be dead, and discovered the contrary only during the trial, and it appeared that no preparation had been made to prove the handwriting of the witness, is not sufficient to support a motion for a new trial on the ground of newly discovered evidence. *Bledsoe v. Doe*, 4 How. Miss. 13.

The loss of relevant testimony in the form of letters, would, after diligent search, authorize proof of their contents, and their discovery after verdict and judgment, no reason being shown why they were not proved at the trial, is no ground for a bill for a new trial, especially if they were merely corroborative in a conflict of parol evidence, and not decisive of the controversy. *Wimpy v. Gaskill*, 76 Ga. 41.

A motion for a new trial on the ground of newly discovered evidence will not be granted where it appears that the evidence relied on is that of the wife of the party making the motion, who came to the place of trial for the purpose of testifying, but was unable to take the stand on account of illness, it appearing that no postponement on account of her illness was asked for, and no effort made to take her testi-

mony in any of the modes provided by law. *Richards v. Smith*, 67 Tex. 610.

A new trial will not be granted a party on the ground of newly discovered evidence, consisting of a lost document which he knew at the time of the trial to be in existence, and the contents of which, upon proof of loss, he could have proved by parol. *Chapman v. Moore*, 107 Ind. 223.

2. **Arkansas.**—*Holt v. State*, 47 Ark. 106; *Wallace v. State*, 28 Ark. 531; *Redman v. State*, 40 Ark. 445; *Bourland v. Skinnnee*, 11 Ark. 671.

**California.**—*Klockenbaum v. Pierson*, 22 Cal. 100; *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40; *Stoakes v. Monroe*, 36 Cal. 383; *People v. McCurdy*, 68 Cal. 576.

**Georgia.**—*Pace v. State*, 63 Ga. 159; *Barron v. State*, 80 Ga. 191; *Hunt v. State*, 81 Ga. 140; *Etheridge v. Hobbs*, 77 Ga. 531; *Levinig v. State*, 13 Ga. 513; *Wright v. State*, 34 Ga. 110; *State v. Henley*, R. M. Charl. (Ga.) 505; *Brown v. State*, 55 Ga. 169; *Baker v. Moor*, 84 Ga. 186; *Mitchell v. Printup*, 25 Ga. 182; *Munroe v. Moody*, 78 Ga. 127; *Reid v. State*, 81 Ga. 760; *Dornick v. State*, 8 S. E. Rep. (Ga.) 432.

**Illinois.**—*Tobin v. People*, 101 Ill. 121; *O'Reilly v. Fitzgerald*, 40 Ill. 310; *Friedberg v. People*, 102 Ill. 160; *Grady v. People*, 125 Ill. 122; *Fletcher v. People*, 117 Ill. 184; *Martin v. Ehrensels*, 24 Ill. 187.

**Indiana.**—*Humphreys v. State*, 75 Ind. 469; *Sullivan v. O'Conner*, 77 Ind. 149; *Pennsylvania Co. v. Nations*, 111 Ind. 203; *Pennsylvania Co. v. Nations*, 111 Ind. 203; *O'Dea v. State*, 57 Ind. 31; *M'Intire v. Young*, 6 Blackf. (Ind.) 496; *Bland v. State*, 2 Ind. 608; *Keck v. Umphries*, 4 Ind. 492; *Fleming v. State*, 11 Ind. 234; *Jackson v. Sharpe*, 29 Ind. 167; *Taylor v. State*, 4 Ind. 540; *Brown v. Grove*, 116 Ind. 84.

**Iowa.**—*Morrow v. Chicago etc. R. Co.*, 61 Iowa 487; *Donnelly v. Burkett*, 75 Iowa 613.

**Kansas.**—*Parker v. Bates*, 29 Kan. 597; *Clark v. Norman*, 24 Kan. 515;

State v. Smith, 35 Kan. 618; Lee v. Birmingham, 39 Kan. 320.

**Kentucky.**—Clark v. Rutledge, 2 A. K. Marsh. (Ky.) 381; Barrett v. Belshe, 4 Bibb (Ky.) 348.

**Maine.**—Bradbury v. Cony, 62 Me. 223.

**Massachusetts.**—Hammond v. Wadhams, 5 Mass. 353; Com. v. Waite, 5 Mass. 261; Parker v. Hardy, 24 Pick. (Mass.) 246.

**Mississippi.**—Moore v. Chicago R. Co., 59 Miss. 243; Vanderburg v. Campbell (Miss. 1890), 8 So. Rep. 206.

**Minnesota.**—Cirkel v. Crosswell, 36 Minn. 323; Watson v. St. Paul City R. Co., 42 Minn. 46; Cirkel v. Ellis, 36 Minn. 323.

**Missouri.**—State v. Rockett, 87 Mo. 666; Phillips v. Phillips, 46 Mo. 607; Jaccard v. Davis, 43 Mo. 535; Deer v. State, 14 Mo. 348; Boggs v. Lynch, 22 Mo. 563; State v. Smith, 65 Mo. 464.

**New York.**—Halsey v. Watson, 1 Cal. (N. Y.) 24; Harrington v. Bigelow, 2 Den. (N. Y.) 100; Meakim v. Anderson, 11 Barb. (N. Y.) 215; 11 Barb. (N. Y.) 223; Warner v. Western Transp. Co., 5 Robt. (N. Y.) 490; Leavy v. Roberts, 8 Abb. Pr. (N. Y.) 310; Schultz v. Third Ave. R. Co., 47 N. Y. Super. Ct. 285; People v. Super. Ct. of N. Y., 5 Wend. (N. Y.) 114; 10 Wend. (N. Y.) 286; Bunn v. Hoyt, 3 Johns. (N. Y.) 255; Shumway v. Fowler, 4 Johns. (N. Y.) 425; Carpenter v. Coe, 67 Barb. (N. Y.) 411; Sproul v. Resolute F. Ins. Co., 1 Lans. (N. Y.) 71; Powell v. Jones, 42 Barb. (N. Y.) 24; Nelson v. Neell, 12 Wk. Dig. (N. Y.) 161; Raphaelsky v. Lynch, 43 How. Pr. (N. Y.) 157, 167; 2 Jones & Sp. (N. Y.) 31; 12 Abb., N. S. (N. Y.) 224.

**North Carolina.**—State v. Mitchell, 102 N. Car. 347.

**Oregon.**—Oregon v. Latschaw, 1 Oreg. 146.

**Pennsylvania.**—Struthers v. Wagner, 6 Phila. (Pa.) 262.

**Texas.**—Grate v. State, 23 Tex. App. 458; Herber v. State, 7 Tex. 69; Atkins v. State, 11 Tex. App. 8; Metzger v. Wendler, 35 Tex. 378; Terry v. State, 3 Tex. App. 236; Love v. State, 3 Tex. App. 501.

**Vermont.**—Dodge v. Kendall, 4 Vt. 31; Campbell v. Hyde, 1 D. Chip. (Vt.) 70.

**Virginia.**—Brugh v. Shanks, 5 Leigh (Va.) 598; Thompson's Case, 8 Gratt. (Va.) 637; Bead's case, 22 Gratt. (Va.) 924; Brown v. Speyers, 20 Gratt. (Va.) 296.

**West Virginia.**—Gillilan v. Ludington, 6 W. Va. 128.

**Wisconsin.**—Hooker v. Chicago etc. R. Co., 76 Wis. 542.

**U. S. Courts.**—Carr v. Gale, 1 Curt. (U. S.) 384.

Where a witness testified to one state of facts at the trial and made statements afterwards contradicting the statements formerly made, such fact furnishes no ground for a new trial. Lassiter v. Simpson, 3 S. E. Rep. 242; Duryee v. Dennison, 5 Johns. (N. Y.) 249; Lake v. Hardee, 55 Ga. 667; Commonwealth v. Randall, Thach. Cr. Cas. (Mass.) 500; Husted v. Mead, 58 Conn. 55.

The rule that newly discovered testimony, for the purpose of impeaching a witness who had testified on the trial, is insufficient to justify the allowance of a new trial, is applicable to the statements of persons *in extremis*. State v. Burt (La. 1889), 6 So. Rep. 631.

Newly discovered evidence going merely to the credit of a witness, even of a sole witness, is not cause for a new trial. Hunt v. State, 81 Ga. 140.

Newly discovered evidence, going to explain and add to conversations from which fraudulent misrepresentations of the credit of a person had been inferred and a verdict accordingly rendered, is neither cumulative nor impeaching, so as to justify the refusal of a new trial. Simmons v. Fay, 1 E. D. Smith (N. Y.) 107.

As a general rule, a new trial will not be granted to afford opportunity of impeaching a witness, though cases may arise so imperative as to require the interposition of the court to prevent a palpable wrong. Cochran v. Ammon, 16 Ill. 316.

Contradictory evidence by the same witness, at different trials, to a point material, is cause for a new trial, provided the party aggrieved could not show the fact at the trial. Durkee v. Fessenden, Brayt. (Vt.) 167.

It is a general rule that a new trial will not be granted on account of newly discovered evidence to impeach a witness sworn on the former trial.

Whether this rule would be departed from where the verdict was rendered upon the sole testimony of the adverse party: *Quære*. It clearly ought not to be where such testimony, though the principal evidence in the case was supported by other evidence; nor where the party seeking the new trial had good reason to expect that the adverse party



Especially if this evidence is directly denied by the witness sought to be impeached.<sup>1</sup> But if the newly discovered evidence proves a distinct and material fact, even though it have the additional effect of impeaching the testimony of the adverse party, a new trial should be granted.<sup>2</sup> And a new trial has been granted where the principal witness made an affidavit that her testimony, as given on the trial, was incorrect;<sup>3</sup> and where a material witness has been convicted of perjury in the cause upon his own confession.<sup>4</sup>

would be the principal witness in the case, and did not use reasonable diligence to ascertain his reputation for veracity and to be prepared to impeach him. *Tappin v. Clark*, 32 Conn. 367.

**Rule Held Not to Apply in S. Carolina.**—"The fourth ground of appeal is based upon the proposition that a new trial should not be granted on the ground of newly discovered evidence, the effect of which is to impeach or contradict a witness examined at the former hearing. Whatever may be the rule elsewhere, it is quite certain that such is not the rule in this State, nor does it seem to be the rule in England. In *Fox v. Levingsworth*, 2 Bay (S. Car.) 520, a new trial was granted because evidence was discovered after the trial, showing that one Rountree, a witness, who had testified at the former trial, was interested in the event of the suit, though he had stated, when examined on his *voir dire*, that he had no interest. In *Durant v. Ashmore*, 2 Rich. L. (S. Car.) 184, a new trial was granted on the ground of after-discovered written evidence, which might have affected the credit of a witness examined at the former trial. So, in *Fabrilus v. Cock*, 3 Burr. 1771, a new trial was granted because evidence was discovered after the former trial, going to show the subornation of witnesses who testified at the first trial." *Durant v. Philpot*, 16 S. Car. 116, 125.

**New York Military Tract.**—In *New York*, it has been held, in causes concerning the title to military lands where the identity of the original patentee is in question, that a new trial may be granted to give the defendant an opportunity of impeaching the character of the principal witness for the plaintiff. *Jackson v. Kinney*, 14 Johns. (N. Y.) 186. See also *Jackson v. Hooker*, 5 Cow. (N. Y.) 207.

1. *Sutherland v. State*, 108 Ind. 389; *Vanderburg v. Campbell*, 64 Miss. 89; *Mitchell v. White*, 74 Ga. 327.

2. *Blackburn v. Crowder*, 110 Ind. 127; *Oakley v. Sears*, 1 Robt. (N. Y.) 73.

Where the evidence is of a distinct and independent fact, as the existence of an account book, a new trial may be granted even if such evidence does impeach the testimony of one of the parties. *Blackburn v. Crowder*, 110 Ind. 127.

Where the plaintiff's judgment follows the complaint, a new trial will not be granted for newly discovered evidence that tends to contradict the case made by the complaint. *Bates v. Bates*, 71 Cal. 307.

In case by a mother for the seduction of her daughter, the daughter swore that she was gotten with child on the evening of June 13th. On a motion for a new trial, the defendant introduced affidavits of several persons proving an *alibi* at that time, and himself made affidavit that he had no reason to suppose that she would fix this as the time of the connection, and therefore was not prepared, and did not attempt, to prove the *alibi* on the trial. *Held*, that these facts furnished ground for a new trial, on the ground of newly discovered evidence. *Sargent v. —*, 5 Cow. (N. Y.) 106.

An affidavit of a credible witness that the plaintiff stated to him the nature of the transaction which was the subject of the suit, and that such statement was in direct conflict with his testimony at the trial and in accord with that of the defendant, is sufficient to support a motion for a new trial on the ground of newly discovered evidence. *Weber v. Weber*, 5 N. Y. Supp. 178.

3. *Mann v. State*, 44 Tex. 642; *Richardson v. Fisher*, 1 Ben. (U. S.) 145.

4. *Great Falls Co. v. Mathes*, 5 N. H. 174. See also *Seward v. Case*, 50 Ill. 228.

The court will not set aside a verdict obtained by perjury, unless the witness

(d) MUST NOT BE MERELY CUMULATIVE.—Cumulative evidence is evidence of the same kind to the same point—evidence which merely multiplies witnesses to a fact, before investigated, or only adds other circumstances of the same general character.<sup>1</sup>

has been convicted of perjury, or has died since the trial, and his conviction has thus been rendered impossible. *Dyche v. Patton*, 3 Jones Eq. (N. Car.) 332.

Courts do not look with favor upon a motion for a new trial founded upon newly discovered evidence that a witness for the successful party committed perjury, unless the witness has been convicted. *Holtz v. Schmidt*, 12 Jones & Sp. (N. Y.) 327. Especially where the newly discovered evidence is that of the perjurer. *People v. McGuire*, 2 Hun (N. Y.) 269. But newly discovered evidence that the judgment was recovered by conspiracy and perjury has been deemed sufficient ground for granting a new trial where the fact of the conspiracy was first disclosed by the conspirators upon a quarrel between them after the trial, and the motion was made as soon as the fact was discovered. *Raphaelsky v. Lynch*, 2 Jones & Sp. (N. Y.) 31; 43 How. Pr. (N. Y.) 157; 12 Abb., N. S. (N. Y.) 224.

1. *Glidden v. Dunlap*, 28 Me. 379; *Bradish v. State*, 35 Vt. 452; *Waller v. Graves*, 20 Conn. 310; *Watson v. Delafield*, 2 Cal. (N. Y.) 224; *Reed v. McGrew*, 5 Ohio 386; *Smith v. Brush*, 8 Johns. (N. Y.) 84; *Pike v. Evans*, 15 Johns. (N. Y.) 210; *Guyot v. Butts*, 4 Wend. (N. Y.) 579; *Parker v. Hardy*, 24 Pick. (Mass.) 246; *Aholtz v. Durfee*, 25 Ill. App. 43; *Abrams v. Van Brunt*, 13 N. Y. Civ. Pro. 402; 12 N. Y. St. Rep.; *Wall v. Trainor*, 16 Nev. 131; *Howland v. Reeves*, 25 Mo. App. 458; *Krueger v. Merrill*, 66 Wis. 28; *Binnson v. Faircloth*, 82 Ga. 185.

Evidence is not cumulative merely because former evidence may have indirectly tended to establish the same fact. *Wolf v. Mahan*, 57 Tex. 171.

Cumulative evidence means additional evidence of the same kind or degree as that previously given, and upon the same point, which in substance and effect simply repeats or adds to what has before been testified. See *People v. Super. Ct. of N. Y.*, 10 Wend. (N. Y.) 285; *Parshall v. Klinck*, 43 Barb. (N. Y.) 203; *Powell v. Jones*, 42 Barb. (N. Y.) 24; *Cole v. Cole*, 50 How. Pr. (N. Y.) 59; *Cole v. Van Keuren*, 51

How. Pr. (N. Y.) 451; *Lawrence v. Ely*, 38 N. Y. 42; *Myers v. Riley*, 36 Hun (N. Y.) 20. If the newly discovered evidence consists merely of additional facts and circumstances going to establish the same points which were principally controverted before, or of additional witnesses to the same facts and circumstances, such evidence is cumulative, and a new trial will be denied. *People v. Superior Ct. of N. Y.*, 5 Wend. (N. Y.) 114, 127. But if the newly discovered evidence does not relate to a fact as to which the moving party gave evidence upon the trial, evidence of such new facts cannot be said to be cumulative within the meaning of the rule. *Parshall v. Klinck*, 43 Barb. (N. Y.) 203; *Powell v. Jones*, 42 Barb. (N. Y.) 24. *Baylies on New Trial*, p. 528.

"From some of the cases on this subject, it may perhaps be inferred that courts have supposed all additional evidence to be cumulative merely, which conduced to establish the same ground of claim or defence before relied upon, and that none would be available for a new trial unless it disclosed or established some new ground. But this does not seem to us to be the true rule, as recognized in the best considered cases. There are often various distinct and independent facts going to establish the same ground, on the same issue. Evidence is cumulative which merely multiplies witnesses to any one or more of these facts before investigated, or only adds other circumstances of the same general character. But that evidence which brings to light some new and independent truth of a different character, although it tend to prove the same proposition or ground of claim before insisted on, is not cumulative within the true meaning of the rule on this subject: as in the present case, Merwin testified only that the libel, as printed and published, was not like the paper written by him and signed by Waller in the particular referred to. But now appears a new fact entirely independent of the testimony of Merwin—one, which did not exist, at the time Merwin speaks of, which is, that another person, without the knowledge or consent of either Waller

or Merwin, inserted the objectionable words into the article, which appeared in the newspaper." *Waller v. Graves*, 20 Conn. 306.

Cumulative evidence is such as tends to support the same facts which were before attempted to be proved. *Chatfield v. Lathrop*, 6 Pick. (Mass.) 417; *Gardner v. Mitchell*, 6 Pick. (Mass.) 116; *People v. Superior Ct. of N. Y.*, 10 Wend. (N. Y.) 286.

And where the evidence tends to establish a new fact which was not before in the case, it is not cumulative. *Gardner v. Mitchell*, 6 Pick. (Mass.) 116. See also *Hughes v. Coursey*, 46 Ga. 115; *Houston etc. R. Co. v. Forsyth*, 49 Tex. 171; *Wall v. Trainer*, 16 Nev. 131; *Howland v. Reeves*, 25 Mo. App. 458; *Casey v. State*, 20 Nev. 138.

Though the evidence tends to establish an issue controverted on the trial, yet, if it introduces a new and distinct fact, it is not cumulative. *German v. Maquoketa Sav. Bank*, 38 Iowa 368.

The admission of a party is not evidence of the same kind as the testimony of other witnesses, and therefore is not cumulative, although relating to the same controverted fact. *Wayt v. Burlington etc. R. Co.*, 45 Iowa 217. See also *Humphreys v. Klick*, 49 Ind. 189; *Rains v. Ballow*, 54 Ind. 82; *Fletcher v. People*, 117 Ill. 190.

Where the new evidence relied upon tended to show direct admissions of the plaintiff, it is not cumulative, if the only evidence of a like nature introduced at the trial was evidence of acquiescence in statements made by his wife, the court said, "This court has held that 'testimony is not merely cumulative when it tends to prove a distinct fact not testified to at the trial, although other evidence may have been introduced by the moving party tending to support the same ground of claim or defence to which such fact is pertinent." *Wilson v. Plank*, 41 Wis. 94; *Goldsworthy v. Town of Linden*, 75 Wis. 24.

In a suit for seduction under promise of marriage the plaintiff testified to the principal facts, and also that, after promise, the marriage was postponed until spring; also to subsequent conversation concerning the marriage and to conversations after the seduction. Held that newly discovered evidence of subsequent conversations between the parties like those to which the plaintiff had testified was not cumulative and was sufficient to warrant a

new trial. *Kochel v. Bartlett*, 88 Ind. 237.

The finding of misplaced letters after the verdict which are relevant to the issue, but whose contents merely tend to corroborate one side of the case, and with little probability of the result being changed, will not be a sufficient ground for granting a new trial. *Wienpy v. Gaskill*, 79 Ga. 620. See also *Robinson v. Veal*, 79 Ga. 633.

Alleged newly discovered evidence, which is nothing but *data* by which the recollections of witnesses are refreshed, enabling them to testify more positively than before to facts corroborative of defendant's own testimony, is inconclusive and cumulative, and insufficient to require a new trial, especially when no diligence is shown to procure the evidence at the trial. *Plumb v. Campbell*, 129 Ill. 101.

When witnesses are examined in respect to the condition of the pistol used in a homicide, and on the point whether or not defendant shot at deceased, all additional evidence on these points is merely cumulative, and a new trial for newly discovered testimony will not be granted on such evidence. 1876, *O'Shields v. State*, 55 Ga. 606.

Where, on the trial of an action, admissions of a party tending to show his liability in such action have been proved, proof of other admissions made by him having the same tendency is cumulative evidence, and the discovery of such evidence cannot support a complaint for a new trial. *Cox v. Harvey*, 53 Ind. 174.

In replevin for a horse, the issue was whether the defendant had bought the horse of the plaintiff or held it as bailee. A witness testified that defendant told him he was breaking the horse for the plaintiff. A new trial was refused where the evidence relied upon was that of a witness to an admission of the defendant's, that he had not bought the horse of the plaintiff, but was breaking it for him. *Audis v. Richie*, 120 Ind. 138.

The issue in the first trial was whether money had been paid to one A. There was evidence of an admission of A that he had received it. The new testimony was that of a witness who saw A receive it. Held, that it was not cumulative. *St. John v. Alderson*, 32 Gratt. (Va.) 140.

In a suit by an attorney to recover for services, the defence was that he was employed, not by defendant, but by

And it is a settled rule that a new trial will not be granted on the ground of newly discovered evidence, when the new evidence relied upon is merely cumulative of that introduced at the former trial.<sup>1</sup>

one L, and the plaintiff's right to recover depended largely on the authority of L to employ him. On the trial the only testimony tending directly to establish such authority was that of L. Held, that newly discovered evidence that a certain person heard the defendant give L such authority will not be considered merely cumulative, in the sense that would make it an abuse of discretion to set aside the verdict on that ground. *Smith v. Grover*, 74 Wis. 171.

And the question whether or not certain evidence is cumulative is purely a question of law in deciding which the court has no discretion. *Town of Manson v. Ware*, 63 Iowa 346.

1. **Arkansas.**—*Brown v. Stacy*, 5 Ark. 403; *Brown v. St. Louis, etc. R. Co.* (Ark.), 12 S. W. 203; *Berry v. Elliott*, 25 Ark. 89; *Burris v. Wise*, 2 Ark. 33.

**California.**—*People v. Anthony*, 56 Cal. 397; *People v. Fong Ah Sing*, 70 Cal. 8; *Klockenbaum v. Pierson*, 22 Cal. 160; *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40; *Wright v. Carillo*, 22 Cal. 595; *Hobler v. Cole*, 49 Cal. 251; *Williamson v. Tobey*, 86 Cal. 497; *People v. Sutton*, 73 Cal. 243; *Russell v. Dennison*, 45 Cal. 337; *Gaven v. Dopman*, 5 Cal. 342; *Meyer v. Mowry*, 34 Cal. 514; *Stoakes v. Monroe*, 36 Cal. 383; *Spencer v. Doane*, 23 Cal. 418; *Aldrich v. Palmer*, 24 Cal. 513.

**Florida.**—*Milton v. Blackshear*, 8 Fla. 161; *Coker v. Merritt*, 16 Fla. 416; *Simpson v. Daniels*, 16 Fla. 677.

**Georgia.**—*Mitchell v. White*, 74 Ga. 327; *Purvey v. State*, 66 Ga. 753; *Erskine v. Duffy*, 76 Ga. 602; *Poullain v. Poullain*, 79 Ga. 11; *Hawkins v. Kermod* (Ga. 1890), 11 S. E. Rep. 560; *McLendon v. Frost*, 57 Ga. 448; *Gardner v. Lamback*, 47 Ga. 133; *Perry v. Houseley*, 40 Ga. 657; *Orand v. Walker*, 41 Ga. 657; *McAfee v. State*, 31 Ga. 411; *Avery v. State*, 26 Ga. 233; *Verder v. Savannah, etc. R. Co.*, 82 Ga. 675; *Wright v. Greenwood*, 17 Ga. 418; *Dickinson v. Solomons*, 26 Ga. 684; *Coggin v. Jones*, 29 Ga. 257; *Smith v. State*, 8 S. E. 187; *Grubb v. Kalb*, 37 Ga. 459; *Hart v. Jackson*, 77 Ga. 493; *Brinson v. Faircloth*, 82 Ga. 185.

**Idaho.**—*Flannagan v. Newberg*, 1 Idaho T. 82.

**Illinois.**—*Toy v. Richards*, 30 Ill. App. 477; *Sconce v. Henderson*, 102 Ill. 376; *Harvey v. Collins*, 89 Ill. 255; *Skelly v. Boland*, 78 Ill. 438; *Jacobson v. Gunzburg*, 25 Ill. App. 223; *Classen v. Cuddigan*, 21 Ill. App. 591; *Cooper v. Johnson*, 27 Ill. App. 504; *O'Neil v. O'Neil* (Ill.), 14 N. E. 844; *Kinney v. People*, 108 Ill. 519; *Calhoun v. O'Neil*, 53 Ill. 354; *Toledo etc. R. Co. v. Seitz*, 53 Ill. 452; *Cleary v. Cummings*, 28 Ill. App. 237; *Klein v. People*, 113 Ill. 596; *Morrison v. Stewart*, 24 Ill. 24; *Schlencker v. Risley*, 4 Ill. 483; *Smith v. Shultz*, 2 Ill. 490; *Adams v. People*, 47 Ill. 376.

**Indiana.**—*Hines v. Driver*, 100 Ind. 319; *Marshall v. Mathers*, 103 Ind. 458; *Pennsylvania Co. v. Nations*, 111 Ind. 203; *Jennings v. Loring*, 5 Ind. 250; *Penn. Co. v. Nations* (Ind.), 12 N. E. 309; *Cox v. Hutchings*, 21 Ind. 219; *Porter v. State*, 2 Ind. 435; *Harris v. Rupel*, 14 Ind. 209; *State v. Clark*, 16 Ind. 97; *Fox v. Reynolds*, 24 Ind. 46; *Merryman v. Ryan*, 24 Ind. 262; *Simpson v. Wilson*, 6 Ind. 474.

**Iowa.**—*Morrow v. Chicago etc. R. Co.* 61 Iowa 487; *Town of Manson and Ware*, 63 Iowa 346; *State v. Oeder* (Iowa, 1800), 45 N. W. Rep. 543; *Sturgeon v. Ferron*, 14 Iowa 160; *Wilhelm v. Thorington*, 14 Iowa 537; *Blair v. Madison Co.* (Iowa, 1890), 46 N. W. 1093; *Hickenbottom v. Chicago etc. R. Co.*, 57 Iowa 704.

**Kansas.**—*Sexton v. Lamb*, 27 Kan. 432; *Parker v. Bates*, 29 Kan. 597; *Baughman v. Penn*, 33 Kan. 504; *Clark v. Norman*, 24 Kan. 515; *Olathe v. Horner*, 38 Kan. 312; *Mitchell v. Stillings*, 20 Kan. 276; *O'Leary v. Reed*, 30 Kan. 749.

**Kentucky.**—*Mercer v. Mercer*, 87 Ky. 21; *Marcum v. Com.* (Ky. 1886), 1 S. W. Rep. 727; *Mercer v. Mercer*, 87 Ky. 21; *Houston v. Kidwell*, 83 Ky. 301; *Klein v. Gibson* (Ky. 1886), 2 S. W. Rep. 116; *Chambers v. Chambers*, 2 A. K. Marsh. (Ky.) 348; *Rippendan v. Scott*, 1 A. K. Marsh. (Ky.) 151.

**Maine.**—*McLaughlin v. Doane*, 56 Me. 289; *Ham v. Ham*, 39 Me. 263; *Handly v. Call*, 30 Me. 9; *Snowman v. Wardwell*, 32 Me. 275.

**Massachusetts.**—*Gardner v. Gardner*, 2 Gray (Mass.) 434; *Gardner v. Mitc.*

This rule has been sometimes relaxed;<sup>1</sup> and it has been

ell, 6 Pick. (Mass.) 114; Yarmouth v. Dennis, 6 Pick. (Mass.) 116, note; Sawyer v. Merrill, 10 Pick. (Mass.) 16.

**Minnesota.**—Lowe v. Minneapolis St. R. Co., 37 Minn. 283; Jones v. Chicago etc. R. Co., 42 Minn. 183; Schacherl v. St. Paul City R. Co., 42 Minn. 42; Gilmore v. Brost, 39 Minn. 190; Cummings v. Taylor, 24 Minn. 429; State v. Dumphrey, 4 Minn. 438; Mead v. Constans, 5 Minn. 171.

**Mississippi.**—Moody v. Farr, 27 Miss. 788; Vanderburg v. Campbell, 64 Miss. 84; Newcomb v. State, 37 Miss. 383; Hare v. Sproul, 2 How. (Miss.) 772.

**Missouri.**—Culbertson v. Hill, 87 Mo. 553; Donovan v. Ryan, 35 Mo. App. 160; State v. Rockett, 87 Mo. 666; Dollman v. Munson, 90 Mo. 85; State v. Larrimore, 20 Mo. 425; Wells v. Sanger, 21 Mo. 354; Beuchamp v. Sconce, 12 Mo. 57; State v. Stumbo, 26 Mo. 306; Miller v. Whitson, 40 Mo. 97; Boggs v. Lynch, 22 Mo. 563.

**Nebraska.**—Campbell v. Holland, 22 Neb. 587; Brooks v. Dutcher, 22 Neb. 644.

**New Jersey.**—Kirk v. Richardson, 46 N. J. L. 13; Tomlin v. Dew, 19 N. J. L. 76; Den v. Geiger, 7 N. J. L. 228; Den v. Wintermute, 13 N. J. L. 177.

**New York.**—People v. Superior Ct. of N. Y., 10 Wend. (N. Y.) 285; Raphaelsky v. Lynch, 43 How. Pr. (N. Y.) 157; 2 Jones & Sp (N. Y.) 31; 12 Abb. Pr., N. S. (N. Y.) 224; Oakley v. Sears, 7 Robt. (N. Y.) 111; Myers v. Riley, 36 Hun (N. Y.) 20, 53; Powell v. Jones, 42 Barb. (N. Y.) 24; Geneva etc. R. Co. v. Sage, 35 Hun (N. Y.) 95; Gale v. New York Cent. etc. R. Co., 53 How. Pr. (N. Y.) 385; 13 Hun (N. Y.) 1; Fleming v. Hollenback, 7 Barb. (N. Y.) 271; Cole v. Van Keuren, 51 How. Pr. (N. Y.) 451; Barteau v. Phoenix Mut. L. Ins. Co., 67 Barb. (N. Y.) 354; Peck v. Hiler, 30 Barb. (N. Y.) 655; Cole v. Cole, 50 How. Pr. (N. Y.) 59; Sheldon v. Stryker, 27 How. Pr. (N. B.) 387, 42 Barb. (N. Y.) 284; Plyer v. German-American Ins. Co., 1 N. Y. Supp. 395; Sproul v. Resolute F. Ins. Co., 1 Lans. (N. Y.) 71; Adams v. Bush, 23 How. Pr. (N. Y.) 262; Williams v. People, 45 Barb. (N. Y.) 201; Tripler v. Ehchalt, 5 Robt. (N. Y.) 609; Brisbane v. Adams, 1 Sandf. (N. Y.) 195; Best v. Starks, 24 How. Pr. (N. Y.) 58; Pike v. Evans, 15 Johns. (N. Y.) 210; Steinbach v. Columbian Ins. Co., 2 Cai. (N.

Y.) 129; Smith v. Brush, 8 Johns. (N. Y.) 84; Burnett v. Phalon, 4 Bosw. (N. Y.) 622; Albert v. Sweet, 9 N. Y. Supp. 86; Hogan v. Carroll, 7 N. Y. Supp. 183.

**North Carolina.**—Simmons v. Mann, 92 N. Car. 12; State v. Starnes, 97 N. Car. 423.

**Ohio.**—Ferrin v. Protection Ins. Co., 11 Ohio 147; Loaffner v. State, 10 Ohio St. 598; Reed v. McGrew, 5 Ohio 375.

**Pennsylvania.**—1869, Com. v. Schoeppe, 1 Pa. Leg. Gaz. R. 450; Com. v. Flanagan, 7 W. & S. (Pa.) 415; Com. v. Murray, 2 Ashm. (Pa.) 41; Com. v. Williams, 2 Ashm. (Pa.) 69.

**Rhode Island.**—Kaul v. Brown (R. I. 1890), 20 Atl. Rep. 10.

**Tennessee.**—Irwin v. Jordon, 7 Humph. (Tenn.) 167; 1868, Noel v. McCrory, 7 Coldw. (Tenn.) 623; McGavock v. Brown, 4 Humph. (Tenn.) 251; Jones v. White, 11 Humph. (Tenn.) 268; Dossett v. Miller, 3 Sneed (Tenn.) 72.

**Texas.**—Latham v. Selkirk, 11 Tex. 314; Castro v. Wurzbach, 13 Tex. 128; Galveston Oil Co. v. Thompson (Tex.), 13 S. W. 60; East Line etc. R. Co. v. Boon (Tex. 1886), 76 Tex. 235; 1 S. W. Rep. 632; Walker v. Brown, 66 Tex. 556; Sabine etc. R. Co. v. Wood, 69 Tex. 679; State v. Moore, 7 Tex. 257.

**Vermont.**—Bullock v. Beach, 3 Vt. 73; Town of Kirby v. Waterford, 14 Vt. 414; Perkins v. Dana, 19 Vt. 589.

**Virginia.**—Akers v. Akers, 83 Va. 633; Smith v. Watson, 82 Va. 712; Tate v. Tate, 85 Va. 205; Harnsbarger v. Kinney, 13 Gratt. (Va.) 511; Hoomes v. Kulm, 4 Call (Va.) 274.

**West Virginia.**—Bales v. State, 3 W. Va. 685; Carder v. Bank of W. Virginia (W. Va. 1880), 11 S. E. Rep. 716; Dower v. Church, 21 W. Va. 23.

**Wisconsin.**—Kruger v. Merrill, 66 Wis. 28; Bigelow v. Sickles, 75 Wis. 427; Gans v. Harrison, 44 Wis. 323; Weiting v. Town of Millston (Wis. 1890), 46 N. W. Rep. 879; Edmister v. Garrison, 18 Wis. 594.

**U. S. Courts.**—Palmer v. Fiske, 2 Curt. (U. S.) 14; Wiggin v. Coffin, 3 Story (U. S.) 1; Aslop v. Commercial Ins. Co., 1 Sumn. (U. S.) 451; Ames v. Howard, 1 Sumn. (U. S.) 482.

1. Thus, in ejectment for land in a military tract, a new trial was granted on the ground of newly discovered evi-

the subject of serious animadversions by the courts.<sup>1</sup>

(c) **MUST BE MATERIAL AND CONCLUSIVE.**—The evidence must be material to the issue,<sup>2</sup> and so conclusive as to give rise to

dence, though it was merely cumulative, and intending to impeach a witness sworn at the trial; ejectment for military lots being in this respect an exception to the general rule. *Jackson v. Crosby*, 12 Johns. (N. Y.) 354; *Jackson v. Hooker*, 5 Cow. (N. Y.) 207.

So in *Barker v. French*, 18 Vt. 160, the court said: "But it," [a new trial] "has not been refused solely because cumulative if it will make a doubtful case clear."

And in *Hambel v. Williams*, 37 Iowa 224, it was held that a new trial should be granted, although the newly discovered evidence was in some degree cumulative, the application being otherwise well founded. So, where the newly discovered evidence was only additional evidence of the petitioner's insanity, consisting of the testimony of various persons who had on different occasions observed his conduct and regarded it as indicating insanity, it was held that, if the court could see that it might reasonably affect the result, the fact that the evidence was in some sense cumulative, ought not, in a case where life was at stake, to be decisive against the granting of a new trial. *Andersen v. State*, 43 Conn. 514.

The rule that a new trial will not be granted on account of newly discovered cumulative evidence, is a rule that will be relaxed with great caution. *Irwin v. Morell*, *Dudley* (Ga.) 72; *Callahan v. Caffarata*, 39 Mo. 136.

In an action of ejectment, it had been an important question affecting the title, whether the father and mother of the plaintiff had ever been married, and the plaintiff had introduced a certificate of their marriage purporting to be signed by a certain magistrate, since deceased, and by E and another as witnesses. The defendant also introduced witnesses who testified that in their opinions the certificate was not that of the magistrate.

On a motion for a new trial on the ground of newly discovered evidence, it was alleged that the defendant had found several witnesses who would testify that E was in Louisiana at the time the certificate was dated, and several others that would testify that one L, at the request of the plaintiff's father,

wrote the certificate and signed the name of the magistrate to it. *Held*, that while it is a general rule that a new trial will not be granted for newly discovered evidence that is merely cumulative, yet such direct evidence of the forgery was something so unusual that the defendant could not have been expected to enquire after it, while it was so apart from the ordinary mode of proving a forgery that it could not properly be regarded as merely cumulative. *Knowles v. Northrop*, 53 Conn. 360.

1. The rule or principle requiring the denial of a motion for a new trial, on the ground of the evidence newly discovered being cumulative, does not rest upon any just or solid foundation. It is simply the dictate of authority which has been followed without much consideration of its foundation. It is not one to be extended to cases not falling directly within its language. For there is the same propriety and necessity for giving a party a new trial, who can vindicate himself, or sustain his cause of action by cumulative evidence, as there is for any other reason. And there is certainly no justice in subjecting a person to what is really an unfounded claim, or for preventing him from maintaining an equally well founded defence, because the evidence discovered by him by which that can be done, may be of the same quality or description as that given upon the trial in which he has been defeated. *Willcox Silver Plate Co. v. Barclay*, 48 Hun (N. Y.) 56. See also *Clegg v. New York Newspaper Union*, 4 N. Y. Supp. 287.

2. *Bourland v. Skinnee*, 11 Ark. 671; *Town of Manson v. Ware*, 63 Iowa 346; *Hines v. Driver*, 100 Ind. 315; *Parker v. Bates*, 29 Kan. 597; *Clark v. Norman*, 24 Kan. 515; *Olathe v. Horner*, 38 Kan. 312; *Watts v. Howard*, 7 Metc. (Mass.) 478; *Wall v. Trainor*, 16 Nev. 131; *Parsons v. Platt*, 37 Conn. 563; *Vardeman v. Byrne*, 7 How. (Miss.) 365; *Marshall v. Union Ins. Co.*, 2 Wash. (U. S.) 411; *Robbins v. Fowler*, 2 Ark. 133; *McDonald v. Early*, 24 Neb. 818; *Potts v. State*, 26 Tex. App. 663; *Langham v. State*, 26 Tex. App. 533; *Sharp v. Loyless*, 39 Ga. 678; *Kepner v. Betz*, 51 N. Y. Supr. Ct. 18;

Meyers v. Fiegel, 38 How. Pr. (N. Y.) 424; White v. State, 10 Tex. App. 167; Chicago etc. R. Co. v. Sullivan (Ill.), 17 N. E. Rep. 460; Bryan v. Walton, 33 Ga. Supp. 11; Crafts v. Union Mut. F. Ins. Co., 36 N. H. 44; Beery v. Chicago etc. R. Co., 73 Wis. 197; Cutler v. Steamer Columbia, 1 Oreg. 101; Gerard v. McCormick, 8 N. Y. Supp. 860; Grace v. McArthur, 16 Wis. 641; Garnett v. Kirkman, 41 Miss. 94; Rippeidan v. Scott, 1 A. K. Marsh. (Ky.) 151; Moore v. Philadelphia Bank, 5 Serg. & R. (Pa.) 41; Myers v. Brownell, 2 Aik. (Vt.) 407; Fiss v. Smith, 1 Browne (Pa.) App. 71; Fears v. Albea, 69 Tex. 437; Johnson v. Flint, 75 Tex. 379; Louisville etc. R. Co. v. Gilbert, 88 Tenn. 430; Livesy v. Festner (Neb. 1889), 44 N. W. Rep. 441; Miller v. Cook, 104 Ind. 238; Omaha etc. R. Co. v. O'Donnell, 24 Neb. 753; Smith v. Chapel, 36 Minn. 180; Shewalter v. Williamson (Ind. 1890), 25 N. E. Rep. 52; Sharpe v. Traver, 8 Minn. 273; Carr v. State, 14 Ga. 358.

In Harnett v. Harnett, 59 Iowa 401, it was held that where the wife had been granted a divorce on the ground of inhuman treatment the husband was not entitled to a new trial for newly discovered evidence which tended to show that the wife's relations had unduly interested themselves in procuring the divorce, as such testimony would be immaterial to rebut the charge of inhuman treatment.

Where a wrong inference might have been, and probably was drawn by the jury from the testimony as to a fact not very material, and the remaining evidence strongly supported the verdict, a motion for a new trial, on account of the discovery of evidence explaining such testimony, was refused. Tuttle v. Cooper, 5 Pick. (Mass.) 414.

Newly discovered evidence may entitle a defendant to a new trial notwithstanding it has no pertinency to the issue of guilty or not guilty; as, for instance, if it shows that the conviction is for a higher grade of the alleged offence than the defendant is legally amenable for. See this case in illustration. Moore v. State, 18 Tex. App. 212.

Where the alleged newly discovered evidence, if offered, would be inadmissible under the pleadings, there is no ground for a new trial. Devot v. Marx, 19 La. An. 491.

Newly discovered evidence upon a question not involved in the issue upon which the case was tried, will not jus-

tify a new trial. Brickley v. Walker, 68 Wis. 563.

The remedy for a party who, after trial, has discovered material new matter, not admissible in evidence under the issues tried, is not a new trial, but a review of the judgment. 1875, Rich v. Starbuck, 50 Ind. 126.

A new trial should be granted if an unsatisfied judgment exists, which may properly be pleaded as a set-off, the existence of it being unknown to the defendant's attorneys at the trial. Childs v. District of Columbia, 19 Ct. of Cl. 332.

A witness has stated in his deposition that the amount of a certain excavation was 888 square yards, but in an exhibit attached thereto the amount was correctly stated as 888 cubic yards. Held, that evidence that the witness meant to say 888 cubic yards was immaterial and cumulative. Olathe v. Horner, 38 Kan. 312.

In an action for personal injuries caused to a freight conductor while uncoupling cars, defendant gave evidence based on observation, without taking the grade, that the track at the place of the injury was about level, not deeming it necessary to ascertain the exact grade, being led to believe by the allegations in plaintiff's petition that he would attempt to prove that the engine caused the train to lurch suddenly. After the trial defendant discovered by measurement that there was a grade. Held, that it was not error to grant a new trial on the ground of newly discovered and material evidence. Kane v. Savannah etc. R. Co. (Ga. 1890), 11 S. E. Rep. 493.

In an application for a divorce, a new trial will not be granted on the ground of newly discovered evidence, where no reason for a divorce to which such evidence is applicable is mentioned in the petition. Pinkard v. Pinkard, 14 Tex. 356.

In an action of slander, after a verdict for the plaintiff, a new trial will not be granted to the defendant on an affidavit of newly discovered evidence which goes only to support the plea of justification. Beers v. Root, 9 Johns. (N. Y.) 264.

Otherwise, if it goes to support the plea of not guilty. Beers v. Root, 9 Johns. (N. Y.) 264.

Newly discovered evidence tending only towards mitigation of damages is not sufficient ground for a new trial. Schlencker v. Risley, 4 Ill. 483; Ham v. Taylor, 22 Tex. 225.

the presumption that if a new trial is granted it will change the result.<sup>1</sup>

See however, *Burlingame v. Cowee* (R. I.) 12 Atl. Rep. 234, where it was held, that if the newly discovered evidence is applicable only in mitigation of damages, a new trial will not be granted unless it is very clear that if the new testimony had been before the jury, the verdict would be so manifestly excessive that the defendant would be entitled to a new trial on that account.

1. *Lewis v. McMullen*, 5 W. Va. 582; *Oneal v. State*, 47 Ga. 229; *Patterson v. Collier*, 77 Ga. 292. *In re Ramsdell's Will*, 3 N. Y. Supp. 499; *State v. Stain*, 82 Me. 472; *Tull v. Pope*, 69 N. Car. 183; *Travelers' Ins. Co. v. Harvey*, 82 Va. 849; *Teal v. State*, 22 Ga. 75; *Roach v. State*, 34 Ga. 78; *Carlisle v. Tidwell*, 16 Ga. 33; *Fay v. Richards*, 30 Ill. App. 477; *Levitsky v. Johnson*, 35 Cal. 41; *Martin v. Ehrenfels*, 24 Ill. 187; *Windham Co. Bank v. Kendall*, 7 R. I. 77; *State v. O'Brien*, 7 R. I. 336; *Heaton v. Manhattan F. etc. Ins. Co.*, 7 R. I. 502; *Stewart v. Hamilton*, 19 Tex. 96; *Briggs v. Gleason*, 27 Vt. 114; *Potter v. Padelford*, 3 R. I. 162; *Watts v. Johnson*, 4 Tex. 311; *Robinson v. Martel*, 11 Tex. 149; *Bixby v. State*, 15 Ark. 395; *Petefish v. Watkins*, 124 Ill. 384; *McCormick v. Central R. Co.*, 75 Cal. 506; *Payne v. Weems*, 36 Mo. App. 54; *Byrne v. Reed*, 75 Cal. 277; *Rich v. Mayer*, 7 N. Y. Supp. 69; *Jones v. State*, 23 Tex. App. 501; *Gallup v. Henderson*, 6 N. Y. Supp. 914; *Grace v. McArthur*, 76 Wis. 641; *Edgmon v. Ashelby*, 76 Ill. 161; *Hall v. Lyons*, 29 W. Va. 410; *Harris v. Thompson*, 23 Kan. 372; *Morgan v. Bell*, 41 Kan. 345; *Allen v. Perry*, 6 Bush (Ky.) 85; *Bennett's Case*, 8 Leigh (Va.) 745; *Keiser v. Decker* (Neb. 1890), 45 N. W. Rep. 272; *Georgia R. Co. v. Kicklighter*, 63 Ga. 708; *Bixby v. State*, 15 Ark. 395; *Williams v. United States*, 11 S. Ct. 43; *Young v. State*, 56 Ga. 403; *Rainey v. State*, 53 Ind. 278; *Hauck v. State*, 1 Tex. App. 357; *Gibbs v. State*, 1 Tex. App. 12; *McDonald v. Early*, 24 Neb. 818; *People v. Sackett*, 14 Mich. 320; *Cole v. Cole*, 50 How. Pr. (N. Y.) 529; *Sistare v. Olcott*, 5 N. Y. Supp. 114\*; *State v. Burge*, 7 Iowa 255; *Illines v. Driver*, 100 Ind. 319; *Humphreys v. The State*, 75 Ind. 469; *Parsons v. Platt*, 37 Conn. 563; *Sexton v. Lamb*, 27 Kan. 432; *Norwich etc. R. Co. v. Cahill*, 18 Conn.

484; *Morris v. Hadley*, 9 Mich. 278; *Crystal Lake Ice Co. v. McAuley*, 75 Cal. 631; *Culbertson v. Hill*, 87 Mo. 553; *McCormick v. Cent. R. Co.*, 75 Cal. 506; *Miller v. Ross*, 43 N. J. L. 552; *Sternfield v. Western Ins. Co.*, 19 N. Y. St. Rep. 460; *Starin v. Kelly*, 47 N. Y. Super. Ct. 288; *McDonald v. Early*, 24 Neb. 818; *McClusky v. Gerhauser*, 2 Nev. 47; *People v. Howard*, 74 Cal. 547; *Mechanics' Ins. Co. v. Nichols*, 16 N. J. L. 410; *People v. Sutton*, 73 Cal. 243; *Wolfinger v. Fenton*, 2 Phila. (Pa.) 19; *Merrick v. Britten*, 26 Ark. 496; *Hoye v. State*, 39 Ga. 718; *Town of Middleton v. Adams*, 13 Vt. 285; *Trask v. Unity*, 74 Me. 208, and cases cited *Burr v. Palmer*, 23 Vt. 244; *Board of Regents v. Linscott*, 30 Kan. 240; *Conrad v. Sixbee*, 21 Wis. 383; *Leschi v. Territory*, 1 Wash. T. 23; *Sayre v. King*, 17 W. Va. 562; *Dower v. Church*, 21 W. Va. 23; *Anderson v. Market Nat. Bank*, 66 How. Pr. (N. Y.) 8; *Schultz v. Third Ave. R. Co.*, 47 N. Y. Super. Ct. 285; *Brady v. Mayor etc. of New York*, 54 N. Y. Super. Ct. 457.

The affidavits in support of a motion for a new trial on the ground of newly discovered evidence which do not show that a retrial would probably result in a change of verdict, are insufficient. *Byrne v. Reed*, 75 Cal. 277.

If the newly discovered evidence would result in an equipolse of witnesses upon the point of an alibi a new trial will not be granted. *Bean v. People*, 124 Ill. 576.

**When the Effect of the Newly Discovered Evidence Upon the Result Is Doubtful.**—*Graham & Waterman* in their work on New Trials, upon this subject remark that, "In cases where the new evidence is material and it is doubtful how in connection with the other testimony it might effect the jury, a new trial should always be granted." They then proceed to state the rule: "If it is clear that the new evidence would not change the result, the motion should be denied; but if it be doubtful as to how it would affect the verdict, the motion should be granted. We are aware that a majority of the cases do not go as far as this, but make it incumbent on the moving party to satisfy the court that, if a new trial were granted, the result would probably be different. This,



**VIII. AMOUNT OF DAMAGES—1. Excessive Damages.**—Excessive or inadequate damages awarded by a jury, as a ground for a new trial, is but a branch of a more general ground already treated, viz: *That the verdict is contrary to the evidence.* For it is evident

however, is making the court weigh the testimony and pronounce for the jury in advance. And it virtually excludes from the benefits of new trials all cases of doubt. We do not believe that in practice the rule can be carried to the rigid extent we would be led to suppose from the language of the authorities." *Lindley v. State*, 11 Tex. App. 283; *citing* *Graham & Waterman on New Trials*, pages 1043 and 1044, note 3; *Turnley v. Evans*, 3 Humph. (Tenn.) 222; *Mechanics' F. Ins. Co. v. Nichols*, 1 Harr. (Del.) 410; *Robins v. Fowler*, 2 Ark. 133; *Smith v. Matthews*, 6 Mo. 600; *Com. v. Williams*, 2 Ashm. (Pa.) 69; *Com. v. Murray*, 2 Ashm. (Pa.) 41; *Glover v. Woolsey*, *Dudley* (Ga.) 85; *Ables v. Donley*, 8 Tex. 331. See further *Grace v. McArthur*, 76 Wis. 644.

See also *Holmes v. Roper*, 10 N. Y. Supp. 288; following the rule stated in *Wilcox Silver Plate Co. v. Barclay*, 48 Hun (N. Y.) 54, which was: "What the effect of the testimony of these witnesses might be upon another trial of the action cannot certainly now be determined. It presents a controverted case, in which the jury might adopt either view. There is a probability certainly that they would consider the case of the plaintiff made out rather than that the defence of the defendant was proved. And in this state of the evidence it will be a matter of propriety and justice to submit the case to the hearing and decision of another jury." Where the newly discovered evidence gives rise to a strong probability that the defendant is innocent, a new trial should be granted. *Morse v. State*, 108 Ind. 599.

**Cases in Which It was Held to be Conclusive or Otherwise.**—Where the motion is for a new trial, on the ground of newly discovered evidence, consisting of proof that the footings of the account contained in the book kept by the bank of which plaintiff is receiver, showing its daily cash balances, are erroneous, which footings had been read to the jury as being accurate, a new trial will be granted where the judge is satisfied by the case, that if the book so read in evidence had contained accurate footings of said account, the verdict would

have been for the defendant. *Butterworth v. Warth*, 4 Bosw. (N. Y.) 624.

A new trial prayed for to obtain the testimony of a witness whose testimony could not be obtained in season to be used at the first trial, but whose testimony was shown to be unworthy of credit by facts proved therein, was refused for that reason. *Jernigan v. Walner*, 12 Tex. 189.

For newly discovered evidence tending to prove an *alibi*—*held*, that a new trial should be granted, defendant having been convicted of an assault with intent to rape. *McClelland v. State*, 24 Tex. App. 202.

A judgment on a promissory note may be set aside and a new trial granted upon the discovery of a receipt proving the payment of the debt. *Bacon v. Williams*, 11 Gray (Mass.) 222.

On a motion for new trial for newly discovered evidence the court will hear evidence as to the credibility of the new witness, and the bad character of the witness is sufficient ground for refusing a new trial. *Parker v. Hardy*, 24 Pick. (Mass.) 246. See also *Pomroy v. Columbian Ins. Co.*, 2 Cal. (N. Y.) 200; *People v. Superior Ct. of N. Y.*, 10 Wend. (N. Y.) 288; *Ames v. Howard*, 1 Sumn. (U. S.) 491. *Graham on New Trials* 7.

Newly discovered evidence which tends to affect only the amount of punitive damages and not the general result is not a good ground for a new trial. *Peck v. Small*, 35 Minn. 465.

In *Miller v. Ross*, 43 N. J. L. 552, *VAN SYCKEL, J.*, says: "It will require an extreme case to justify this court in granting a second rule, after the right of a party to a retrial has been deliberately considered and denied. The newly discovered evidence should not only be so persuasive as to scarcely leave it debatable that the verdict is wrong, but also such evidence as the most careful enquiry and preparation of the case for the trial at the circuit, and for the first rule to show cause, would have failed to bring to the knowledge of the party which seeks to prolong the litigation."

That the supreme court may set aside a verdict and order a new trial for newly discovered evidence there must

that, if the damages be either excessive or too small, the verdict must be contrary to the evidence.<sup>1</sup> Where the law recognizes some fixed rule in determining the amount of damages, whereby it may be known that a verdict is excessive, the court may set aside such a verdict.<sup>2</sup> If the amount of the verdict exceed that

be enough of the former evidence before the court that it may be seen whether the new evidence is sufficient to change the result. *Omaha etc. R. Co. v. O'Donnell*, 24 Neb. 753.

1. 4 *Minor's Inst.* 757; *Bennett v. Hobro*, 72 Cal. 178; *De Brutz v. Jessup*, 54 Cal. 118; *Benjamin v. Stewart*, 61 Cal. 608.

2. *Coffin v. Coffin*, 4 Mass. 1; *Commonwealth v. Norfolk Co.*, 5 Mass. 435; *Fish v. Roseberry*, 22 Ill. 288; *Hopkins v. Myres*, Harp. (S. Car.) 56; *Dodd v. Pierson*, 11 N. J. L. 284; 3 *Bouv. Inst.* 514; *Lang v. Hopkins*, 10 Ga. 37; *Southwestern R. Co. v. Paulk*, 24 Ga. 356; *Atkinson v. Fraser*, 5 Rich. L. (S. Car.) 519.

Where the amount of damages is matter of opinion merely, the fact that the jury have fixed them at a greater or less sum than any of the witnesses, is not a ground for a new trial. *Brewer v. Tyrringham*, 12 Pick. (Mass.) 547.

It is not sufficient for a party who seeks a new trial, for the excessiveness of the damages, merely to raise a doubt whether they are not too large; but it is incumbent on him to show affirmatively and most satisfactorily that they are so, and to what extent. *Clark v. Whitaker*, 19 Conn. 319.

**Judgment After Default.**—If a jury after default in a case when the criterion of damages is fixed by law, should assess too large an amount, the verdict should be set aside. *White v. Green*, 3 Mon. (Ky.) 155. See also *Chase v. Brown*, 32 N. H. 130.

In actions for torts to property, without malice or injury to the person or feelings, the real injury is the standard for the measure of damages; and if the jury give a verdict beyond the amount of the real injury, as it appears in evidence, the verdict may be set aside. *Berry v. Vreeland*, 21 N. J. L. 183.

If an undisputed item in an account is wholly unconsidered by the jury, the verdict will be set aside. *Wyman v. Erickson*, 35 Minn. 202.

A verdict will be reversed, where, upon any view of the evidence reported, damages are excessive. *Bell v. Cher-*

*rie*, 8 Ill. App. 310. See also *Pierce v. Roche*, 40 Ill. 293.

Where it appeared from their own testimony that some of the jurors, supposing the defendant to be entitled to one half of a lottery ticket, when, in fact, he was only entitled to one fourth, if any, assessed damages on that supposition, *held*, that a new trial would be granted. *Woods v. Macrae*, Wythe (Va.) 78.

**Promissory Notes.**—If a verdict is given for the full face of a note without making any deduction for endorsements, a new trial will be granted. *Houston v. Morrison*, 10 Tex. 1. See also *Rockdale Paper Mills v. Stevens*, 65 Ga. 380.

Or, if a gross sum is given for principal and interest when no interest is due, and the verdict does not show which part is for principal and which for interest, a new trial will be granted. *Lesesne v. Grant*, 1 Brev. (S. Car.) 403.

A mistake by the jury in computing interest should be remedied by a motion for a new trial. *Whitwell v. Atkinson*, 6 Mass. 272; *Winn v. Young*, 1 J. J. Marsh. (Ky.) 51. See also *Perkins v. Gridley*, 35 Cal. 398.

Where it is impossible to reconcile the amount of damages found by the jury with any legal principle, the verdict will be set aside. *Ellsworth v. Central R. Co.*, 34 N. J. L. 93; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151; *Albion Consolidated Mining Co. v. Richmond Mining Co.*, 19 Nev. 225; *Harris v. Panama R. Co.*, 5 Bosw. (N. Y.) 312.

Where the court instructed the jury to find only nominal damages against the defendants and they gave a verdict for substantial damages, the verdict was set aside. *Johnson v. Root*, 2 Cliff. (U. S.) 107. Compare *Chilvers v. Greaves*, 5 M. & G. 578; *Chilvers v. Greaves*, 6 Scott (N. R.) 539.

After such a verdict is reduced to one for merely nominal damages on the court's own motion, he cannot afterward grant a new trial on the ground that the jury disregarded his instructions. *Morlan v. Russell*, 71 Iowa 214.

claimed by the pleadings, the verdict will be set aside, and a new trial granted.<sup>1</sup> And if the jury fail to assess damages according to the rule correctly laid down by the court, a new trial may be

In a proceeding to condemn land for a right of way by a railway company, when there is a conflict of testimony and diversity of opinion as to the value of the property sought to be taken, and when the jury have made a personal inspection of the premises the supreme court will not reverse on the ground that the damages are excessive or that the evidence does not support the verdict. *Chicago etc. R. Co. v. Blake*, 116 Ill. 163; *Chicago etc. R. Co. v. Jacobs*, 110 Ill. 414; *Peoria etc. R. Co. v. Barnum*, 107 Ill. 160; *McReynolds v. Burlington etc. R. Co.*, 106 Ill. 152; *Chicago etc. R. Co. v. Hopkins*, 90 Ill. 316.

The price of three slaves sold with warranty of soundness was \$2,550. In an action for a breach of warranty as to two only, the damages assessed were \$2,200. A new trial was granted for excess of damages. *Ingraham v. Russell*, 3 How. (Miss.) 304.

On a motion for a new trial for a verdict against evidence, it being claimed among other things that the damages were higher than the evidence would warrant, *held*, that though the damages appeared to be greater than the court would have given, yet as they depended on sundry matters of account which the evidence did not enable the court to state with precision, it was not so manifest that the jury had erred in the assessment of damages as to make it the duty of the court to set aside the verdict. *Douglas v. Chapin*, 26 Conn. 76.

When the defendant pleads a recoupment, counter claim or set-off, the court will not set aside a verdict on account of its amount. *Harton v. Bloom*, 33 N. Y. Super. Ct. 115.

If there be any calculation which the evidence will reasonably support, the verdict will stand, though it may not be by the same calculation as used by the jury. *Hilliard on N. T.* (2nd ed.) 569; *Dacy v. Gay*, 16 Ga. 204. See also *Willis v. Lowry*, 66 Tex. 540.

Where a jury gives damages upon two distinct grounds and do not return how much was given upon each, the only remedy is to set aside the verdict if it was against law or evidence as to either. *Chesley v. King*, 74 Me. 164.

Where the evidence was clearly insufficient on the question of damages to justify the verdict, a new trial will

be granted. *Osborne v. Huntington*, 37 Minn. 275.

Where, under the instruction of the court, the fact to be found by the jury was whether \$200 were due from defendant or nothing, a verdict of \$100 should be set aside. *Wehringer v. Ahlemeyer*, 23 Mo. App. 277.

1. *Hook v. Turnbull*, 6 Call (Va.) 85; *Roberts v. Muir*, 7 Ind. 544; *Lester v. Barnett*, 33 Miss. 584; *McIntire v. Clarke*, 7 Wend. (N. Y.) 330; *Dox v. Dey*, 3 Wend. (N. Y.) 356; *Koeltz v. Bleckman*, 46 Mo. 320; *Garlick v. Bowler*, 62 Cal. 65; *Manson v. Robinson*, 37 Wis. 339; *Tarbell v. Tarbell*, 60 Vt. 486. *Compare Webb v. Thompson*, 23 Ind. 428; *Raymond v. Williams*, 24 Ind. 416.

Where the verdict of the jury, or the finding of the court on trial by consent without a jury, awards damages in excess of the amount claimed in the complaint, plaintiff, if he desires to amend the complaint in respect to the amount claimed, must abandon the verdict or finding, pay costs, and consent to a new trial. *Decker v. Parsons*, 11 Hun (N. Y.) 295.

A new trial will not be granted after verdict because the amount of damages assessed by the verdict exceeds the amount claimed in the writ, but not the amount laid in the declaration. *Roderick v. Railroad Co.*, 7 W. Va. 54.

Where the amount of the verdict was only slightly in excess of the amount claimed in the declaration, the court allowed the verdict to stand by the plaintiff remitting the excess. *King v. Howard*, 1 Cush. (Mass.) 137; *Francis v. Baker*, 11 R. I. 103; *Williams v. Baltimore etc. R. Co.*, 9 W. Va. 33; *Manson v. Robinson*, 37 Wis. 339; *Steadman v. Simmons*, 39 Ga. 591; *Griffin v. Witherspoon*, 8 Ga. 113. *Compare Koeltz v. Bleckman*, 46 Mo. 320; *Decker v. Parsons*, 11 Hun (N. Y.) 295; *Johnson v. Root*, 2 Cliff. (U. S.) 108; *Hook v. Turnbull*, 6 Call (Va.) 85.

A verdict in excess of the highest amount shown by the testimony to be due will be set aside as excessive. *Budlong v. Cunningham*, 11 Ill. App. 28. See also *Howe v. Lincoln*, 23 Kan. 468; *Schneider v. McCabe*, 4 Jones & Sp. (N. Y.) 83. *Compare Mostyn v. Coles*, 7 H. & N. 872; *Finch v. Brown*, 13

given.<sup>1</sup> But where there is no legal measure of damages, and where the damages are unliquidated, and the amount is referred to the discretion of the jury, the court will not ordinarily interfere. The estimation of damages is peculiarly within the province of the jury, they being considered especially competent to determine such matters; and, therefore, it is particularly incumbent upon the court to forbear any encroachment upon the functions of the jury in this particular, save in the strongest cases of injustice. No mere difference of opinion, however decided, justifies an interference with the verdict for this cause, but the amount must be so out of the way as to evince passion, prejudice, partiality, or corruption in the jury.<sup>2</sup> In case of excessive damages, a new trial

Wend. (N. Y.) 601; *Thompson v. Porter*, 4 Bibb (Ky.) 70; *Tarleton v. Briscoe*, 1 A. K. Marsh. (Ky.) 67.

**Insignificant errors in assessing damages** will not warrant a court in reversing a judgment and ordering a new trial. Thus, when the court allowed interest to the amount of \$10.59 on the sum assessed as damages, it was held that, whether the interest was allowable or not, the amount involved was so small that a new trial was refused. *Brown v. Town of Southbury*, 53 Conn. 212. See also *Buddington v. Knowles*, 30 Conn. 26; *Hull v. Bartlett*, 49 Conn. 64; *Smith v. Surber*, 2 A. K. Marsh. (Ky.) 450.

1. *Hoffman v. Bosch*, 18 Nev. 360; *Rafferts v. Missouri Pac. R. Co.*, 15 Mo. App. 559; *Knapp v. Williamsport Nat. Bank*, 15 Fed. Rep. 333; *Johnson v. Root*, 2 Cliff. (U. S.) 108.

Where a court, in an action for harboring and concealing slaves, charged the loss of the services of the slaves for six days and certain expenses of recovering them, which could not, according to the evidence, exceed \$600, and the verdict was for \$1,200, a new trial was granted on account of excessive damages, at the cost of the defendant. *Jones v. Van Zandt*, 2 McLean (U. S.) 611.

2. The following cases support the text proposition:

**Arkansas.**—*McClintock v. Lary*, 23 Ark. 215; *Ford v. Ward*, 26 Ark. 360; *Walworth v. Pool*, 9 Ark. 405; *Peterson v. Gresham*, 25 Ark. 381; *Sexton v. Brock*, 15 Ark. 345.

**California.**—*Aldrich v. Palmer*, 24 Cal. 513; *Wheaton v. North Beach etc. R. Co.*, 36 Cal. 590; *Boyce v. California State Co.*, 25 Cal. 460; *Kinsey v. Wallace*, 36 Cal. 481; *Russell v. Dennison*, 45 Cal. 337.

**Colorado.**—*Denver v. Dunsmore*, 7 Colo. 328; *Wall v. Livezey*, 6 Colo. 465.

**Connecticut.**—*Clark v. Pendleton*, 20 Conn. 495; *Waters v. Bristol*, 26 Conn. 398; *Douglas v. Chapin*, 26 Conn. 76.

**Florida.**—*Murray v. Bassnett*, 18 Fla. 609.

**Georgia.**—*Davis v. Central R. Co.*, 60 Ga. 329; *Dye v. Denham*, 54 Ga. 224; *Snelling v. Darrell*, 17 Ga. 141; *Broach v. King*, 23 Ga. 500; *Pomeroy v. Golly*, Ga. Dec. 26; *Brown v. Autrey*, 78 Ga. 753; *Longstreet v. Reeside*, Ga. Dec. 39.

**Illinois.**—*Chicago v. Smith*, 48 Ill. 107; *Terre Haute etc. R. Co. v. Vannatta*, 21 Ill. 188; *Chicago etc. R. Co. v. Peacock*, 48 Ill. 253; *Cummins v. Crawford*, 88 Ill. 312; *Illinois Cent. R. Co. v. Parks*, 88 Ill. 373; *Chicago etc. R. Co. v. Hughes*, 87 Ill. 94; *Chicago etc. R. Co. v. Payzant*, 87 Ill. 125; *McNamara v. King*, 7 Ill. 432; *Ross v. Innis*, 35 Ill. 487; *Illinois Cent. etc. R. Co. v. Simmons*, 38 Ill. 242; *Fidler v. McKinley*, 21 Ill. 308; *Elgin v. Renwick*, 86 Ill. 498; *Schlencker v. Risley*, 4 Ill. 483.

**Indiana.**—*Guard v. Rusk*, 11 Ind. 156; *Harris v. Rupel*, 14 Ind. 209; *Yater v. Mullen*, 23 Ind. 562; *Alexander v. Thomas*, 25 Ind. 268; *Lake Erie etc. R. Co. v. Acres*, 108 Ind. 548; *Town of Westerville v. Freeman*, 66 Ind. 255; *Pittsburgh etc. R. Co. v. Hennigh*, 39 Ind. 509.

**Iowa.**—*Paukett v. Livermore*, 5 Iowa 277; *Stevenson v. Belknap*, 6 Iowa 97.

**Kansas.**—*Missouri etc. R. Co. v. Weaver*, 16 Kan. 456; *Union Pacific R. Co. v. Hand*, 7 Kan. 380.

**Kentucky.**—*North v. Cates*, 2 Bibb (Ky.) 591; *Respass v. Parmer*, 2 A. K. Marsh. (Ky.) 365; *Webber v. Kenny*, 1 A. K. Marsh. (Ky.) 345; *Taylor v. Giger*, Hard. (Ky.) 586; *Vanzant v. Jones*, 3 Dana (Ky.) 464; *Owings v. Ulroy*, 3 A. K. Marsh. (Ky.) 454; *Bell*

*v. Howard*, 4 Litt. (Ky.) 117; *Holburn v. Neal*, 4 Dana (Ky.) 120; *Letton v. Young*, 2 Metc. (Ky.) 558; *Duncan v. Finnyhorn*, Sneed (Ky.) 309.

**Maine.**—*Humphries v. Parker*, 52 Me. 502; *Gilbert v. Woodbury*, 22 Me. 246.

**Massachusetts.**—*Stillman v. Proprietors etc.*, 16 Pick. (Mass.) 541; *Treanor v. Donahoe*, 9 Cush. (Mass.) 228; *Bodwell v. Osgood*, 3 Pick. (Mass.) 379; *Clark v. Binney*, 2 Pick. (Mass.) 113; *Shute v. Barrett*, 7 Pick. (Mass.) 82; *Oakes v. Barrett*, 7 Pick. (Mass.) 82; *Coffin v. Coffin*, 4 Mass. 1.

**Minnesota.**—*Shartle v. Minneapolis*, 17 Minn. 308; *Beaulieu v. Parsons*, 2 Minn. 37; *Pratt v. Pioneer Press Co.*, 32 Minn. 217; *St. Martin v. Desnoyer*, 1 Minn. 156; *Lynd v. Picket*, 7 Minn. 184.

**Mississippi.**—*Ingraham v. Russell*, 3 How. (Miss.) 304; *Bell v. Morrison*, 27 Miss. 68; *Mississippi Cent. etc. R. Co. v. Caruth*, 51 Miss. 77; *New Orleans etc. R. Co. v. McBride*, 38 Miss. 32; *Harris v. Halliday*, 4 How. (Miss.) 338.

**Missouri.**—*Wells v. Sanger*, 21 Mo. 354; *Goetz v. Amba*, 27 Mo. 28; *Kennedy v. North Missouri R. Co.*, 36 Mo. 351; *Allred v. Bray*, 41 Mo. 484; *Falenstein v. Boothe*, 13 Mo. 427; *Stonesseifer v. Sheble*, 31 Mo. 243.

**Nevada.**—*Quigley v. Central Pac. R. Co.*, 11 Neb. 350; *Solen v. Virginia City etc. R. Co.*, 13 Nev. 106.

**New Jersey.**—*Allen v. Craig*, 13 N. J. L. 294; *Reuck v. McGregor*, 32 N. J. L. 70; *Vunck v. Hull*, 3 N. J. L. 579, 814; *Deacon v. Allen*, 4 N. J. L. 338; *Merritt v. Harper*, 44 N. J. L. 73; *Ogden v. Gibbons*, 5 N. J. L. 518.

**New York.**—*Collins v. Albany etc. R. Co.*, 12 Barb. (N. Y.) 492; *Coleman v. Southwick*, 9 Johns. (N. Y.) 44; *Clapp v. Hudson R. Co.*, 19 Barb. (N. Y.) 461; *Diblin v. Murphy*, 3 Sandf. (N. Y.) 19; *Rompillon v. Abbott*, 1 N. Y. Supp. 662; *Bierbauer v. New York etc. R. Co.*, 15 Hun (N. Y.) 559; *Tinny v. New Jersey Steamboat Co.*, 5 Lans. (N. Y.) 507; *Cropsey v. Murphy*, 1 Hilt. (N. Y.) 126; *Scherpf v. Szadeczkzy*, 1 Abb. Pr. (N. Y.) 366; *McConnell v. Hampton*, 12 Johns. (N. Y.) 236; *Gale v. New York etc. R. Co.*, 53 How. Pr. (N. Y.) 385; *Cook v. Hill*, 3 Sandf. (N. Y.) 341; *Curtiss v. Rochester etc. R. Co.*, 20 Barb. (N. Y.) 282; 18 N. Y. 534; *Coleman v. Southwick*, 9 Johns. (N. Y.) 45; *Southwick v. Stevens*, 10 Johns. (N. Y.) 443; *Sar-*

*gent v. —*, 5 Cow. (N. Y.) 106; *Moody v. Baker*, 5 Cow. (N. Y.) 351; *Cole v. Perry*, 8 Cow. (N. Y.) 214; *Douglass v. Tousey*, 2 Wend. (N. Y.) 352; *Finch v. Brown*, 13 Wend. (N. Y.) 601; *Bump v. Betts*, 23 Wend. (N. Y.) 85; *Knight v. Wilcox*, 18 Barb. (N. Y.) 212; *Travis v. Barger*, 24 Barb. (N. Y.) 614; *Hager v. Danforth*, 8 How. Pr. (N. Y.) 435; *Blum v. Higgins*, 3 Abb. Pr. (N. Y.) 104; *Tillotson v. Cheetham*, 2 Johns. (N. Y.) 63; *Potter v. Thompson*, 22 Barb. (N. Y.) 87; *Fry v. Bennett*, 9 Atb. Pr. (N. Y.) 45; *Ingerson v. Miller*, 47 Barb. (N. Y.) 47.

**North Carolina.**—*Denby v. Hairston*, 1 Hawks (N. Car.) 315; *McRea v. Lilly*, 1 Ired. L. (N. Car.) 118; *Dodd v. Hamilton*, Term. (N. Car.) 31.

**Ohio.**—*Simpson v. Pitman*, 13 Ohio 365; *Fisher v. Patterson*, 14 Ohio 418.

**Pennsylvania.**—*Whipple v. West Philadelphia etc. R. Co.*, 11 Phila. (Pa.) 345.

**South Carolina.**—*Bourke v. Bulow*, 1 Bay (S. Car.) 49; *Nettles v. Harrison*, 2 McCord L. (S. Car.) 230; *Richardson v. Murray*, Cheves (S. Car.) 11; *Morgan v. Livingston*, 2 Rich. L. (S. Car.) 573; *Mayson v. Sheppard*, 12 Rich. L. (S. Car.) 254; *Poppenheim v. Wilkes*, 2 Rich. L. (S. Car.) 354; *Tripp v. Martin*, 1 Spears (S. Car.) 236; *Davis v. Ruff*, Cheves (S. Car.) 17; *Stott v. Ryan*, 3 Brev. (S. Car.) 417.

**Tennessee.**—*Goodall v. Thurman*, 1 Head (Tenn.) 209; *Boyers v. Pratt*, 1 Humph. (Tenn.) 90; *Moore v. Burchfield*, 1 Heisk. (Tenn.) 203; *Nashville etc. R. Co. v. Smith*, 6 Heisk. (Tenn.) 174; *Tennessee Coal etc. Co. v. Roddy*, 85 Tenn. 400; *Tinkle v. Dunivant*, 16 Lea (Tenn.) 503; *Thompson v. French*, 10 Yerg. (Tenn.) 452.

**Texas.**—*Hamman v. Willis*, 62 Tex. 507; *Barnette v. Hicks*, 6 Tex. 352; *McGehee v. Shafer*, 9 Tex. 20; *Cook v. De la Garza*, 9 Tex. 358.

**West Virginia.**—*Vinal v. Core*, 18 W. Va. 1.

**Wisconsin.**—*Birchard v. Booth*, 4 Wis. 67; *Bass v. Chicago etc. R. Co.*, 42 Wis. 654; *Hammond v. Town of Mukiva*, 40 Wis. 35; *Goodno v. Oshkosh*, 28 Wis. 300.

**Wyoming.**—*Union Pac. R. Co. v. House*, 1 Wyo. 27.

**Federal Courts.**—*Reese v. Third Ave. R. Co.*, 16 Fed. Rep. 368; *Lancaster v. Providence*, S. S. S. Co., 26 Fed. 233; *Frericks v. Bermes*, 22 Fed. Rep. 424; *Whipple v. Cumberland Mfg. Co.*, 2

Story (U. S.) 661; Blunt v. Little, 3 Mason (U. S.) 102; Walker v. Smith, 1 Wash. (U. S.) 152; Stephens v. Felt, 3 Blatchf. (U. S.) 37, 39; Aiken v. Bemis, 3 Woodb. & M. (U. S.) 348; Carr v. Gale, 3 Woodb. & M. (U. S.) 38; Wightman v. Providence, 1 Cliff. (U. S.) 524; Palmer v. Fiske, 2 Curt. (U. S.) 14.

**English Cases.**—Armitage v. Haley, 4 Q. B. 917; Chambers v. Caulfield, 6 East 244; Sharp v. Brice, 2 Wm. Blacks. 942; Edgell v. Francis, 1 M. & G. 222; Creed v. Fisher, 9 Excheq. 472; Williams v. Currie, 1 C. B. 841.

Where, in an action by a husband and his wife to recover of a railroad company for putting them, with their two children and baggage, off a passenger train three-fourths of a mile from a station at midnight, in December, the evidence was conflicting as to whether he requested the conductor to put them off then and there, she denying any knowledge thereof. *Held*, that a verdict for the plaintiffs for \$1,000, although seeming excessive, should not be disturbed. *Baltimore etc. R. Co. v. Pixley*, 61 Ind. 22.

A verdict for \$8,000 in favor of a woman for injuries caused by the negligence of the defendant, which confined her to her bed for several months causing great and constant pain, was held to be just and not excessive, and that though she was earning but \$30.00 per month. *Harold v. New York Cent. R. Co.*, 13 Daly (N. Y.) 378.

A verdict of \$1,450 was not excessive for injuries to a girl nine years old caused by the bite of a dog, it appearing that a new trial would be a great hardship for the plaintiff. *Fitzgerald v. Dobson*, 78 Me. 559.

It has been held that there must be affirmative evidence that the jury were unduly influenced in order that a verdict should be set aside as excessive. *Cox v. Northwestern Stage Co.*, 1 Idaho, N. S. 376; *M. K. & T. R. Co. v. Weaver*, 16 Kan. 456. See also *Texas etc. R. Co. v. Garcia*, 62 Tex. 285.

Where a case is left to a jury on the question of damages, only the verdict must stand unless a sufficient justification appears from defendant's showing. *Davis v. Burgess*, 54 Mich. 514.

Under the Indiana statutes providing that a new trial may be granted on the ground "that the damages are excessive," it has been held that the provision applies only to cases of tort.

Where the action is *ex contractu*, the

cause for a new trial should be stated as, "error in the assessment of the amount of recovery." *Lake Erie etc. R. Co. v. Acres*, 108 Ind. 548; *Dix v. Akers*, 30 Ind. 431; *Frank v. Kessler*, 30 Ind. 8; *McCormick etc. Machine Co. v. Gray*, 114 Ind. 340; *Moore v. State*, 114 Ind. 414; *Western Assur. Co. v. Studebaker Bros. Mfg.*, 124 Ind. 176.

Hence an action on a sheriff's bond being an action on a contract the amount of recovery cannot be considered under a motion for a new trial because "the damages awarded the plaintiff are excessive." *Moore v. State*, 114 Ind. 414.

The courts have an unquestionable power to grant a new trial to defendant in an action for a wrong, on the ground that the damages awarded by the verdict are excessive. But the power should be sparingly exercised. *Clapp v. Hudson River R. Co.*, 19 Barb. (N. Y.) 461; *Blum v. Higgins*, 3 Abb. Pr. (N. Y.) 104.

In an action for a diversion of a water course in which the only question litigated was that of damages, there was a wide diversity in the opinion of the witnesses. *Held*, that an order granting a new trial, and setting aside a verdict as excessive, was within the sound discretion of the trial court. *Schaffer v. St. Paul*, 41 Minn. 310.

A judge may set aside a verdict as excessive even in a case where exemplary damages are recoverable. *Tynberg v. Cohen*, 76 Tex. 409.

It has been held that a new trial will be granted for excessive damages in any kind of action if the circumstances require it. *Ducker v. Wood*, 1 T. R. 277; *Hewlett v. Crutchley*, 5 Taunt. 277; *Jones v. Sparrow*, 5 T. R. 257; *Goldsmith v. Sefton*, 3 Aust. 808.

But in cases of personal torts the circumstances will be more closely examined. *Fabrigas v. Mostyn*, 2 W. Bla. 929; *Gilbert v. Burtenshaw, Cowp.* 230; *Farnier v. Darling*, 4 Burr. 1971.

In an action for a trespass upon land, damages to the full value of the land are excessive, and a new trial will be granted. *Thompson v. Morris Canal etc. Co.*, 17 N. J. L. 480.

Where a Mississippi statute provided that the jury should "be the sole judges of the damages sustained," it was held, that in actions under the statute, the courts had no authority to set aside a verdict on the ground of excessive damages. *Lewis v. Black*, 27 Miss. 425.

In breach of promise cases coupled

may be granted with respect to the assessment of damages without opening the whole case.<sup>1</sup> Even though the trial court may have regarded the verdict as excessive, but allowed it to stand, the appellate court will not disturb it.<sup>2</sup> A new trial will not be

with seduction a new trial is seldom granted for excessive damages. *Berry v. Da Costa*, 1 H. & R. 291; *Tullidge v. Wase*, 3 Wils. 18; *Hattin v. Chapman*, 46 Conn. 607. See also *Waters v. Bristol*, 26 Conn. 396. And also in libel and slander cases *Alexander v. Thomas*, 25 Ind. 268; *Coleman v. Southwick*, 9 Johns. (N. Y.) 45; *Davis v. Davis*, 2 M. & McC. 81; *Pratt v. Pioneer Press Co.*, 32 Minn. 217.

Whether the damages are excessive in an action on the case for personal injury from negligence depends upon the facts, and when the judgment of the trial court is affirmed by the appellate court its decision on that question is final. *Chicago etc. R. Co. v. Holland*, 122 Ill. 461.

In three successive trials of an action for personal injuries the plaintiff obtained verdicts of \$3,000, \$2,500, and \$6,000, respectively, upon substantially the same evidence as to the extent of his injuries. *Held* that, in view of the first two verdicts, the damages awarded by the third are excessive, and the judgment thereon is reversed for that reason. *Baker v. Madison*, 62 Wis. 137.

A verdict, upon a second trial, for \$8,000 for personal injuries caused by a defective sidewalk (the first verdict, rendered two years and eight months after the accident, having been for \$2,000 only) is *held* excessive, and a new trial is ordered, unless the plaintiff remit \$3,000 therefrom. *McLimans v. Lancaster*, 63 Wis. 596.

To warrant a trial court to set aside a verdict for excessive damages, the damages must be not merely *more* than the court would have awarded had it tried the case, but they must (especially in an action for defamation) so greatly and grossly exceed what would be adequate in the judgment of the court, that they cannot reasonably be accounted for, except upon the theory that they were awarded, not in a judicial frame of mind, but under the influence of passion—that is to say, of excited feeling, rather than of sober judgment; or of prejudice—that is to say, of a state of mind partial to the successful party, or unfair to the other.

*Pratt v. Pioneer Press Co.*, 32 Minn. 217. See also *Olson v. Solveson*, 71 Wis. 663.

Where a statute provides that in personal injury no part of the damages shall be allowed for mental anguish, and it appears in an action by a parent for injuries to his minor son that part of the damages must have been given on this account, or by way of punitive damages, the verdict must be set aside. *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286. See also *International etc. R. Co. v. Telegraph etc. Co.*, 69 Tex. 277.

1. *Boyd v. Brown*, 17 Pick. (Mass.) 453; *Winn v. Columbian Ins. Co.*, 12 Pick. (Mass.) 288; *Robbins v. Townsend*, 20 Pick. (Mass.) 345; *Harlston v. Sale*, 6 Smed. & M. (Miss.) 634.

2. *Tennessee Coal etc. Co. v. Roddy*, 85 Tenn. 400.

"In view of the rule at common law, and so discovered in the decisions of our predecessors on the bench, we hold that in actions for damages for personal torts that it is within the strict province of the jury to estimate the extent of the injury and assess the damage, and that unless there is manifest abuse of this trust such as to indicate passion, prejudice, partiality or unaccountable caprice or corruption that the trial judge ought not to interfere. It follows a *fortiori* that when the trial judge has simply expressed his disapproval of the verdict as being excessive, yet has refused to set it aside, that this court will not alone, upon the ground of such disapproval or dissatisfaction with the amount of the verdict, grant a new trial." *Tennessee Coal etc. Co. v. Roddy*, 85 Tenn. 400.

An appellate court may consider the damages larger than they would have given and yet not feel justified in setting aside the verdict. *Duberly v. Gunning*, 1 Burrow 609; *Goodall v. Thurman*, 1 Head (Tenn.) 217; *Chenowith v. Hicks*, 5 Ind. 224; *Blanchard v. Morris*, 15 Ill. 35.

**Appellate Court.**—The objection is not generally available in error that the damages are excessive. If, however, on the nature of the case, or on a proper return of all the testimony, the

granted in order to allow the injured party to recover only nominal damages.<sup>1</sup> But if a judgment for the plaintiff would entitle him to costs, or is necessary to vindicate any right drawn in question, a new trial will be granted, if the jury have erroneously found for the defendant when they should have found nominal damages for the plaintiff.<sup>2</sup>

**2. Inadequate Damages.**—As a general rule, a new trial will not be granted on the ground that the damages are too small in actions for wrongs and injuries.<sup>3</sup> Especially if the cause of the

point can be raised in the appellate court, as under the practice in many of the States it can, and it thus clearly appears that the damages found are excessive, the judgment will be reversed on that ground. *Cuff v. Dorland*, 57 N. Y. 560; *Metcalf v. Baker*, 57 N. Y. 662; *Hayden v. Florence Sewing Machine Co.*, 54 N. Y. 221; *Stickney v. Bronson*, 5 Minn. 215; *Burdick v. Weeden*, 9 R. I. 139; *Wilkins v. Gilmore*, 2 *Humph. (Tenn.)* 140; *Johnson v. Van Kettler*, 66 Ill. 63; *Chicago etc. R. Co. v. McAlra*, 52 Ill. 296; *Decatur v. Fisher*, 53 Ill. 407; *Cassel v. Hays*, 51 Ill. 261; *Chicago v. Kelly*, 69 Ill. 475; *Cochrane v. Tuttle*, 75 Ill. 361; *Goetz v. Ambs*, 22 Mo. 170; *Woodson v. Scott*, 20 Mo. 272; *Barth v. Merritt*, 20 Mo. 567; *Ellsworth v. Central R. Co.*, 34 N. J. L. 93; *Patten v. Chicago etc. R. Co.*, 32 Wis. 524; *Mentz v. Second Ave. R. Co.*, 2 Robt. 356; *Union Pacific R. Co. v. Milliken*, 8 Kan. 647; *Jacksonville v. Lambert*, 62 Ill. 519; *Chicago v. Jones*, 66 Ill. 349; *Chicago etc. R. Co. v. Garvey*, 58 Ill. 83; *Chicago v. Langlass*, 66 Ill. 361; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125; *Huftalin v. Misner*, 70 Ill. 55; *Dearlove v. Herrington*, 70 Ill. 251; *Newton v. Locklin*, 77 Ill. 103; *Walker v. Martin*, 52 Ill. 347; *Ross v. Ross*, 5 B. Mon. (Ky.) 20; *Holburn v. Neal*, 4 Dana (Ky.) 121.

The question as to the verdict being excessive cannot be reviewed in the New York court of appeals. *Schenck v. Ringler (N. Y.)*, 11 N. E. 382.

The judgment of the appellate court of Illinois, upon the question of excessive damages, is conclusive, and will not be disturbed by the supreme court. *Chicago etc. R. Co. v. Holland*, 122 Ill. 461.

1. *Lewis v. Flint etc. R. Co.*, 56 Mich. 638; *Haven v. Beidler Mfg. Co.*, 40 Mich. 286; *Ely v. Parsons*, 55 Conn. 83; *Warner v. Lockerby*, 31 Minn. 421; *Harris v. Kerr*, 37 Minn. 537; *Cooke v.*

*Barr*, 39 Conn. 296; *Jones v. King*, 33 Wis. 422; *Watson v. VanMeter*, 43 Iowa 76; *Nolan v. Harrie*, 52 How. Pr. (N. Y.) 409; *Hopkins v. Grinnell*, 28 Barb. (N. Y.) 533; *McConihe v. New York etc. R. Co.*, 20 N. Y. 495; *Aberle v. Fajen*, 10 Jones & Sp. (N. Y.) 217; *Reading v. Gray*, 5 Jones & Sp. (N. Y.) 79; *Gold v. Ives*, 29 Conn. 119; *Patton v. Hamilton*, 12 Ind. 256. To the contrary, *Shenk v. Mundorf*, 2 Browne, (Pa.) 106; *State v. Miller*, 5 Blackf. (Ind.) 381; *Watson v. VanMeter*, 43 Iowa 76.

In actions for torts generally, or where a judgment for nominal damages would not carry costs, a reversal should not be granted merely because the jury found for defendant instead of for the plaintiff, with nominal damages. 1873, *Jones v. King*, 33 Wis. 422; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558.

This rule, however, applies only where the trivial nature of the claim is clear and unquestionable. *McCarty v. Legget*, 3 Hill (N. Y.) 134; *Pumleigh v. Dawson*, 6 Ill. 544; *Teale v. Russell*, 3 Ill. 319.

2. *Lewis v. Flint etc. R. Co.*, 56 Mich. 638; *Ely v. Parsons*, 55 Conn. 83; *Hickey v. Baird*, 9 Mich. 32; *Jones v. King*, 33 Wis. 422; *McCarty v. Legget*, 3 Hill (N. Y.) 134; *High v. Johnson*, 28 Wis. 72; *Rosenbaum v. McThomas*, 34 Ind. 331; *Plumleigh v. Dawson*, 6 Ill. 544. See *Johnson v. Weedman*, 5 Ill. 495; *Jenny v. Deletdernier*, 20 Me. 183.

3. *Taunton Mfg. Co. v. Smith*, 9 Pick. (Mass.) 10; *Watson v. Harmon*, 85 Mo. 443; *Sharpe v. O'Brien*, 39 Ind. 501; *Pritchard v. Hewitt*, 91 Mo. 547; *Burns v. Erben*, 26 How. Pr. (N. Y.) 273; *Colyer v. Huff*, 3 Bibb (Ky.) 34; *Shoemaker v. Livizely*, 2 Brown (Pa.) 286.

**Inadequate Damages Not a Ground for New Trial a Common Law**—In Action for Torts.—There has been never a doubt



that the power to grant new trials for excessive damages exists at common law, as well as in actions *ex delicto* as in actions *ex contractu*; but smallness of damages seems not to have been ground for a new trial, at least in actions of trespass, unless made so by statute, apparently for no better reason than that actions for torts, at least actions of trespass *vi et armis*, were considered as bearing an analogy to prosecutions for crimes as to which it is an admitted doctrine that whilst a new trial may be granted upon the application of the accused upon the ground that the punishment inflicted by the jury is too great, no such application is allowed on the part of the commonwealth, because the penalty assessed by the jury is too small. 4 Minor's Inst. 758, citing, Jackson v. Boast, 2 Va. Cas. 49; Rixey v. Ward, 3 Rand. (Va.) 52; Humphrey v. West, 3 Rand. (Va.) 516; 6 Com. Dig. 227, Plead. (R. 17). See also Bacon's Abr. tit. L. 4 (ed. 1851, p. 605), citing Mocsham v. Buller, 2 Roll. R. 21; Stra. 940; Howard v. Newton (Mich.), 6 G. 2; Stra. 1051; Barker v. Dixie Trin, 9 G. 2; Maurice v. Brencok, Doug. 509 S. P., and other cases.

In Benjamin v. Stewart, 61 Cal. 608, the court said: "There is a provision that a new trial may be granted for the cause of 'excessive damages appearing to have been given under the influence of passion or prejudice.'" But there is no provision which authorizes the setting aside of the finding of the cause of the passion or prejudice of the jury exhibited by the rendition of the verdict for insufficient damages, and, as the whole matter is statutory, the last is not proper as an independent ground for setting aside a verdict.

It may be that under the fifth statutory ground for a new trial—"insufficiency of the evidence to justify the verdict"—a party might urge that a jury found against the evidence in finding a less sum than the evidence established as the amount of damages sustained; but in such case the statement must specify the particulars from which the evidence is alleged to be insufficient, and where, as is the case before us, no such specifications are made, the statement must be disregarded. Compare Bennett v. Hobro, 72 Cal. 178.

New trials for inadequate damages have been refused in slander cases. Randall v. Haywood, 5 Bing. N. C. 424; Forsdike v. Stone, 3 C. P. L. R.

607; Colyer v. Huff, 3 Bibb (Ky.) 34; Wavle v. Wavle, 9 Hun (N. Y.) 125. See, however, Rixey v. Ward, 3 Rand. (Va.) 52, in assault and battery, Shoff v. Wells, 1 Neb. 168. See also Sharpe v. O'Brien, 39 Ind. 501; Pritchard v. Hewett, 91 Mo. 547; s. c., 60 Am. Rep. 265.

A trial court may regard the damages wholly inadequate and yet refuse to grant a new trial on that account. Lancaster v. Providence & S. S. Co., 26 Fed. Rep. 233; Walker v. Smith, 1 Wash. (U. S.) 202. See also Brooks v. Ludin, 1 N. Y. Supp. 338.

Some courts have attempted to make a distinction as to what kind of actions will warrant an appellate court in setting aside a verdict for inadequate damages. Watson v. Harmon, 85 Mo. 443; Phillips v. Southwestern R. Co., 4 Q. B. Div. 406; Sharpe v. O'Brien, 39 Ind. 501; Taunton Mfg. Co. v. Smith, 9 Pick. (Mass.) 10.

Civil Code Ky., § 341, providing that a new trial shall not be granted on account of the smallness of damages in an action for injury to the person or reputation, nor in any other action in which the damages equal the actual pecuniary injury sustained, does not apply where special damages are pleaded and proven. Jesse v. Shuck (Ky. 1889), 12 S. W. Rep. 304.

While it is provided by § 2839 of the Code of Iowa that "a new trial shall not be granted on account of the smallness of the damages, in an action for an injury to the person or reputation, where the damages equal the actual pecuniary injury sustained," yet a court is not required thereby to grant a new trial in every case where the damages are less than the actual pecuniary injury; and in this case, where the jury evidently meant to say, by finding a verdict for one dollar, that plaintiff was not entitled to damages at all, and the preponderance of the evidence was strongly against his right to recover, held that a motion for a new trial was properly overruled. Hubbard v. Town of Mason City, 64 Iowa 245.

By statute in many States a new trial will not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor in any other action when the damages equal the actual pecuniary injury sustained. R. St. O., § 5306; Civ. Pro. Wyo., § 2653; Code Iowa, ch. 9, § 2839; R. St. Ind. 1881, art. 23, § 560; Comp. Stat. Neb., § 314, p. 670.

injury is a matter of conjecture;<sup>1</sup> or if other causes than the act of the defendant were instrumental in bringing about the damage.<sup>2</sup> Where actual damage is shown with such definiteness as to be capable of being classified under a particular head, and determined by a legal measure, a verdict for merely nominal damages will be set aside.<sup>3</sup> And where a verdict gives grossly inadequate damages to a plaintiff, it is as much a ground for a new trial upon the motion of the plaintiff as a verdict for excessive damages would be upon the motion of the defendant.<sup>4</sup> Or if the evidence

In an action by B to recover damages for grain in the field destroyed by hogs belonging to L, a verdict was rendered for twenty-five cents. There was testimony tending to show the amount and value of the grain destroyed; also that hogs other than those of L committed a portion of the injury, but there was no testimony tending to show the number of such hogs, nor what proportion of the damage was occasioned by the hogs of L. *Held*, that an objection by B that the verdict was against the weight of evidence could not be sustained. *Blanchard v. Loges*, 11 Neb. 460.

Where the damages recovered equal the pecuniary loss in actions for injuries to person or character no new trial will be granted for smallness of damages. *Sullivan v. Wilson*, 15 Ind. 246. But see *Sharpe v. O'Brien*, 39 Ind. 501.

A new trial, on account of the smallness of damages, in actions for injuries to person or character, is not prohibited absolutely by the statute of Indiana, but only in cases where the damages recovered equal the pecuniary loss. *Sullivan v. Wilson*, 15 Ind. 246.

1. *Benzon v. Burlington etc. R. Co.*, 18 Neb. 659.

2. *Phillips v. Phillips*, 34 N. J. L. 208.

3. *English v. Clerry*, 3 Hill L. (S. Car.) 279. See also *Bacot v. Keith*, 2 Bay (S. Car.) 466; *Potter v. Swindle*, 77 Ga. 419.

Where a verdict is too small the court may give the defendant his election between a new trial or an increase in the amount of the verdict. *Carr v. Miner*, 42 Ill. 179; *James v. Morey*, 44 Ill. 352.

4. *McDonald v. Walter*, 40 N. Y. 551; *Platz v. Cohoes*, 8 Abb. N. Cas. (N. Y.) 392; *Cowles v. Watson*, 14 Hun (N. Y.) 46; *Pollock v. Wanamaker*, 65 How. Pr. (N. Y.) 510; *McKeever v. Weyer*, 11 Wk. Dig. (N. Y.) 258; *Smith v. Smith*, 50 N. Y. Supr.

Ct. 537; *Meyer v. Fiegel*, 38 How. Pr. (N. Y.) 424.

"A verdict for a grossly inadequate amount stands upon no higher ground in legal principle, nor in the rules of law or justice, than a verdict for an excessive or extravagant amount. It is doubtless true that instances of the former occur less frequently, because it is less frequently possible to make it clearly appear that the jury have grossly erred. But when the case does plainly show such a result, justice as plainly forbids that the plaintiff should be denied what is his due as that the defendant should pay what he ought not to be charged." *McDonald v. Walter*, 40 N. Y. 551.

Where evidence shows that the plaintiff was not entitled to any verdict at all, or was damaged to a much larger amount than the jury had given him by their verdict, a new trial should be granted. *Lough v. Romaine*, 4 Jones & Sp. (N. Y.) 332.

In *Whitney v. Milwaukee*, 65 Wis. 409, a verdict for \$24.27 damages for injuries caused by a fall upon a defective cross-walk, imposing costs of suit amounting to \$30.47 on plaintiff, was set aside as perverse on its face and a new trial ordered.

In a suit for damages for physical injuries, it appeared that the plaintiff had been so injured as to remain insensible for the whole day, and for ten or twelve days he was unable to use his feet, and hardly knew he had any, and was laid up for five months. The jury found that the injury occurred through negligence of the defendants, without fault of the plaintiff, and assessed damages at six cents. *Held*, that the damages were inadequate, and a new trial must be granted. *Robbins v. Hudson River R. Co.*, 7 Bosw. (N. Y.) 1.

In an action to recover damages caused by the reckless taking of human life, a verdict for \$200 is not a just and fair compensation, and justifies the

furnishes a reasonably certain measure of damages, the court will look into the circumstances of the case and set aside the verdict, if the damages are too small.<sup>1</sup> And if the defendant admits in his pleadings, or at trial, a certain sum to be due, a verdict for a

court in granting the plaintiff a new trial. 1873, *Mariani v. Dougherty*, 46 Cal. 26.

Where, in an action to recover for services rendered under a contract providing for compensation in a certain contingency, it appears that the contingency never happened, a nominal verdict for plaintiff is not such an inconsistency as will entitle him to a new trial. *Simrall v. Morton* (Ky. 1889), 12 S. W. Rep. 185.

They have been granted on account of inadequate damages in personal injury cases. *Phillips v. Southwestern R. Co.*, 4 Q. B. Div. 406; *Bennett v. Hobro*, 72 Cal. 178.

And in malicious prosecution. *Paul v. Leyenberger*, 17 Ill. App. 167.

**Appellate Court.**—It is within the province of an appellate court to set aside a verdict for inadequate damages as well as for excessive damages. *Paul v. Leyenberger*, 17 Ill. App. 167; *Robbins v. Hudson R. Co.*, 7 Bosw. (N. Y.) 1; *McDonald v. Walter*, 40 N. Y. 551; 2 Sedg. Dam. (7th ed.), 660; 1 Suth. Dam. 810; *Phillips v. Southwestern R. Co.*, 4 Q. B. Div. 406; *Platz v. Cohoes*, 8 Abb. N. Cas. (N. Y.) 392; *Mobile etc. R. Co. v. Ashcraft*, 48 Ala. 15. Compare *Randall v. Howard*, 5 Bing. N. C. 424; *Forsdike v. Stone*, 3 C. P. L. R. 607.

1. *Bishop v. Mayor of Macon*, 7 Ga. 200; *Taunton Mfg. Co. v. Smith*, 9 Pick. (Mass.) 11; *Bennett v. Hobro*, 72 Cal. 178.

A verdict for a less sum than the lowest amount set by the evidence will be set aside. *Hood v. Ware*, 34 Ga. 328; *Shropshire v. Doxey*, 25 Tex. 127; *Fawcett v. Woods*, 5 Iowa 400.

"It is objected, however, that verdicts cannot be set aside on account of the damages being too small, but we are satisfied that this is a mistake. It is a power rarely exercised, and especially in actions of personal wrongs, such as slanders, batteries and the like; but when the foundation of the action is a breach of contract, and the damages are capable of estimation, if there is glaring deficiency, justice requires that the case shall be revised. *Taunton Mfg. Co. v. Smith*, 9 Pick. (Mass.) 10.

Under Wis. Stat., ch. 132, relating to new trials, where, if the plaintiff were entitled to recover at all, he was entitled to a larger amount than that allowed by the jury, the verdict may be set aside for insufficient evidence on a motion founded upon the judge's minutes. *Emmons v. Sheldon*, 26 Wis. 648.

Where some elements of damages properly involved in a plaintiff's claim are evidently omitted in the consideration of the case by the jury, a new trial will be granted on the ground of inadequate damages. *Phillips v. Southwestern R. Co.*, 4 Q. B. Div. 406.

In cases of a malicious prosecution the plaintiff may be entitled to attorney fees, together with the costs of defence in the original action. *Gregory v. Chambers*, 78 Mo. 204; *Bradlaugh v. Edwards*, 11 C. B., N. S. 377; *Closson v. Staples*, 42 Vt. 209; *Farlie v. Dauks*, 30 Eng. L. & Eq. 115.

In an action for a malicious prosecution, the undisputed evidence conclusively showed that plaintiff had incurred reasonable expenses in his defence exceeding fifty dollars. The jury were instructed that if they found for plaintiff he would be entitled to recover a reasonable sum for the expense so incurred, but they found for the plaintiff, and assessed his damages at five dollars. Under the statute, the plaintiff, recovering less than fifty dollars, could recover no more costs than damages. *Held*, that it was error to deny his motion for a new trial. *Waufile v. McLellan*, 51 Wis. 484.

A verdict for \$24.27 damages for considerable injuries to plaintiff's person, which verdict (being for less than \$50) entitled the defendant to recover costs amounting to \$30.47, is held to have been *perverse*, and a new trial is ordered. *Whitney v. Milwaukee*, 65 Wis. 409.

The court should set aside a verdict for the plaintiff in an action for the conversion of property when the damages assessed by the jury are manifestly inadequate; and where the trial court refuses to do so, the supreme court will interfere and reverse the judgment. *Watson v. Harmon*, 85 Mo. 443.

less sum will be set aside, and a new trial granted.<sup>1</sup>

3. *Remittitur*.—Where a new trial should be granted for this cause, the court may, in many instances, impose upon the successful party the option of accepting a new trial or remitting such portion of the damages as justice may require.<sup>2</sup> If the jury have reported to the court several items or elements of damage, upon which they have founded their verdict, and one or more of such items can be shown by fixed rules and principles of law to have been improperly allowed, when the amount can be ascertained, remission of such amount will remove the objection, if the verdict is excessive; or if the court can, by any fixed rules of law, determine the damages in a particular case, they may order the plaintiff to remit any excess.<sup>3</sup> And so, in an action *ex delicto*, if the plaintiff remits damages to the amount that the court may deem proper, a new trial may be refused.<sup>4</sup> But if the verdict is grossly excessive

1. *Coffman v. Brown*, 7 Colo. 147; *State v. Wilson*, 90 Ind. 114; *Williams v. Reynolds*, 86 Ill. 263. See also *Rowe v. Smith*, 10 Bosw. (N. Y.) 268.

A verdict in an action of trover for a less sum than that fixed by the defendant cannot stand. *Bernstein v. Walker*, 25 Ill. App. 224.

2. 4 Minor's Inst. 457; 1 Sutherland on Damages 812; *Whaley v. Broadwater* (Ga. 1887), 2 S. E. Rep. 749; *Carlisle v. Callahan*, 78 Ga. 320; *Magee v. Tufts*, 76 Ga. 96; *Atkinson v. Fraser*, 5 Rich. L. (S. Car.) 519; *McBride v. Daniels*, 92 Pa. St. 332; *Crew v. McCafferty*, 124 Pa. St. 200; *Snow v. Weeks* (Me. 1887), 8 Atl. Rep. 462; *Kopp v. Northern Pac. R. Co.*, 41 Minn. 310; *Reddon v. Union Pac. R. Co.* (Utah 1887), 15 Pac. Rep. 262; *Sears v. Conover*, 4 Abb. App. Dec. (N. Y.) 179; *Russel v. Place*, 5 Fish. Pat. Cas. 134; *Jewell v. Gage*, 42 Me. 247; *International etc. R. Co. v. Wilkes*, 68 Tex. 617; *Thomas v. Womack*, 13 Tex. 580; *Young v. Englehard*, 1 How. (Miss.) 19; *Smith v. Paul*, 8 Port. (Ala.) 503; *King v. Howard*, 1 Cush. (Mass.) 137; *Branch v. Bass*, 5 Sneed (Tenn.) 366. But see *Leeson v. Smith*, 4 Nev. & M. 321; s. c., 30 E. C. L. 373, where it was held that the court could not reduce the damages without the consent of both parties.

3. *Lambert v. Craig*, 12 Pick. (Mass.) 199; *King v. Howard*, 1 Cush. (Mass.) 137; *Bank of Ky. v. Ashley*, 2 Pet. (U. S.) 327; *Hodges v. Hodges*, 5 Metc. (Mass.) 205; *Sanborn v. Emerson*, 12 N. H. 57; *Trischett v. Hamilton Mut. Ins. Co.*, 14 Gray (Mass.) 456; *Pierce v. Wood*, 23 N. H. 519; *Odlin v. Gove*, 41 N. H. 465; *Cross v. Wilkin*, 43 N. H.

332; *Cram v. Hadley*, 48 N. H. 191; *Evertson v. Sawyer*, 2 Wend. (N. Y.) 507; *Howard v. Grover*, 28 Me. 97; *Speckman v. Byers*, 6 S. & R. (Pa.) 385; *Atwood v. Gillespie*, 4 Mo. 423; *Pendleton etc. R. Co. v. Rahmann*, 22 Ohio St. 446; *Hury v. Watson*, 4 T. R. 659; *Toledo etc. R. Co. v. Beals*, 50 Ill. 150; *Kavanaugh v. Janesville*, 24 Wis. 618; *Bigelow v. Doolittle*, 36 Me. 115; *Strong v. Hooe*, 41 Wis. 659; *Young v. Englehard*, 1 How. (Miss.) 19; *Smith v. Paul*, 8 Port. (Ala.) 503.

And it is not error to cause the jury to report to the court the items which constituted the elements of their verdict, in order to enable the judge to determine how much should, in justice, be released. *James River etc. Co. v. Adams*, 17 Gratt. (Va.) 427, 434; 4 Minor's Inst. 840.

A verdict being rendered for the plaintiff for \$25 more than the evidence for the plaintiff warranted, the court, apprehensive that there was culpable inattention or indifference on the part of the jury, did not order a *remittitur*, but remanded the cause for a new trial. *Illies v. Diercks*, 16 Tex. 251.

Where a verdict was for the sum of \$317.46, and, by the evidence, the party was not entitled to more than \$150, *held*, that a new trial should be granted, unless the plaintiff would remit the excess and interest from the date of the writ. *Jewell v. Gage*, 42 Me. 247; *Guerry v. Kerton*, 2 Rich. L. (S. Car.) 512.

4. *Union Rolling Mills Co. v. Gillen*, 100 Ill. 52; *Baker v. Madison*, 62 Wis. 137; *Potter v. Chicago etc. R. Co.*, 22 Wis. 615; *Upham v. Dickinson*, 50 Ill.

and unwarranted by the evidence, it cannot be cured by a *remittitur*.<sup>1</sup>

97; *Vinal v. Core*, 18 W. Va. 1; *Benedict v. Cozzens*, 4 Cal. 381; *Collins v. Council Cluffs*, 35 Iowa 432; *Albin v. Kinney*, 96 Ill. 214; *Thomas v. Fischer*, 71 Ill. 576; *Louisville etc. R. Co. v. Hodge*, 6 Bush (Ky.) 141; *Branch v. Bass*, 5 Sneed (Tenn.) 366; *Stedman v. Simmons*, 39 Ga. 591; *King v. Howard*, 1 Cush. (Mass.) 137; *Howard v. Grover*, 28 Me. 97; *Sinclair v. Railroad Co.*, *McArthur & Mackey (D. C.)* 13; *New Jersey Flax Co. v. Mills*, 26 N. J. L. 60; *Russell v. Place*, 5 Fisher Pat. Cas. 134; *Union Pac. R. Co. v. Byrne*, 2 Wyom. 109; *Carlisle v. Callahan*, 78 Va. 320; *Pratt v. Pioneer Press Co.*, 35 Minn. 251; *Young v. Englehard*, 1 How. (Miss.) 19; *Callahan v. Shaw*, 24 Iowa 441; *Stickney v. Bronson*, 5 Minn. 215; *Chapin v. Bourne*, 8 Cal. 294; *Diblin v. Murphy*, 3 Sandf. (N. Y.) 19.

An erroneous entry of judgment may be cured by the plaintiff remitting the excess. *Smith v. Paul*, 8 Port. (Ala.) 503; *Lear v. McMillen*, 17 Ohio St. 464.

There is an apparent departure from sound principle in this practice. The court concludes that the jury were influenced by passion or prejudice, or both, because they found such excessive damages, and yet allows their finding, covering the major propositions of the case upon which damages are consequent, to stand. Why should a verdict be in part retained if the jury were really influenced by passion or prejudice? Where their estimate of damages is rejected and another substituted, is the latter a verdict? See *Sutherland on Damages*; *Luson v. Smith*, 1 Nev. & Man. 304; *Sherry v. Frecking*, 4 Duer (N. Y.) 452; *Koeltz v. Bleckman*, 46 Mo. 320.

In an action for libel the general term of the supreme court can, on appeal, exact as a condition to refusing a new trial that plaintiff stipulate to a reduction of the verdict in the absence of any other error. *Holmes v. Jones (N. Y.)*, 24 N. E. Rep. 701.

A verdict may be excessive even after remission of a part, in which case a new trial will be granted. *Johnson v. Van Kettler*, 66 Ill. 63.

Where a judgment is reversed upon the sole ground that the damages awarded are excessive, the appellate court may indicate the excess and allow it to be remitted and judgment

entered for the balance. *Baker v. Madison*, 62 Wis. 137.

Where, in a suit by a wife for the homicide of her husband, who was a railroad employé, the Carlisle tables of mortality were introduced in evidence and the value of the services of the deceased proved, thereby furnishing a measure of damages, and after a verdict for the plaintiff for \$12,000, and pending the motion for new trial counsel for plaintiff voluntarily wrote off from the verdict \$2,000 so as to come within the measure of damages proved, the refusal of a new trial was not error. *The Central R. Co. v. Crosby*, 74 Ga. 737.

"The practice of permitting a *remittitur* of a portion of the verdict, even in actions sounding in damages, is so well settled that the point made against the judgment in this case on account of the *remittitur* entered need not be discussed as a new question. The rule is uniform that when there is a motion for a new trial on the ground of excessive damages, plaintiff may if he chooses remit a portion of the verdict to obviate the objection. The court cannot compel a plaintiff to remit any portion of his verdict, but he may have his election to do so or stand the chances of another verdict." *Scott J.*, in *Albin v. Kinney*, 96 Ill. 214. See also *McCauley v. Wonderly*, 56 Ill. 410; *Thomas v. Fischer*, 71 Ill. 576. In *Lowenthal v. Streng*, 90 Ill. 74, the court expressed misgivings as to the propriety of the practice.

1. *Doty v. Steinberg*, 25 Mo. App. 328; *Atchison etc. R. Co. v. Dwelle* (Kan. 1890), 24 Pac. Rep. 500; *Baltimore etc. R. Co. v. Unfried (W. Va.)*, 12 S. E. Rep. 512.

Where, in an action for slander, there is a verdict for \$4,000, and the trial court decides that all damages above \$500 are excessive, such excess shows that the verdict was rendered under the influence of passion or prejudice, and must be set aside, though the plaintiff may have agreed to remit \$3,500. *Steinbuchel v. Wright*, 43 Kan. 307.

In the case of *Koeltz v. Bleckman*, 46 Mo. 320, the court say: "The extraordinary verdict of the jury renders it certain that they disregarded the evidence and mistook the law. The

*Remittiturs* are favored by the courts.<sup>1</sup> However, the offer of the successful party to remit a portion of an excessive verdict, will not deprive the other party of a new trial.<sup>2</sup> A *remittitur* will cure a verdict greater than the amount claimed in the pleadings.<sup>3</sup>

It is within the province of an appellate court to order a *remittitur*.<sup>4</sup>

question in this case is, will the *remittitur* cure the error? We think not. As the verdict was for more than the amount demanded in the petition, of course it could not be permitted to stand. . . . The truth crops out in the whole proceeding, and the conclusion is irresistible that the defendant's side of the case was never considered by the jury; and to allow the judgment to stand by the *remittitur* is really permitting the plaintiff to make up his own verdict."

Where it appears that the verdict is the result of passion or prejudice on the part of the jury, a *remittitur* will not be allowed to cure the verdict. *International etc. R. Co. v. Wilkes*, 68 Tex. 617.

In an action to recover damages for a personal injury, the trial court concluded that the verdict of the jury was excessive, and ordered the plaintiff to enter a *remittitur* of \$3,000 as a condition to its overruling the motion for a new trial. The appellate court said, "If the judge was of opinion the verdict was excessive, he should have granted a new trial." The damages are assessed by the jury, if the verdict was excessive, the judge in actions like this, had no measure by which to determine how much it is excessive. His attempt to do so is an invasion of the rights of the jury. *Gulf etc. R. Co. v. Coon*, 69 Tex. 730.

Where it is impossible to determine what the jury acted upon, or how they made up their verdict under the charge of the court, so as to correct the error and arrive at the amount they should have given, a *remittitur* will not cure the verdict. *Smith v. Dukes*, 5 Minn. 373; *Orange etc. R. Co. v. Fulvey*, 17 Gratt. (Va.) 366; *Lambert v. Craig*, 12 Pick. (Mass.) 199; 2 *Sutherland Dam.* 812 (ed. 1883); *Hodapp v. Sharp*, 40 Cal. 69; *Sourwine v. Truscott*, 25 Hun (N. Y.) 67; *McConnell v. Hampton*, 12 Johns. (N. Y.) 234; *Nudd v. Wells*, 11 Wis. 407.

A *remittitur* will cure an excessive verdict arising from an erroneous in-

struction when the excess can be computed. *Cross v. Wilkins*, 43 N. H. 332; *Odlin v. Gove*, 41 N. H. 565 and cases cited. See also *Forbes v. Howard*, 4 R. I. 364; *Sanborn v. Emerson*, 12 N. H. 57; *Robson v. Watts*, 11 Tex. 768; *Thomas v. Womack*, 13 Tex. 580. Compare *Pontius v. Commonwealth*, 4 W. & S. (Pa.) 52; but where the excess cannot be determined by the record the parties may agree as to the amount and have the excess remitted. *Lambert v. Craig*, 12 Pick. (Mass.) 199.

The court cannot substitute its judgment for the verdict of the jury upon a question which the jury alone could determine. *Nudd v. Wells*, 11 Wis. 407; *Thomas v. Womack*, 13 Tex. 580.

1. *Howard v. Grover*, 28 Me. 97; *Reasoner v. Brown*, 19 Ark. 234.

The court below made an order granting the defendant a new trial unless the plaintiff should remit a specified portion of the damages. The plaintiff declined to do so, and appealed from the order. *Held*, the practice adopted by the judge below has been several times approved here, and we cannot say the evidence did not justify his action. *Gregg v. San Francisco etc. R. Co.*, 59 Cal. 312.

2. *La Salle v. Tift*, 52 Iowa 164; *Hill v. Newman*, 47 Ind. 187-197; *Railroad Co. v. Garrett*, 8 Lea (Tenn.) 438.

But where the defendant refused to accept the amount of the verdict after the plaintiff had consented to a *remittitur*, it was held that the appellate court could not review the action of the circuit court in refusing a new trial. *Arkansas Valley Land etc. Co. v. Mann*, 130 U. S. 69.

3. *Tarbell v. Tarbell*, 60 Vt. 486; *Hurd v. Germany*, 7 How. (Miss.) 675.

4. *Howard v. Grover*, 28 Me. 101; *Guerry v. Kerton*, 2 Rich. L. (S. Car.) 512; *Anderson v. Tarpley*, 6 Smed. & M. (Miss.) 512; *Hurd v. Germany*, 7 How. (Miss.) 675; *Hodges v. Hodges*, 5 Metc. (Mass.) 205, 212; *Evertsen v. Sawyer*, 2 Wend. (N. Y.) 513; *Devore v. McDermitt*, 47 Ind. 234.

**IX. NEW TRIAL AS OF RIGHT.**—In actions of ejectment it was formerly held in *England* that new trials would not be awarded, for the reason that the judgment was not conclusive.<sup>1</sup> In 1768, it was held otherwise, on the ground that, though a second ejectment might be instituted, a change of possession would be effected under the first judgment to the injury of the defeated party.<sup>2</sup> It is now well settled that, at common law, in ejectments, as in civil actions generally, new trials may be awarded for such legal causes as ordinarily constitute grounds for new trials.<sup>3</sup> And, in fact, it may be said that, irrespective of statutes, new trials are granted more freely in ejectment suits than in other civil actions.<sup>4</sup>

As the judgment, in the common-law action of ejectment, conferred no additional title upon the successful party, but merely gave him the possession, and was not final, nor evidence in a subsequent action brought by or against the same parties, and did not preclude the losing party from bringing another action, there was no limit to the number of trials which might be had, unless the court of equity interfered by injunction to prevent what, in effect, was continuous litigation.<sup>5</sup>

Of recent years, the statutes of many of the States have provided for new trials as of right in actions of ejectment, or in the nature of ejectment.<sup>6</sup> It may be said of these statutes that it was designed that they should be restrictive of the common-law right of the defeated party, the number of new trials authorized usually being limited, and a conclusiveness as to the parties and the title attached to their result.<sup>7</sup> In substance, these statutes are

1. *Argent v. Darrell*, 2 Salk. 648; *Penwick v. Grosvenor*, 2 Salk. 650.

2. *Goodtitle v. Clayton*, 4 Burr. 2224.

3. *Clayton v. School District*, 20 Kan. 256; *Emmons v. Bishop*, 14 Ill. 152; *Taylor v. Sutton*, 15 Ga. 103; *Baze v. Arper*, 6 Minn. 220.

4. *Newell v. Sanford*, 10 Iowa 396; *White v. Poorman*, 24 Iowa 108; *Jackson v. Dickenson*, 15 Johns. (N. Y.) 309; *Jackson v. Laird*, 8 Johns. (N. Y.) 489; *Clayton v. Yarrington*, 33 Barb. (N. Y.) 144. And see *Clymer v. Liltler*, 3 Burr. 1244; *Peck v. Carmichael*, 9 Yerg. (Tenn.) 325.

5. See article EJECTMENT, 6 Am. & Eng. Encyc. of Law 195, 245u.

6. Reason for these statutes may be found, to use the language of MILLER, J., in *Equator Co. v. Hall*, 106 U. S. 87, in the fact that "A title to real estate has, under the traditions of the common law, been held, in all the States where that law prevailed, to be too important, we might almost say, too sacred to be concluded forever by the result of one action between the contesting parties.

Hence those States which, by abolishing the fictions of the action at the common law, and substituting a direct suit between the parties actually claiming under conflicting titles, which, according to the nature of this new proceeding, would end in a judgment concluding both parties, have found it necessary to provide for new trials to such extent as each State legislature has thought sound policy to require. These provisions for new trials in actions of ejectment are not the same in all the States, but it is believed that almost all of them which have abolished the common law action have made provision for one or more new trials as a matter of right." See also *Miles v. Caldwell*, 2 Wall. (U. S.) 35; *Spence v. McGowan*, 53 Tex. 30; *Gregory v. Lincoln*, 13 Neb. 352; *People v. Genesee Circuit Judge*, 37 Mich. 281; *Beckman v. Richardson*, 28 Kan. 648; *Hunter v. Chrisman*, 70 Ind. 439; *Knight v. Valentine*, 35 Minn. 367; *Bender v. Sherwood*, 21 Ind. 167.

7. *Sedgwick & Wait on Trial of Title to Land*, § 580.

similar, though in detail and in the procedure under them, they vary with the different jurisdictions. The remedy afforded by them, it is apparent, is independent of that afforded by the ordinary motion for a new trial on grounds common to civil actions generally.<sup>1</sup> The tendency of the courts of the different States of late years has been to construe these statutes strictly, though here the decisions are not harmonious, a greater liberality being allowed for their scope in some jurisdictions than in others.<sup>2</sup>

It has been held that these statutes do not embrace actions of forcible entry or detainer, or actions to recover possession of land because of non-payment of rent;<sup>3</sup> nor actions to set aside deeds for fraud,<sup>4</sup> though such a statute has been held to embrace a suit to revest title in one whose land was taken from him by fraud, and conveyed afterward to a fraudulent grantee;<sup>5</sup> nor actions to enforce liens;<sup>6</sup> nor partition suits, where neither title nor right of

1. *Lafin v. Herrington*, 17 Ill. 399.

The right to a new trial as of right is not lost by the fact that new trials have been granted previously for cause. *Emmons v. Bishop*, 14 Ill. 152.

2. For example: In *Texas*, it was said in *Spence v. McGowan*, 53 Tex. 30, that the statute (now repealed) constituted an exception to an almost universal rule founded on the wisest public policy, and should be strictly construed; while in *Illinois* it was held that the statute should receive a liberal construction. *Chamberlin v. McCarty*, 63 Ill. 262; *Myers v. Phillips*, 68 Ill. 269.

In *Bay v. Gage*, 36 Barb. (N. Y.) 447, it was held that an amendatory act, under which new trials as of right were demandable more freely than before, should not be construed retroactively so as to bring within the scope of the amendment an action in which judgment had been rendered prior to the enactment of the amendatory act. And see *Jackson v. Coe*, 5 Wend. (N. Y.) 101; *Singer v. Belt*, 8 Ohio St. 291, where it was held that the statute providing for a new trial in actions for the recovery of real property, did not apply to actions of ejectment which were pending when the act took effect.

3. *Whitaker v. McClung*, 14 Minn. 170. But it has been held in *Minnesota* that, while this is so, there may be a new trial as of right where the forcible entry proceeding is in effect an ejectment, as under the somewhat novel practice in that State it may be. *Ferguson v. Kumler*, 25 Minn. 183.

The New York Code of Civ. Proc., § 1528, has excepted actions of ejectment founded upon an allegation of rent in arrear from the operation of the

statutes. See, as to the law prior to the enactment of the Code, *Christie v. Bloomingdale*, 18 How. Pr. (N. Y.) 12, which held that ejectments between landlord and tenant for non-payment of rent were not within the statute, and *Reed v. Loucks*, 61 How. Pr. (N. Y.) 434, *contra*.

A tenant holding over against his landlord, or the grantee of the landlord, is not entitled to a new trial as of right in an action begun before a justice, and on appeal to the circuit court decided in the landlord's favor. *Over v. Moss*, 41 Ind. 463.

In *Campbell v. Hunt*, 104 Ind. 210, it was adjudged that a leasehold interest for a term of years was a "valid, subsisting interest in real property," within Indiana Rev. St., § 1050, such as entitled the lessee, in an action to recover the possession, to a new trial as of right under § 1064.

4. A new trial as of right is not allowable in a suit to have a deed adjudged a mortgage and to procure its cancellation, as satisfied, even though the complaint also prays for a quieting of title. *Voss v. Eller*, 109 Ind. 260. See also *Warburton v. Crouch*, 108 Ind. 83, and cases cited; *Bradford v. School Town of Marion*, 107 Ind. 280.

Nor is a new trial as of right allowable in an ordinary suit to set aside a fraudulent conveyance. *Warburton v. Crouch*, 108 Ind. 83; *Somerville v. Donaldson*, 26 Minn. 75.

5. *Warburton v. Crouch*, 108 Ind. 83; *Voss v. Eller*, 109 Ind. 260; *Adams v. Wilson*, 60 Ind. 560; *Physio-Medical College v. Wilkinson*, 89 Ind. 23; *McKittrick v. Glenn*, 116 Ind. 27.

6. *Williams v. Thames Loan & Trust*



possession is involved,<sup>1</sup> though it may be otherwise, if the title is put in issue directly;<sup>2</sup> nor a proceeding by an administrator to

Co., 105 Ind. 420; *Jenkins v. Corwin*, 55 Ind. 21; *Butler University v. Conard*, 94 Ind. 353.

1. *Gullett v. Miller*, 106 Ind. 75; *Pipes v. Hobbs*, 83 Ind. 45; *Hawkins v. Heinzman* (Ind. 1890), 25 N. E. Rep. 708. So in *McFerran v. McFerran*, 69 Ind. 29, though the action was one of partition, the answer and cross complaint were in the nature of an action for specific performance, and it was held that a new trial was not grantable as of right.

2. *Kreitline v. Franz*, 106 Ind. 359. And see *Campbell v. Hunt*, 104 Ind. 210.

In *Bucher v. Carroll*, 19 Hun (N. Y.) 618, a new trial under the statute was allowed where, on the whole, the action was, in effect, one of ejectment, though the complaint also stated facts in relation to the assessment of damages, contained averments sufficient to warrant an application for a receiver, and prayed for an injunction.

In *Cheesebrough v. Parker*, 25 Kan. 566, it was held that a case fell within the statute, though the answer set forth an equitable defence and the petition prayed for mesne profits, the action being in form one for the recovery of real property.

In *Houston etc. R. Co. v. McGehee*, 49 Tex. 481, it was adjudged that the plaintiff was entitled to a new trial as of right, though the judgment in the first action contained a superfluous provision that the defendant be quieted in his possession of the land. And see *Blessing v. Edmonson*, 49 Tex. 333.

In *Indiana* the statute is deemed to apply where the statute is one to quiet title as well as where it is for the recovery of possession. *Shuman v. Gavin*, 15 Ind. 93; *Galletley v. Williams*, 15 Ind. 468; *Wills v. Dillinger*, 17 Ind. 253; *Schucraft v. Davidson*, 19 Ind. 98; *Zimmerman v. Marchland*, 23 Ind. 474; *Truitt v. Truitt*, 37 Ind. 514; *Physio-Medical College v. Wilkinson*, 89 Ind. 23.

In *Butterfield v. Walsh*, 25 Iowa 263, it was held that there was a right to a new trial, though the defence was an equitable one.

But in *Russell v. Nelson*, 32 Iowa 215, it was held that the Iowa statute did not apply to the equitable action to quiet title, but only to the action for the recovery of the land; and in *Black-*

*ford v. Loveridge*, 10 Kan. 101, it was held that the statute did not embrace the case of an action to compel the specific performance of a contract for the sale and conveyance of land, and to quiet the title.

It has been held in *South Carolina*, that the defendant could not, after a recovery against him in an action of trespass to try title, himself maintain an action to try the title to the same land. *Thomas v. Geiger*, 2 Nott & M. L. (S. Car.) 528.

Where the action, though in form trespass to try title, in fact covered the issue of a disputed boundary only, the statute has been held not to apply. *Bird v. Montgomery*, 34 Tex. 713. And see *Spence v. McGowan*, 53 Tex. 30; *San Patrico v. Mathis*, 58 Tex. 242; *Barbee v. Stinnett*, 60 Tex. 167; *Russell v. Senior* 118 Ind. 520.

The Kansas statute has been deemed not to extend to an action brought by one in possession to determine conflicting claims to the land. *Northrup v. Romary*, 6 Kan. 240. And see *Swartzell v. Rogers*, 3 Kan. 374. The same doctrine was held in New York prior to the enactment of the existing Code of Civil Procedure, § 1646. *Malin v. Rose*, 12 Wend. (N. Y.) 258.

In *Edgar v. Galveston City Co.*, 46 Tex. 421, it was adjudged that a new trial was demandable as of right, though the judgment in the first case was rendered on demurrer instead of on a verdict; while in *People v. St. Claire Circuit Judge*, 37 Mich. 131, it was held that an actual trial in the first action was necessary to bring the case within the statute, and that a judgment of a nonsuit was not sufficient.

See also, as bearing upon the scope of these statutes, *Eastman v. Linn*, 20 Minn. 433; *Magee v. Chadoin*, 44 Tex. 488.

It was held in *Cooke v. Passage*, 4 How. Pr. (N. Y.) 360, and in *Rogers v. Wing*, 5 How. Pr. (N. Y.) 50, that the provisions of the Revised Statutes of that State, authorizing new trials in actions of ejectment, embraced actions brought under the Code to recover the possession of real property. It has been held that the New York statute did not embrace equitable actions. *Shumway v. Shumway*, 42 N. Y. 143, nor to actions to set aside a conveyance.

procure a sale of land of the intestate for the payment of debts;<sup>1</sup> nor suits to foreclose mortgages;<sup>2</sup> nor an action brought by a judgment creditor, to subject to the judgment lien land conveyed by the debtor;<sup>3</sup> nor a suit to enjoin a railroad company from appropriating land for a right of way and to recover damages for such appropriation;<sup>4</sup> nor a suit to enjoin the obstruction of a right of way and for damages;<sup>5</sup> nor an action of tort to recover damages for the removal of a building from the plaintiff's land;<sup>6</sup> nor a suit to redeem and procure the cancellation of a mortgage, even though the complaint also prays for the quieting of the plaintiff's title;<sup>7</sup> nor a suit to compel the conveyance of land charged with a trust in the plaintiff's favor, this not being an action for the recovery of real property;<sup>8</sup> nor a proceeding instituted by an heir to test the validity of a devise.<sup>9</sup> Sometimes the statute grants the right to a new trial to the defendant only.<sup>10</sup> Again, only a party concluded by the judgment, or his heirs, assignees, or personal representatives is entitled to a new trial.<sup>11</sup> Again, it has been held that a mortgagee was entitled to a new trial as of right of an action of ejectment, to which he was not a party and wherein judgment had been entered by default against a purchaser from the mortgagor.<sup>12</sup> Generally speaking, there must have been a judgment before a new trial can be demanded as of

McConnell v. McCullough, 14 N. Y. St. Rep. 621.

It has been held that these statutes do not extend to suits for the specific performance of a contract. *Benner v. Benner*, 10 Ind. 256; *Allen v. Davidson*, 16 Ind. 416; *Walker v. Cox*, 25 Ind. 271. Nor to actions for damages for obstructing an easement. *Larrimore v. Williams*, 30 Ind. 18.

Where, pending an action to recover land, rents and profits, the defendant abandoned the property and plaintiff dismissed *pro tanto* and proceeded with the action as one for rents and profits only, and prevailed, it was held that the defendant was not entitled to a new trial as of right. *Wafer v. Hamill* (Kan. 1890), 24 Pac. Rep. 950.

1. *Fralich v. Moore*, 123 Ind. 75.

2. *Shular v. Shular*, 56 Ind. 30; *Sterne v. Vert*, 111 Ind. 408.

3. *Liggett v. Hinkley*, 120 Ind. 387.

4. *Tompkins v. Augusta etc. R. Co.*, 30 S. Car. 479.

5. *Hall v. Hedrick* (Ind. 1890), 25 N. E. Rep. 350.

6. *Jonsson v. Lindstrom*, 114 Ind. 15.

7. *Voss v. Eller*, 109 Ind. 260.

8. *McConnell v. McCollough*, 47 Hun (N. Y.) 405.

9. *Marvin v. Marvin*, No. 2, 11 Abb. Pr., N. S. (N. Y.) 102.

10. As in *Minnesota*. See *Howes v. Gillett*, 10 Minn. 397.

In *Wisconsin*, the statute is construed not to grant one new trial to each party, but one new trial only. *Boland v. Gillett*, 44 Wis. 329. And so in *Indiana*. *Ewing v. Gray*, 12 Ind. 64; *Crews v. Ross*, 44 Ind. 481. While in *Illinois*, each party is entitled to a new trial as a matter of right, if applied for within the time specified. *Chamberlin v. McCarty*, 63 Ill. 263; *Emmons v. Bishop*, 14 Ill. 152.

In *Pennsylvania* it has been held that a second action may be brought by the prevailing party before taking possession under the first verdict. *Ross v. Pleasants*, 19 Pa. St. 157.

11. *Forsyth v. Van Winkle*, 9 Fed. Rep. 247, in which case the question turned upon the construction of the Indiana statute.

12. *Howell v. Leavitt*, 90 N. Y. 238.

Where, under the statute, as in *Michigan*, a judgment in ejectment may be set aside within three years on motion, the purchaser at an execution sale thereunder takes the title with notice of such right, even though the time for redemption from the execution sale has expired. *Cook v. Judge of Kent Circuit Court*, 70 Mich. 94.

right.<sup>1</sup> That the new trial is demandable as of right does not do away with the necessity for a demand.<sup>2</sup> Notice, however, is not necessarily required.<sup>3</sup> It is usually required that the costs of the preceding action must be paid,<sup>4</sup> and sometimes that the damages awarded by the first verdict shall be paid also.<sup>5</sup> But, beyond

1. Under the Michigan statute, the right to a new trial does not exist where there has been a nonsuit merely. *People v. St. Clair Circuit Judge*, 37 Mich. 131. Nor under the Kansas statute, where neither appearance, answer nor demurrer has been filed. *Hall v. Sanders*, 25 Kan. 538. Nor under the New York statute, where judgment was entered pursuant to a stipulation that judgment absolute should be entered against the appellant, if the order of the general term in granting a new trial should be affirmed. *Roberts v. Baumgarten*, 10 N. Y. Supp. 519; 11 N. Y. Supp. 699.

In *Indiana etc. R. Co. v. McBroom*, 103 Ind. 310, it was held that an undisposed-of appeal did not preclude the right to a new trial, but that the appeal should be dismissed on the vacating of the judgment and the granting of a new trial.

Where the action embraces one cause of action wherein a new trial is demandable as of right, and another cause of action where it is not, a new trial is not demandable as of right. *Butler University v. Conard*, 24 Ind. 353; *Bradford v. School Town of Marion*, 107 Ind. 280; *Wilson v. Brookshire* (Ind. 1890), 25 N. E. Rep. 131.

In *Miller v. Evansville Nat. Bank*, 99 Ind. 272, and in *Hammann v. Mink*, 99 Ind. 279, the correctness of this rule was recognized, but it was held that where two causes were properly joined, as, for example, the foreclosure of a mortgage and a proceeding to recover possession of the land, there might be a new trial as of right, and that such a case was distinguishable from the cases aforesaid.

In *Schmitt v. Schmitt*, 32 Minn. 130, it was held that where, in an action for divorce, there were also issues involving the title and the right to possession of land, a second trial as of right was demandable as to these issues.

2. *Anderson v. Kent*, 14 Kan. 207; *West v. Cameron*, 39 Kan. 136.

Where the new trial was granted without a written motion and an appearance was entered, and no objection to the order granting the new trial

made for four years, it was held that there was a waiver of the right to object to the want of a written motion. *Marsh v. Elliott*, 51 Ind. 547. And see *Harvey v. Fink*, 111 Ind. 249.

3. It is not necessary that the party applying for a new trial, as of right, should notify the opposite party of his intention so to do. If the party against whom a judgment has been rendered pays the costs of the former trial, and applies for and obtains the order of the court vacating the judgment and ordering a new trial at the same term of court that the judgment is rendered, then the opposite party is required to take notice of the order vacating the judgment and ordering the new trial; but if the new trial is applied for and obtained at a subsequent term, then the party obtaining such new trial is required to notify the other party or parties that he has so obtained a new trial, and this notice must be served ten days before the first day of the term at which the action stands for trial. *Whitlock v. Vancleve*, 39 Ind. 511. And see *Stanley v. Holliday*, 113 Ind. 525; *People v. Genesee Circuit Judge*, 37 Mich. 281; *Doster v. Sterling*, 33 Kan. 381.

4. *Gilman v. Circuit Judge*, 21 Mich. 373; *Dennison v. Circuit Judge*, 37 Mich. 281; *Shaw v. McMaran*, 2 Hill (N. Y.) 417; *Oetgen v. Ross*, 36 Ill. 335. It is not error to overrule a motion for a new trial as of right if no proof that the costs have been paid is presented to the court. *McSheely v. Bentley*, 31 Ind. 235.

Payment of the costs within the year is a condition precedent to the right to demand a new trial. *Whitlock v. Vancleve*, 39 Ind. 511. And see *Davidson v. Lamprey*, 16 Minn. 445; *Dawson v. Shillock*, 29 Minn. 189; *Railsback v. Walke*, 81 Ind. 409.

5. *Golden v. Snellen*, 54 Ind. 282, and cases cited in preceding note. It was held in *Myers v. Phillips*, 68 Ill. 269, that the right to the new trial was not lost by an omission to pay the damages of one cent, this being too small an amount for the court to concern itself about.

this, it may be stated, as a general rule, that the court is without power to impose conditions or to exercise a discretion.<sup>1</sup> The time within which the application must be made or the second action brought, is a matter of statutory regulation.<sup>2</sup> The second action must be brought in the same court as the first.<sup>3</sup> All objections to granting a new trial as of right are waived by proceeding to try the case the second time.<sup>4</sup>

**X. NEW TRIAL IN CRIMINAL CASES**—1. In General; Felonies and Misdemeanors.—The principles underlying the rule that new trials in criminal cases cannot be had at the instance of the State, are not within the province of this article,<sup>5</sup> which treats only of new

But in *Pugh v. Reat*, 107 Ill. 440, it was adjudged that the right to a new trial was lost by a failure to pay certain additional costs of one dollar.

Where the right to a new trial in ejectment depends on the payment of costs, the order granting the new trial may be vacated in the succeeding term if the costs are not paid. *Setzke v. Setzke*, 121 Ill. 30.

In *Risley v. Rice*, 11 Civ. Proc. R. 367, it was held that the terms to be imposed on granting a new trial did not include the payment of the sum awarded for mesne profits.

As to the bond required by the Indiana Rev. Stat. 1064, to pay costs and damages where a new trial as of right is awarded, see *Stanley v. Dailey*, 112 Ind. 489; *Martin v. Martin*, 118 Ind. 227.

1. *McManamy v. Ewing*, *McCahon* (Kan.) 171; *Bellinger v. Martindale*, 8 How. Pr. (N. Y.) 113; *Marrietta v. Emerson*, 5 Ohio St. 288; *Rogers v. Wing*, 5 How. Pr. (N. Y.) 50; *Heseltine v. Simpson*, 61 Wis. 427. See also *Schrodt v. Bradley*, 29 Ind. 352, where it was held that the right, on payment of costs, was absolute and unaffected by a failure of the applicant to comply with an unauthorized condition imposed by the court, such as that the costs should be paid within a certain number of days. And see *Scranton v. Stewart*, 52 Ind. 68.

An order granting a statutory new trial in ejectment, which recites that it appears that the defeated party has paid all the costs, is a final judgment, and cannot be set aside at a subsequent term. *Cook Co. v. Calumet etc. Dock Co.*, 131 Ill. 305.

2. Under the Michigan statute, the time begins to run from the perfecting of the judgment. *People v. Judge of Kent Co. Circuit Ct.*, 34 Mich. 62.

In *South Carolina*, the second action must have been brought within two years. *Henderson v. Kenner*, 1 Rich. L. (S. Car.) 474.

In *Pugh v. Reat*, 107 Ill. 440, it was held that the application came too late when made April 13th, 1883, judgment having been rendered April 12th, 1882, and the statute requiring the application to be made within one year. And see also *Keener v. Union Pac. R. Co.*, 34 Fed. Rep. 871; *Boyce v. Osceola Circuit Judge* (Mich. 1890), 44 N. W. Rep. 343; *Crews v. Ross*, 44 Ind. 481; *People v. Judge of Wayne Circuit Court*, 24 Mich. 42.

Under the Texas statute (since repealed) a judgment against a plaintiff in an action for the possession of land was conclusive, unless the second action was commenced within the year. It was held that in an action commenced within the year by the former defendant against the grantees of the former plaintiff, the latter were not precluded by the judgment from setting up their claim to the land. *Brownsville v. Cavazos*, 100 U. S. 138.

Under that statute, the second action must have been brought within the year from the entry of the judgment in the first action, not within the year from the dismissal of an appeal. *Martin v. Wayman*, 38 Tex. 649.

3. *Cunningham v. Milwaukee*, 13 Wis. 120. So in *Frazer v. Weller*, 6 McLean (U. S.) 11, the federal court held that, the first action having been tried in the State court, the defeated party was not at liberty to resort to the federal court.

4. *Hutchinson v. Lemcke*, 107 Ind. 121; *Marsh v. Elliott*, 51 Ind. 547; *Vernia v. Lawson*, 54 Ind. 485.

5. See JEOPARDY, 11 Am. & Eng. Encyc. of Law 926.

And, in support of the general rule

trials granted at the instance of the accused. At common law, new trials were not granted in cases of felony, a recommendation to pardon affording the remedy for one whose conviction should not stand.<sup>1</sup> A *venire de novo* for an irregularity such as ordinarily called for the issue of this writ was grantable in cases of felony.<sup>2</sup> The English doctrine refusing new trials in felony cases, is at present nowhere followed in the United States,<sup>3</sup> though it was recognized, in New York no longer ago than in 1832;<sup>4</sup> in Massachusetts in 1822<sup>5</sup> it was argued that the English rule was applicable, but the court refused to follow it. In misdemeanors, the English rule has been to grant a new trial instead of recommending a pardon.<sup>6</sup> In the United States no distinction is now made between felonies and misdemeanors as to granting a new trial, further than that, where the offence is a felony, a new trial is granted the more readily, for the reason that the consequences of a refusal are the greater.<sup>7</sup>

that they cannot, see *Temple v. Com.*, 1 Va. Cas. 163; *People v. Nestle*, 19 N. Y. 583; *Steel v. Roach*, 1 Bay (S. Car.) 63; *State v. Salge*, 2 Nev. 321; *State v. Lavinia*, 25 Ga. 311; *People v. Bangeueur*, 40 Cal. 613; *State v. Kinney*, 44 Iowa 444; *State v. Rowe*, 22 Mo. 328; *State v. Brown*, 5 Ore. 119; *Paige v. People*, 3 Abb. App. Dec. (N. Y.) 439; *State v. Intoxicating Liquors*, 40 Iowa 95; *Hannaball v. Spalding*, 1 Root (Conn.) 86; *State v. Dailv*, 6 Ind. 9; *State v. Tolls*, 5 Yerg. (Tenn.) 363; *State v. Upton*, 5 La. An. 438; *State v. Cason*, 20 La. An. 43; *State v. McGrorty*, 2 Minn. 224; *Nonemaker v. State*, 34 Ala. 211; *State v. Carmichael*, 3 Kan. 96; *State v. Credle*, 63 N. Car. 506; *State v. Rentiford*, 14 La. An. 211; *State v. Hand*, 1 Eng. (Ark.) 169; *State v. Denton*, 1 Eng. (Ark.) 259; *State v. Taylor*, 1 Hawks (N. Car.) 462; *State v. Martin*, 3 Hawks (N. Car.) 383; *State v. Kanouse*, 20 N. J. L. 115; *State v. Wright*, 3 Brev. (S. Car.) 421; *State v. Riely*, 2 Brew. (S. Car.) 444; *Com. v. Capp*, 48 Pa. St. 53; *State v. Johnson*, 2 Iowa 549; *State v. Lane*, 78 N. Car. 547; *Terrell v. Com.*, 13 Bush (Ky.) 246.

1. *Reg. v. Frost*, 2 Moody 140; *United States v. Gibert*, 2 Sumn. (U. S.) 19; *United States v. Keen*, 1 McLean (U. S.) 429; *Rex v. Mawbey*, 6 T. R. 619; *Tinker's Case*, 13 East 416; *Reg. v. Bertrand*, L. R., 1 P. C. 520; *Reg. v. Murphy*, L. R., 2 P. C. 535.

2. Archb. Crim. Pl. and Ev. (18th ed.) 188; *People v. McKay*, 18 Johns. (N. Y.) 212; *Shepherd v. People*, 25 N. Y. 406; *Com. v. Gibson*, 2 Va. Cas.

70; *State v. Hardie*, 3 Murph. (N. Car.) 232.

3. *State v. Slack*, 6 Ala. 676; *State v. Prescott*, 7 N. H. 287; *United States v. Fries*, 3 Dall. (U. S.) 515; *Weinzorpfli v. State*, 7 Blackf. (Ind.) 186; *Grayson v. Com.*, 6 Gratt. (Va.) 712; *United States v. Keen*, 1 McLean (U. S.) 429; *United States v. Conner*, 3 McLean (U. S.) 573; *Lane v. People*, 10 Ill. 305, 308; *United States v. Halberstadt*, Gilp. (U. S.) 262; *Com. v. Roby*, 12 Pick. (Mass.) 496; *Com. v. Green*, 17 Mass. 515; *State v. Merrill*, 2 Dev. L. (N. Car.) 269; *State v. Larumbo*, Harper (S. Car.) 183; *Allens v. Com.*, 2 Leigh (Va.) 727; *State v. Sims*, Dudley (Ga.) 213; *State v. Wood*, 1 Mill. Const. (S. Car.) 29; *People v. Morrison*, 1 Park. Cr. (N. Y.) 625; *United States v. Harding*, 1 Wall. Jr. (C. C.) 127; *Ball's Case*, 8 Leigh (Va.) 726; *United States v. Macomb*, 5 McLean, (U. S.) 286; *People v. McMahon*, 2 Park. Cr. (N. Y.) 663; *People v. Marble*, 38 Mich. 309; *Anderson v. State*, 43 Conn. 514; *Buzzell v. State*, 59 N. H. 61.

4. *People v. Comstock*, 8 Wend. (N. Y.) 549.

5. *Com. v. Green*, 17 Mass. 514.

6. *Rex v. Mawbey*, 6 T. R. 619; *Rex v. Bear*, 2 Salk. 646; *Rex v. Read*, 1 Lev. 9; *Rex v. Smith*, 2 Show. 165; *Rex v. Simmons*, 1 Wils. 329; *Rex v. Curril*, Lofft 156; *Rex v. Simons*, Say. 34; *Rex v. Askew*, 3 M. & S. 9; *Rex v. Gough*, 2 Doug. 791; *Rex v. Tremaine*, 7 D. & R. 684; s. c., *nom.* *Rex v. Tremaine*, 5 B. & C. 254.

7. 1 Bishop on Crim. Proc., § 1273.

**2. Effect on Rights of Accused.**—By asking for a new trial, the accused waives his constitutional right to object to being placed in jeopardy the second time. It would seem, on principle, that if he is found guilty of a part of that charged in the indictment and not guilty as to another part, the waiver should be *pro tanto* and not go to the whole indictment, and, according to the weight of authority, this is so.<sup>1</sup>

1. Bishop on Crim. Law, § 1004.

See *Campbell v. State*, 9 Yerg. (Tenn.) 333; *State v. Kittle*, 2 Tyler (Vt.) 471; *Esmon v. State*, 1 Swan (Tenn.) 14; *State v. Kattlemann*, 35 Mo. 105; *State v. Dark*, 8 Blackf. (Ind.) 526, to the point that where there is a conviction on one count and an acquittal on the other, there cannot be a conviction on the second trial of that covered by the acquittal on the first trial. And see *Slaughter v. State*, 6 Humph. (Tenn.) 410; *Livingston's Case*, 14 Gratt. (Va.) 592; *State v. Flannigan*, 6 Md. 167; *State v. Tweedy*, 11 Iowa 350, to the point that where there is but one count in an indictment for murder, and the verdict is guilty of manslaughter and not guilty of murder, there cannot be a conviction of murder on the second trial. And see further, as tending to support the same general doctrine, *Lithgow v. Com.*, 2 Va. Cas. 297; *People v. Gilmore*, 4 Cal. 376; *Major v. State*, 4 Sneed (Tenn.) 597; *State v. Mallings*, 11 Iowa 239.

It has been held, however, in *Ohio*, that where the same offence is charged in different forms in separate counts, and the verdict is guilty on some of the counts, and not guilty on others, everything is opened on the new trial. *Jarvis v. State*, 19 Ohio St. 585; *Lesslie v. State*, 18 Ohio St. 390; and *State v. Behimer*, 20 Ohio St. 572, where the indictment in one count charged murder in the first degree, and it was found that the accused was not guilty of murder in the first degree, but was guilty of murder in the second degree, it was held that the new trial should be had on the original issues. The court said: "If the finding as to the main fact be set aside, the finding as to the circumstances necessarily goes with it;" and "we are of opinion that the verdict is severable only when there is a conviction or an acquittal on different counts for separate and distinct offences, or where there are several defendants; but that, where there is but one defendant, and, in fact, but

one offence, the verdict is entire." To the same effect are *Bailey v. State*, 26 Ga. 579; *Mitchell v. State*, 8 Yerg. (Tenn.) 514; *State v. Commissioners*, *Riley* (S. Car.) 273.

Formerly this was the law in Missouri. *State v. Ross*, 29 Mo. 32; *State v. Smith*, 53 Mo. 139. But the Missouri constitution of 1875 abrogated the rule.

In *Kring v. Missouri*, 107 U. S. 221, it was held by the United States supreme court (reversing the decision of the State courts) that the constitutional provision was an *ex post facto* law as applied to the case of one convicted before the adoption of the constitution and whose new trial occurred afterwards.

In *People v. Palmer*, 109 N. Y. 413, it was held that the provisions of the N. Y. Code of Crim. Proc., §§ 464, 543, that "The granting of a new trial places the parties in the same position as if no trial had been had," authorized a trial for an assault in the first degree, where the conviction on the first trial was of an assault in the third degree, and a reversal had followed the defendant's appeal, and that, so construed, the provisions of the Code were constitutional.

In *Wisconsin*, however, it has been held otherwise, and that under similar circumstances there could not on the second trial be a conviction of murder in the first degree. *State v. Martin*, 30 Wis. 216; *State v. Belden*, 33 Wis. 120. In the latter case the authorities are reviewed, and in support of the Wisconsin doctrine, the court cites *State v. Kittle*, 2 Tyler (Vt.) 471; *Campbell v. State*, 9 Yerg. (Tenn.) 334; *Esmon v. State*, 1 Swan (Tenn.) 14; *Jordan v. State*, 22 Ga. 546; *State v. Tweedy*, 11 Iowa 352; *Morris v. State*, 8 Smed. & M. (Miss.) 762; *Hurt v. State*, 25 Miss. 378; *Brennan v. People*, 15 Ill. 511; *People v. Gilmore*, 4 Cal. 376; *Jones v. State*, 13 Tex. 168; *State v. Ross*, 29 Mo. 32; *State v. Kattlemann*, 35 Mo. 105; *State v. Hill*, 30 Wis. 416, 422.

Where the accused is found guilty of a specified part of the charge and the

**3. Grounds; Rules Governing Application.**—There is no considerable difference between the rules applied to applications for new trials in criminal cases and in civil cases. The difference, so far as any exists, is thus stated by an eminent text writer: "It is in numerous cases rather assumed than decided, that the question whether a new trial shall be granted or not depends on the same rules in criminal causes as in civil. And, justly, it does as to a part of the rules. But we have seen that the burden of proof is in a degree different; and very different is the weight of evidence, which, in a criminal cause, requires the jury to be satisfied of guilt beyond a reasonable doubt. Therefore, and because by the entire spirit of the criminal law the prisoner is under a protection from the judge, which a party in a civil suit is not, many deem, and it is believed rightly, that new trials should be awarded more freely in criminal causes than in civil, and in criminal the more freely in proportion to the gravity of the punishment."<sup>1</sup> If it is perceived that the evidence was inadequate to support the conviction, or did not cover every element of the offence, a new trial will be

rest is not mentioned in the verdict, the authorities are at variance. It has been held in such cases that the verdict was too incomplete to sustain any judgment. *State v. Sutton*, 4 Gill (Md.) 492. *Contra*, *Brooks v. State*, 3 Humph. (Tenn.) 25; *Stoltz v. People*, 5 Ill. 168; it has been held that such a verdict is equivalent to an acquittal of that part of the charge as to which the verdict is silent. *Brooks v. State*, 3 Humph. (Tenn.) 25; *Weinzorpfli v. State*, 7 Blackf. (Ind.) 186; *Kirk's Case*, 9 Leigh (Va.) 627; *Morris v. State*, 8 Smed. & M. (Miss.) 762; *People v. Dowling*, 84 N. Y. 478; *State v. McNaught*, 36 Kan. 624; *Commonwealth v. Bennett*, 2 Va. Cas. 235; *State v. Lessing*, 16 Minn. 75; *State v. Tweedy*, 11 Iowa 350; *Brennan v. People*, 15 Ill. 511, 517; *Stoltz v. People*, 5 Ill. 168; *Chambers v. People*, 5 Ill. 351; *State v. Payson*, 37 Me. 361; *State v. Hill*, 30 Wis. 416; *State v. Belden*, 33 Wis. 120; *State v. Smith*, 5 Day (Conn.) 175; *Jones v. State*, 13 Tex. 168. *Contra*, *United States v. Keen*, 1 McLean (U. S.) 429. It has been held that the prosecuting officer in such case might *not pros.* the part of the charge not responded to. *United States v. Keen*, 1 McLean (U. S.) 429; *Commonwealth v. Stedman*, 12 Metc. (Mass.) 444. And it has been held that the part of the charge not responded to might be disregarded altogether, and that judgment might be rendered on the rest. *State v. Coleman*, 3 Ala. 14; *Nabors v. State*, 6

Ala. 200; *Swinney v. State*, 8 Smed. & M. (Miss.) 576; *Weinzorpfli v. State*, 7 Blackf. (Ind.) 188. In *1 Bishop on Crim. Law*, § 1006, it is said: "There seems to be no objection, in principle, to permitting the prosecuting officer to claim judgment on so much of the verdict as is distinct; and, when he does, the defendant, who has been in jeopardy on the whole, is protected by the constitution from any further prosecution for the rest of the charge. But this is where there is no waiver of the constitutional provision by a proceeding for a new trial. If the defendant has a new trial after the imperfect finding and without the *not pros.*, he seems in principle to stand, in respect to those parts of the allegation on which the jury were silent, in the same position as if the verdict were too defective in form to sustain any judgment, liable to be retried on the whole. But the authorities are not uniform to the latter effect: the greater number of cases seem to favor the extending of the new trial only to those parts of the indictment found expressly against the defendant."

1. *1 Bishop on Crim. Proc.*, § 1273. *State v. Tomlinson*, 11 Iowa 401; *State v. Hammond*, 5 Strobb. L. (S. Car.) 91; *Phipps v. State*, 3 Coldw. (Tenn.) 344; *Owens v. State*, 35 Tex. 361; *Falk v. People*, 42 Ill. 331; *Quarles v. State*, 1 Sneed (Tenn.) 407; *Troxdale v. State*, 9 Humph. (Tenn.) 411; *State v. Powers*, 1 Ga. Dec., pt. 1, 150; *State v.*

granted, notwithstanding that the jury has the right to determine facts and pass upon the weight of evidence.<sup>1</sup> So, if the conviction may have been due to erroneous rulings or instructions.<sup>2</sup> Newly

Johnson, 40 Conn. 136; Andersen v. State, 43 Conn. 514; Landers v. State, 35 Tex. 359.

1. In the following cases the principles which control courts in dealing with verdicts attacked as against the evidence or weight of evidence have been discussed. State v. Powers, Ga. Dec., pt. 1, 150; State v. Jeffreys, 3 Murph. (N. Car.) 480; Lee v. State, 71 Ga. 260; Lincoln v. People, 20 Ill. 364; McCann v. People, 6 Park. Cr. (N. Y.) 629; Marlatt v. People, 104 Ill. 364; Sherman v. State, 17 Fla. 888; State v. Hogard, 12 Minn. 293; Brite v. State, 10 Tex. App. 368; Blevin's Case, 5 Gratt. (Va.) 703; State v. Dille, Riley (S. Car.) 302; United States v. Martin, 2 McLean (U. S.) 256; Wright v. State, 21 Neb. 406; Wickersham v. People, 2 Ill. 130; Walker v. State, 4 Ark. 87; Manuel v. People, 48 Barb. (N. Y.) 548; Revel v. State, 26 Ga. 275; Grayson v. Commonwealth, 7 Gratt. (Va.) 613; State v. Ford, 3 Strobb. L. (S. Car.) 517; Gibbons v. People, 23 Ill. 518; Reynolds v. State, 24 Ga. 427; State v. Hammond, 5 Strobb. L. (S. Car.) 91; Whiteside v. State, 4 Coldw. (Tenn.) 175; Winfield v. State, 3 Greene (Iowa) 339; Fields v. State, 43 Tex. 214; State v. Packwood, 26 Mo. 340; Cicely v. State, 13 Smed. & M. (Miss.) 202; State v. Miller, 10 Minn. 313; Rice v. State, 45 Ga. 526; Johnson v. State, 48 Ga. 116; Stanton v. State, 13 Ark. 317; Mains v. State, 13 Ark. 285; Hines v. State, 51 Ga. 301; Topolanck v. State, 40 Tex. 160; Bailey v. State, 56 Ga. 314; Jobe v. State, 1 Tex. App. 183; State v. Dieckhoff, 1 Mo. App. 83; Wynne v. State, 5 Coldw. (Tenn.) 319; Green v. State, 23 Miss. 509; Pleasant v. State, 15 Ark. 624; United States v. Duval, Gilp. (U. S.) 356; State v. Green, Kirby (Conn.) 87; Alford v. State, 6 Ga. 483; State v. Murphy, 46 Miss. 347; Browning v. State, 33 Miss. 47; Skinner v. State, 53 Miss. 399; Kirby v. State, 3 Humph. (Tenn.) 289; Riggs v. State, 30 Miss. 635; Taylor v. State, 4 Ind. 540; State v. Cordes, 1 Rice (S. Car.) 152; State v. Cross, 12 Iowa 66; Holeman v. State, 13 Ark. 105; Wise v. State, 24 Ga. 31; Falk v. People, 42 Ill. 331; Dains v. State, 2 Humph. (Tenn.) 439; State v. Spenlove, Riley (S. Car.) 269; Peek v. State, 2 Humph.

(Tenn.) 78; Bedford v. State, 5 Humph. (Tenn.) 552; Garland v. State, 2 Swan (Tenn.) 18; Ball's Case, 8 Leigh (Va.) 726; Copeland v. State, 7 Humph. (Tenn.) 479; Cochran v. State, 7 Humph. (Tenn.) 544; Leake v. State, 10 Humph. (Tenn.) 144; Gibson v. State, 9 Ind. 264; People v. Ah Loy, 10 Cal. 301; Guilford v. State, 24 Ga. 315; Holcomb v. State, 28 Ga. 66; M'Whirt's Case, 3 Gratt. (Va.) 594; Hudgins v. State, 2 Ga. 173; Raines v. State, 33 Ga. 571; Clarke v. State, 35 Ga. 75; M'Cune's Case, 2 Rob. (Va.) 771; State v. Elliott, 15 Iowa 72; Grayson v. Commonwealth, 6 Gratt. (Va.) 712; United States v. Daubner, 17 Fed. Rep. 793; Carr v. State, 13 Ga. 328; State v. Moody, 24 Mo. 560.

And see also on questions of evidence, Owens v. Sanders, 44 Ga. 610; People v. Dailey, 59 Cal. 600; People v. Stanford, 64 Cal. 27; State v. Jones, 93 N. Car. 611; Adams v. State, 10 Tex. App. 677; Gallaher v. State, 17 Fla. 370; Moody v. State, 1 W. Va. 337; Matthis v. State, 33 Ga. 24; McAdams v. State, 8 Lea (Tenn.) 456; McDonald v. State, 72 Ga. 55; Lyles v. State, 41 Tex. 172; Holcomb v. State, 8 Lea (Tenn.) 417; State v. Merrill, 2 Dev. L. (N. Car.) 269; State v. Simons, Dudley (Ga.) 27; State v. Tomlinson, 8 Iowa 401; Guffy v. Commonwealth, 2 Grant Cas. (Pa.) 66; State v. Woolsey, 30 Iowa 251; People v. Gordon, 39 Mich. 508; Cooper v. State, 53 Ga. 256; Rafferty v. People, 72 Ill. 37; Barnes v. State, 53 Ga. 143; Jackson v. State, 53 Ga. 195; Clifton v. State, 53 Ga. 241; Spears v. State, 53 Ga. 252; Bromley v. People, 27 Ill. 20; State v. Collins, 20 Iowa 85; People v. Brown, 27 Cal. 500.

2. Troxdale v. State, 9 Humph. (Tenn.) 411; State v. Neville, 6 Jones L. (N. Car.) 423; State v. Ingold, 4 Jones L. (N. Car.) 216; Terry v. State, 17 Ga. 204; Boyd v. State, 17 Ga. 194; Henry v. State, 9 Tex. App. 358; Madrox v. State, 12 Tex. App. 429; People v. Williams, 29 Hun (N. Y.) 520; People v. Gray, 5 Wend. (N. Y.) 289; Sutton v. State, 41 Tex. 513; Bivens v. State, 6 Eng. (Ark.) 455; State v. Sims, Dedley (Ga.) 213; State v. Nash, 10 Iowa 81; Morgan v. State, 48 Ala. 65; Williams v. State, 48 Ala. 85; Stokes v. People, 53 N. Y. 164; Simpson v.



discovered evidence may afford ground for a new trial. The principles governing new trials on this ground have been dealt with in another part of this article.<sup>1</sup> Beyond the general statement of the distinction between criminal and civil cases adverted to above, the general rule may be said to apply.<sup>2</sup> To motions

State, 31 Ind. 90; Commonwealth v. Remby, 2 Gray (Mass.) 508; State v. Bailey, 1 S. Car. 1; Rand v. Commonwealth, 9 Gratt. (Va.) 738; Commonwealth v. Green, 17 Mass. 515; State v. Gray, 39 Me. 353; Morehead v. State, 9 Humph. (Tenn.) 635; Leoni v. State, 44 Ala. 110; Cato v. State, 9 Fla. 163; Commonwealth v. Manson, 2 Ashm. (Pa.) 31; State v. Camp, 23 Vt. 551; Licett v. State, 23 Ga. 57; Drake v. Commonwealth, 10 B. Mon. (Ky.) 225; Olds v. Commonwealth, 3 A. K. Marsh. (Ky.) 467; Clifford v. State, 56 Ind. 245.

And see also for questions relating to rulings or instructions relied upon as affording ground for new trials, Trammell v. State, 10 Tex. App. 467; United States v. Smith, 3 Blatchf. (U. S.) 255; Nuzum v. State, 88 Ind. 599; People v. White, 22 Wend. (N. Y.) 167; People v. Cunningham, 1 Den. (N. Y.) 524; Richardson v. State, 70 Ga. 825; State v. Bailey, 1 Wins. (N. Car.) 137; State v. Cameron, 40 Vt. 555; State v. Baker, 19 Mo. 683; State v. Grear, 28 Minn. 426; State v. Grady, 83 N. Car. 643; State v. Jones, 87 N. Car. 547; State v. Warren, 18 Nev. 459; State v. Rogers, 93 N. Car. 523; State v. McNair, 93 N. Car. 628; State v. Sands, 77 Mo. 118; Commonwealth v. Desmond, 5 Gray (Mass.) 80; Craft v. State, 3 Kan. 450; Keener v. State, 18 Ga. 194; Keaton v. State, 7 Ga. 189; Crawford v. State, 44 Ala. 382; State v. McGinnis, 5 Nev. 337; Long v. People, 102 Ill. 331.

And see, on the general subject of instructions to juries, INSTRUCTIONS, 11 Am. & Eng. Encyc. of Law 236.

1. See NEWLY DISCOVERED EVIDENCE, *supra*.

2. In the following criminal cases courts have dealt with questions of newly discovered evidence relied on as affording ground for a motion for a new trial: Anderson v. State, 43 Conn. 514; State v. Lockier, 2 Root (Conn.) 84; Scott v. State, 1 Root (Conn.) 155; State v. Harding, 2 Bay L. (S. Car.) 267; Case v. State, 5 Ind. 1.

To the point that the evidence must have been discovered since the trial, see White v. State, 17 Ark. 404; United States v. Smith, 1 Sawy. (U. S.) 277;

Holeman v. State, 13 Ark. 105; State v. Ray, 53 Mo. 345; Higden v. Higden, 2 A. K. Marsh. (Ky.) 42; United States v. Gibert, 2 Sumn. (U. S.) 19; People v. Vermilyea, 7 Cow. (N. Y.) 369; O'Neal v. State, 47 Ga. 229.

That there must have been due diligence. Avery v. State, 26 Ga. 233; People v. Mack, 2 Park. Cr. (N. Y.) 673; Commonwealth v. Murray, 2 Ashm. (Pa.) 41; Commonwealth v. Williams, 2 Ashm. (Pa.) 69; Runnels v. State, 28 Ark. 121; Roberts v. State, 3 Kelly (Ga.) 310; Bennett's Case, 8 Leigh (Va.) 745; Thompson v. Commonwealth, 8 Gratt. (Va.) 637; Yanez v. State, 20 Tex. 656.

That the newly discovered evidence must not be cumulative merely. O'Shields v. State, 55 Ga. 696; State v. Stumbo, 26 Mo. 306; State v. Larriamore, 20 Mo. 425; Bixby v. State, 15 Ark. 395; Loeffner v. State, 10 Ohio St. 598; Brown v. State, 51 Ga. 502; Long v. State, 54 Ga. 564; Newcomb v. State, 37 Miss. 383. That it is likely to change the result. Young v. State, 56 Ga. 403; State v. Burge, 7 Iowa 255; Rainey v. State, 53 Ind. 278; Ash v. State, 56 Ga. 583; State v. J. W., 1 Tyler 417; Jones v. State, 48 Ga. 163; Lynes v. State, 46 Ga. 208; Teal v. State, 22 Ga. 75; Wise v. State, 24 Ga. 31; State v. Locke, 26 Mo. 603; Carter v. State, 46 Ga. 637; Attaway v. State, 56 Ga. 363; Giles v. State, 6 Ga. 276; Carr v. State, 14 Ga. 358; Meeks v. State, 57 Ga. 329; Peterson v. State, 50 Ga. 142.

That it must not tend merely to impeach a witness. Hauck v. State, 1 Tex. App. 357; Gibbs v. State, 1 Tex. App. 12; Thompson v. State, 2 Tex. App. 289; Wallace v. State, 28 Ark. 531; Brown v. State, 55 Ga. 169; Levinning v. State, 13 Ga. 513; Herber v. State, 7 Tex. 69; Bland v. State, 2 Ind. 608; Fleming v. State, 11 Ind. 234; State v. Henley, R. M. Charlt. (Ga.) 505; State v. McLaughlin, 27 Mo. 111; Walsh v. People, 65 Ill. 58; Wheeler v. State, 23 Ga. 292.

For additional cases, see this article, NEWLY DISCOVERED EVIDENCE, *supra*.

for new trials on the ground of surprise, the same principles apply, generally, as in civil cases.<sup>1</sup> It may be ground for a new trial that a continuance which should have been granted was refused.<sup>2</sup> A new trial may be ordered for a variance between the allegations of an indictment and the proof;<sup>3</sup> for error in permitting the introduction of incompetent testimony,<sup>4</sup> or for the imposition of a sentence for a longer or a shorter time than that allowed by law.<sup>5</sup> It may be ground for a new trial that the venue was not proved;<sup>6</sup> that the prosecuting attorney refused to elect on which of the two counts of an indictment he would seek a conviction—one count charging a felony, the other a misdemeanor, and the verdict being for the misdemeanor only, the effect of the refusal being to deprive the defendant of his right to testify under the statute;<sup>7</sup> that a material witness, a young child, was examined as to its ability to testify in a private room instead of in open court;<sup>8</sup> that the record fails to show steps essential to the regularity of the proceedings;<sup>9</sup> or that the record being defective the original papers are found to have been stolen, so that the case cannot be passed upon on *certiorari*;<sup>10</sup> that the accused was not in court during the trial;<sup>11</sup> that the accused was unable to pro-

In *Iowa*, newly discovered evidence is not recognized by the statute as ground for a new trial in criminal cases. *State v. Bowinan*, 45 *Iowa* 421; and *State v. Lee* (*Iowa*, 1890), 45 *N.W. Rep.* 545.

1. See subd. MISTAKE AND SURPRISE, *supra*.

The following cases illustrate the application of these rules: *Hoffmann v. State*, 65 *Wis.* 46; *Jackson v. State*, 18 *Tex. App.* 586; *Jordan v. State*, 10 *Tex.* 479; *State v. Benton*, 65 *Iowa* 482; *Childs v. State*, 10 *Tex. App.* 183; *Cunningham v. State*, 20 *Tex. App.* 162; *People v. Lane*, 31 *Hun* (*N. Y.*) 13; *State v. Williams*, 27 *Vt.* 724; *Thomas v. State*, 52 *Ga.* 509; *People v. Mack*, 2 *Park. Cr.* (*N. Y.*) 673; *Yanez v. State*, 20 *Tex.* 656; *People v. O'Brien*, 4 *Park. Cr.* (*N. Y.*) 203; *Wholford v. Commonwealth*, 4 *Gratt.* (*Va.*) 553; *Robinson v. State*, 15 *Tex.* 311; *Mayfield v. State*, 44 *Tex.* 59; *State v. Wightman*, 27 *Mo.* 121.

For additional cases, see this article MISTAKE AND SURPRISE, *supra*.

2. *Thompson v. State*, 26 *Ark.* 323; *Williams v. State*, 10 *Tex. App.* 528; *Casinova v. State*, 12 *Tex. App.* 554; *Laubach v. State*, 12 *Tex. App.* 583; *McCline v. State*, 25 *Tex. App.* 247; *Jackson v. State*, 23 *Tex. App.* 183; *State v. Winningham*, 10 *Rich. L.* (*S. Car.*) 257; *State v. Salge*, 2 *Nev.* 321; *Eppes v. State*, 10 *Tex.* 474; *Smith v.*

*State*, 20 *Tex. App.* 134; *State v. Horn*, 34 *La. An.* 100; *Frain v. State*, 40 *Ga.* 529.

3. *State v. Hamilton*, 17 *S. Car.* 462; *State v. Herring*, 1 *Brev.* (*S. Car.*) 159; *State v. Windham*, *Cheeves* (*S. Car.*) 75.

4. *Com. v. Green*, 17 *Mass.* 515; *Williams v. State*, 4 *Tex. App.* 5. And see *Drake v. Com.*, 10 *B. Mon.* (*Ky.*) 225.

5. *Brown v. State*, 47 *Ala.* 47. It was held, however, in *Wattingham v. State*, 5 *Sneed* (*Tenn.*) 64, that one found guilty of grand larceny was not entitled to a new trial on the ground that he was sentenced for two years' imprisonment, when the minimum term fixed by the statute was three years.

6. *Hoover v. State*, 1 *W. Va.* 336; *Carter v. State*, 48 *Ga.* 43; *Evans v. State*, 17 *Fla.* 192; *Walker v. State*, 35 *Ark.* 386.

7. *Com. v. Toland*, 11 *Phila.* (*Pa.*) 433.

8. *Simpson v. State*, 31 *Ind.* 90.

9. *Gaiter v. State*, 45 *Miss.* 441.

10. *State v. Reed*, 67 *Mo.* 36.

11. As where a verdict of guilty was rendered and the jury discharged in the absence of the accused. *State v. Hays*, 2 *Lea* (*Tenn.*) 156; *Cole v. State*, 10 *Ark.* 318.

In *State v. Davenport*, 33 *La. An.* 231, it was held ground for a new trial that the judge repeated his verbal

cure the attendance of witnesses, though due diligence was used;<sup>1</sup> that the court refused to order an officer to serve a process to procure the attendance of a material witness, who was confined in the penitentiary;<sup>2</sup> that the trial judge went out of office before making up the case;<sup>3</sup> that, after verdict, the court omitted to ask the accused what he had to say why judgment should not be pronounced against him.<sup>4</sup> On the other hand, an objection to an indictment cannot be presented in the form of a motion for a new trial;<sup>5</sup> nor objections to the summoning, qualifications, and organization of the grand jury;<sup>6</sup> nor the question whether the statute upon which the prosecution was founded is void or not.<sup>7</sup> As in civil cases so in criminal, if it is apparent that the error complained of did no harm, a new trial will be refused.<sup>8</sup> Trifling

charge to the jury in the absence of the prisoner's counsel. But in *State v. Paylor*, 89 N. Car. 539, it was held that the defendant's absence during the argument of counsel was not ground for a new trial, no injury appearing; and in *State v. Jones*, 91 N. Car. 654, it was held that one could not as of right demand a new trial on the ground of the absence of his counsel from the court room when the verdict was rendered.

In *Hair v. State*, 16 Neb. 601, it was held that the voluntary absence of the accused during the examination of a witness, who was re-examined after the return of the accused, the trial being stopped as soon as his absence was ascertained, afforded no ground for a new trial.

Both at common law and under the Texas Code, the absence of the defendant in a felony case, during the hearing and determination of his motion for a new trial, is a ground for a new trial. *Gibson v. State*, 3 Tex. App. 437.

In *Griffin v. State*, 34 Ohio St. 299, it was held, however, that an objection that a motion for a new trial was made, argued and overruled in the absence of the prisoner, came too late when made in the first instance after sentence.

The refusal of motions in the absence of the prisoner, as it does not preclude the renewal of them at the trial, is no ground of exception to the verdict. *Kelly v. State*, 3 Smed. & M. (Miss.) 518.

1. *Cooper v. State*, 16 Tex. App. 341.

2. *Roberts v. State*, 72 Ga. 673.

3. *State v. O'Kelly*, 88 N. Car. 609; *State v. Randall*, 88 N. Car. 611.

4. *Messner v. People*, 45 N. Y. 1.

But in *People v. McGeery*, 6 Park.

Cr. (N. Y.) 653, it was held that this would be presumed by the appellate court in support of the verdict, the record being silent upon the point.

5. *State v. Taylor*, 37 La. An. 40; *Price v. State*, 67 Ga. 723; *State v. Duestoe*, 1 Bay (S. Car.) 377.

It was adjudged in *People v. Moran*, 48 Mich. 639, that the endorsement upon an information, after the beginning of the trial, of the names of additional witnesses, in disregard of the statute and without leave of the court, was ground for a new trial.

In *Ray v. State*, 1 Greene (Iowa) 316, and in *Skipworth v. State*, 8 Tex. App. 135, it was held that this afforded no ground for a new trial if not objected to on the trial.

6. *Potsdamer v. State*, 17 Fla. 895.

7. *State v. Main*, 31 Conn. 572.

8. *Ballew v. State*, 36 Tex. 98; *Com. v. Drew*, 4 Mass. 391; *Com. v. Turner*, 3 Metc. (Mass.) 19, 26; *Lester v. State*, 11 Conn. 415; *State v. Lawson*, 14 Ark. 114; *Rachels v. State*, 51 Ga. 374; *Rex v. Oldroyd*, Russ. & Ry. 88; *Rex v. Ball*, Russ. & Ry. 132; *Rex v. Tincklet*, 1 East P. C. 354; *Manson v. State*, 24 Ohio St. 590; *Hester v. State*, 17 Ga. 130; *Lynes v. State*, 36 Miss. 617; *People v. Scott*, 6 Mich. 287, 289; *State v. Kingsbury*, 58 Me. 238; *State v. Neville*, 6 Jones L. (N. Car.) 423; *State v. Frank*, 5 Jones (N. Car.) 384; *State v. Pike*, 20 N. H. 344; *Com. v. Churchill*, 2 Metc. (Mass.) 118; *Garrard v. State*, 50 Miss. 147; *Thurmond v. State*, 55 Ga. 600; *State v. Potter*, 15 Kan. 302; *Wallace v. State*, 28 Ark. 531; *State v. Guisenhouse*, 20 Iowa 227; *Boyd v. State*, 17 Ga. 194; *Braswell v. State*, 42 Ga. 609; *Watts v. State*, 33 Ind. 237; *Wheeler v. State*, 23 Ga. 292; *Thomas v. State*, 27 Ga.

irregularities in the procedure are not deemed ground for a new trial.<sup>1</sup> A motion for a new trial will not be entertained where the

287; *Com. v. Gill*, 14 B. Mon. (Ky.) 20; *Champ v. Com.*, 2 Metc. (Ky.) 17; *State v. Jennings*, 18 Mo. 435; *Henderson v. State*, 12 Tex. 525; *Boon v. State*, 42 Tex. 237; *Mitchell v. State*, 1 Tex. App. 194; *State v. Engle*, 21 N. J. L. 347; *State v. Fox*, 25 N. J. L. 566; *State v. McCurry*, 63 N. Car. 33; *State v. Herrick*, 12 Minn. 132; *Sarah v. State*, 28 Ga. 576; *State v. Givens*, 5 Ala. 747; *People v. Keith*, 50 Cal. 137; *State v. Ford*, 3 Strobb. L. (S. Car.) 517; *Jim v. State*, 15 Ga. 535; *Bird v. State*, 14 Ga. 43; *People v. Colmere*, 23 Cal. 631; *State v. Tindall*, 10 Rich. L. (S. Car.) 212; *Ogle v. State*, 33 Miss. 383; *State v. Orsini*, 22 La. An. 93; *State v. Pike*, 65 Me. 111; *Beck v. State*, 57 Ga. 351; *Hill v. State*, 43 Ala. 335; *People v. Donahue*, 45 Cal. 321; *Hall v. State*, 8 Ind. 439, 442; *Perkins v. Com.*, 7 Gratt. (Va.) 651; *United States v. Flowery*, 1 Sprague (U. S.) 109; *State v. Camp*, 23 Vt. 551, 554; *State v. Floyd*, 15 Mo. 349; *Pines v. State*, 21 Ga. 227; *People v. Vermilyea*, 7 Cow. (N. Y.) 369; *Myer v. People*, 8 Hun (N. Y.) 528; *Clark v. People*, 31 Ill. 479; *Young v. Com.*, 4 Gratt. (Va.) 550; *State v. Fuller*, 39 Vt. 74; *People v. Rodundo*, 44 Cal. 538; *State v. Andrews*, 29 Conn. 100; *People v. Ah Who*, 49 Cal. 32; *Quarles v. State*, 1 Sneed (Tenn.) 407; *Sarah v. State*, 28 Ga. 576.

While the text statement is an accurate statement of the general rule, in some jurisdictions error is deemed ground for a new trial irrespective of the question of apparent injury done. In *Kentucky*, for example, it was held in *Cornelius v. Com.*, 15 B. Mon. (Ky.) 539, that for error in refusing to admit competent evidence a new trial should be granted, though on the whole the verdict seemed to be right. And so in *Tennessee*. *Peck v. State*, 2 Humph. (Tenn.) 78; *Morehead v. State*, 9 Humph. (Tenn.) 635; and in *Texas*, *Draper v. State*, 22 Tex. 400. And, to the same point, see *Gillespie v. Gillespie*, 2 Bibb (Ky.) 89; *Gaines v. Buford*, 1 Dana (Ky.) 481; *People v. Williams*, 18 Cal. 187; *Frain v. State*, 40 Ga. 529; *Wardell v. Hughes*, 3 Wend. (N. Y.) 418.

1. The fact that a prisoner was arraigned after the panel of jurors had been called and put upon him, and

that, after the arraignment, the court allowed the panel to be put upon the prisoner again, is no ground for a new trial. *Hester v. State*, 17 Ga. 130.

Where the defendant in a criminal trial has been acquitted by the court on agreed facts, a new trial will not be granted because the court failed to sign each day's proceedings. *State v. Newkirk*, 80 Ind. 131.

Although the statute provides that two judges shall be a *quorum*, if an opinion sustaining a demurrer, assented to by both, is delivered by one sitting alone, and both sit at the trial, there is no irregularity requiring a new trial. *State v. Congdon*, 14 R. I. 458.

A new trial of a criminal case will not be granted because the presiding judge, upon an adjournment for dinner, inadvertently neglected to admonish the jury not to converse about the case until its final submission to them. *People v. Draper*, 28 Hun (N. Y.) 1.

It has been held that the court did not err in refusing to set aside a verdict on the ground that the jury were empanelled and sworn before the defendant was required to plead to the indictment. *State v. Cole*, 19 Wis. 129.

In *State v. Camp*, 23 Vt. 551, it was held that a new trial was properly refused in a misdemeanor case, though a State's witness testified to material facts without being sworn, it not appearing that the accused or his counsel were ignorant of the irregularity until after the verdict, that the testimony was untrue, or that the accused sustained injury.

In *Thomas v. State*, 27 Ga. 287, it was held not to be ground for a new trial that a State's witness, who had testified, told a witness who had not yet been examined what had been testified to.

In *People v. Ah Who*, 49 Cal. 32, it was held that the exercise of the discretion of the trial court in refusing a new trial would not be revised, the point taken being that a witness, who on cross-examination testified that he was in jail, was asked whether he was not in jail charged with a certain offence.

In *Jackson v. State*, 39 Ohio St. 37, it was adjudged that no ground for a new trial appeared in the fact that the State concealed from its witness the

accused has concealed himself, having run away on learning of the verdict.<sup>1</sup> On the second trial a second arraignment is not necessary;<sup>2</sup> nor a second indictment, the original not having been adjudged insufficient.<sup>3</sup>

**XI. PROCEDURE ON THE APPLICATION FOR NEW TRIAL.—1. In What Proceedings Made.**—The remedy supplied by a motion for a new trial is, as a general rule, applicable only to actions and not to special proceedings,<sup>4</sup> and is designed to enable the court to correct such errors occurring during the progress of the trial as do not appear on the face of the record.<sup>5</sup> Motions upon the pleadings, and other

fact that he was under indictment for harboring the accused.

In *Keithler v. State*, 10 Smed. & M. (Miss.) 192, it was held that a new trial was not required for the reason that an accessory was found guilty on the testimony of the principal alone, though such testimony was somewhat contradictory and inconsistent.

In *Bacon v. State*, 22 Fla. 52, it was held that it was not necessarily ground for a new trial that a codefendant tried at the same time and acquitted was a material witness for the defendant convicted.

In *People v. Graham*, 21 Cal. 261, it was held not to be ground for a new trial that a child was withdrawn after being sworn and without testifying, it appearing that it was too young, the ground of the motion being that the child's appearance on the stand was calculated to excite the sympathies of the jury.

In *Walker v. State*, 39 Ark. 221, it was held that one convicted was not entitled as of right to a new trial on a discovery after verdict that a material witness was incompetent because of a conviction of felony.

In *Brown v. State*, 60 Ga. 210, it was held a new trial should not be granted on the ground that a witness had perjured himself until there had been a conviction for the perjury.

In *Parham v. State*, 10 Lea (Tenn.) 498, it was held that a new trial should not be granted upon affidavits aimed merely at an incidental statement of a State's witness.

1. *State v. Rippon*, 2 Bay (S. Car.) 99.

2. *Byrd v. State*, 1 How. (Miss.) 247.

3. *State v. Hughes*, 2 Ala. 102.

Where a new trial in a criminal case has been ordered because the court improperly refused a change of venue, the defendant, at the new trial, must file new affidavits showing that the cause

for the change still continues. *State v. Nash*, 7 Iowa 347.

4. See *Denise v. Denise*, 41 Hun (N. Y.) 9; *Marion etc. R. Co. v. Lomax*, 7 Ind. 406; *James v. McCann*, 78 Cal. 107; s. c., 20 Pac. Rep. 241.

The provisions of the New York Rev. Stat. and Code of Civ. Proc. do not apply to a judgment rendered upon a voluntary submission. *Lang v. Ropke*, 1 Duer (N. Y.) 701. And a judgment on the pleadings is not a trial or verdict requiring that a motion for a new trial or for an arrest of judgment be filed within four days under the Missouri Rev. Stat., § 3707. *Todd v. Missouri R. Co.*, 33 Mo. App. 110.

5. *Powder River Cattle Co. v. Custer Co.* (Mont. 1889), 23 Pac. Rep. 383; *Scherrer v. Hale* (Mont. 1889), 22 Pac. Rep. 151; *Racer v. Baker*, 113 Ind. 177; *McAllister v. Connecticut Mut. L. Ins. Co.*, 78 Ky. 531; *Harrington v. Latta*, 23 Neb. 84; *Hoffner v. State*, 93 Ind. 519; *Billings v. State*, 107 Ind. 54.

A motion for a new trial is, as a general rule, necessary to correct such errors as do not appear upon the record, consisting of the summons or writ, and the pleadings, verdict and judgment. Such errors are deemed to have been waived, and the appellate court will refuse to review them if the proper foundation for such review has not been laid by a motion for a new trial. *Ford v. Clark*, 12 Ark. 99; *Danley v. Robbins*, 3 Ark. 144; *Berry v. Singer*, 10 Ark. 483; *McClurkin v. Ewing*, 42 Ill. 283; *Daniels v. Shields*, 38 Ill. 197; *Pottle v. McWorter*, 13 Ill. 454; *Reichwald v. Gaylord*, 73 Ill. 503; *McGee v. Robbins*, 58 Ind. 463; *Cobb v. Krutz*, 40 Ind. 323; *McKinney v. Shaw etc. Mfg. Co.*, 51 Ind. 219; *Holesapple v. Fawbush*, 51 Ind. 494; *New York etc. R. Co. Doane*, 105 Ind. 92; *Nesbitt v. Hines*, 17 Kan. 316; *Gruble v. Ryus*, 23 Kan. 195; *Pratt v. Kelley*, 24 Kan. 111; *Wilson v. Kestter*, 34 Kan. 61; *Buet-*

matters arising before the trial is actually entered upon, furnish no basis for the motion,<sup>1</sup> but where the case is regularly called for trial, upon the day set for hearing, upon issues made by the pleadings, the trial then commences, in a sense authorizing an application for a new trial, even though all evidence on the part of the prejudiced party was excluded, and judgment rendered against him on motion.<sup>2</sup> Under the statutes of some of the States, however, a motion for a new trial can be made only when

*tinger v. Hurley*, 34 Kan. 585; *Atchison v. Byrnes*, 22 Kan. 65; *Cropsey v. Wiggenhorn*, 3 Neb. 108; *Wells v. Preston*, 3 Neb. 444; *Cruts v. Wray*, 19 Neb. 581; *Singleton v. Boyle*, 4 Neb. 414; *Horacek v. Keebler*, 5 Neb. 356; *Manning v. Cunningham*, 21 Neb. 288; *Light v. Kennard*, 11 Neb. 130; *Russell v. State*, 13 Neb. 68; *Stanton Co. v. Canfield*, 10 Neb. 390; *Walrath v. State*, 8 Neb. 88; *Hosford v. Stone*, 6 Neb. 378; *Horbach v. Miller*, 4 Neb. 31; *Joiner v. Van Alstyne*, 20 Neb. 578; *Cropsey v. Wiggenhorn*, 3 Neb. 108; *State v. Phares*, 24 W. Va. 657; *Danks v. Rodeheaver*, 26 W. Va. 274; *Riddle v. Core*, 21 W. Va. 530; *Shrewsbury v. Miller*, 10 W. Va. 115; *Vineyard v. Matney*, 68 Mo. 105; *Wetherall v. Harris*, 51 Mo. 65; *Kauffman v. Harrington*, 23 Mo. App. 573; *Exchange Nat. Bank v. Allen*, 68 Mo. 474; *Hatcher v. Moore*, 51 Mo. 115; *Pogue v. State*, 13 Mo. 444; *Gruen v. Bamberger*, 25 Mo. App. 89. *Contra*, *Fine v. Rogers*, 15 Mo. 315; *Hill v. Alexander*, 77 Mo. 296.

Upon a trial by the court without a jury, the general rule is that an appellate court will not review a case on the ground of insufficiency of evidence, unless the question is first presented to the trial court in a motion for a new trial. *Bills v. Stanton*, 69 Ill. 51, 55; *Helm v. Coffey*, 80 Ky. 176; *Seibel v. Vaughan*, 69 Ill. 257, 260; *Snell v. Trustees M. E. Church*, 58 Ill. 290; *Barnes v. Barber*, 69 Ill. 401; *Reichwald v. Gaylord*, 73 Ill. 503; *Choate v. Hathaway*, 73 Ill. 518; *Nimmo v. Kuykendall*, 85 Ill. 476; *Obermier v. Core*, 25 Ark. 562.

But it is held in some States that proper exceptions to the findings and judgment will raise the question on an appeal or writ of error of the sufficiency of the evidence. *Village of Hyde Park v. Cornell*, 4 Ill. App. 602; *Metcalf v. Fouts*, 27 Ill. 110; *Mahony v. Davis*, 44 Ill. 291; *Jones v. Buffum*, 50 Ill. 277; *Force Mfg. Co. v. Horton*, 74 Ill. 310; *Davis v. Scripps*, 2 Mo. 187.

A new trial is unnecessary where all the facts had been found upon which to base a judgment, and a mere computation was required to ascertain the amount for which judgment should be entered. *People v. Sierra etc. Min. Co.*, 39 Cal. 511.

A new trial is only a judicial re-examination of the issues of fact, not of questions presented in arriving at the issues, whether those questions were raised by demurrer to a pleading, or by a motion to strike out. Error of the court in ruling on a motion to strike out can only be reserved by bill of exceptions and is not a reason assignable for a new trial. *Milliken v. Ham*, 36 Ind. 166.

In a common-law action, where the law and the facts are submitted to the court, a motion and grounds for a new trial are necessary to obtain a review of the judgment. *Helm v. Coffey*, 80 Ky. 176.

In *Georgia* it has been held that a motion for a new trial is a part of the pleadings, and does not belong to a bill of exceptions. *Cox v. Weems*, 64 Ga. 165.

1. *Powder River Cattle Co. v. Custer Co.* (Mont. 1889), 22 Pac. Rep. 383; *Scherrer v. Hale* (Mont. 1889), 22 Pac. Rep. 151; *Adams v. Howard*, 14 Vt. 158.

A judgment rendered on default in pleading, will not support a motion for a new trial. *Marion etc. R. Co. v. Lomax*, 7 Ind. 406; *Hallam v. Doyle*, 35 Minn. 337.

But default in answering is not an admission of the plaintiff's case under Georgia practice, the defendant, therefore, in such a case may apply after judgment for a new trial. *Hayden v. Johnson*, 59 Ga. 104.

2. *Moore v. Bates*, 46 Cal. 30.

Under the Code of California, § 980, where a nonsuit has been granted on the trial of an appeal from a justice's court, the superior court has jurisdiction to grant a new trial. *Massman v. San Francisco Superior Ct.*, 71 Cal. 582.

a verdict has been rendered in a jury trial,<sup>1</sup> or its equivalent, a decision and findings have been made upon a trial by the court.<sup>2</sup> And the fact that the verdict or the decision is not final, does not change the rule.<sup>3</sup> Within these rules new trials may be had as a general proposition in all classes of actions and legal proceedings.<sup>4</sup>

A new trial, or a rehearing, as it is called in equity, may be granted in an equitable action at any time before final decree,<sup>5</sup>

After sustaining a demurrer to the evidence, a motion for a new trial is proper. *Missouri Pac. R. Co. v. Goodrich*, 38 Kan. 224.

1. *First Nat. Bank v. Clark*, 42 Hun (N. Y.) 90; *Emmerich v. Hefferan*, 33 Hun (N. Y.) 54; *Hill v. Hotchkin*, 23 Hun (N. Y.) 414; s. c., 3 N. Y. Supp. 51. And see *Denise v. Denise*, 41 Hun (N. Y.) 9; *James v. Superior Ct.*, 78 Cal. 107.

Under Supp. Rev. N. J., p. 260, pl. 207, as amended by acts 1888, p. 470, giving the district court power to order a new trial where there has been a verdict, that court has no power to grant a rule setting down the cause for retrial after the jury have disagreed. *Hartman v. Rose* (N. J.), 20 Atl. 29.

It has been held in a New York case, however, that application for a new trial on the judge's minutes may be made, notwithstanding there was no verdict. *Duden v. Waitzfelder*, 2 Abb. N. Cas. (N. Y.) 295, citing *McDonald v. Walter*, 40 N. Y. 551; *Algeo v. Duncan*, 39 N. Y. 314.

And a plaintiff who has been nonsuited may move at special term for a new trial. He is not confined to taking an appeal after judgment entered upon the nonsuit. This was the former practice, and is not changed by New York Code. *Moloney v. Dows*, 9 Abb. Pr. (N. Y.) 86; 18 How. Pr. (N. Y.) 27. Compare *Jackson v. Fassett*, 9 Abb. Pr. 137; s. c., 17 How. Pr. 453.

2. *Hallock v. Portland*, 8 Oreg. 29; *Robinson v. Mutual Ben. L. Ins. Co.*, 16 Blatchf. (U. S.) 194.

3. *Stanton v. Miller*, 65 Barb. (N. Y.) 58; *Bennett v. Austin*, 10 Hun (N. Y.) 451.

4. See the statutes of the different States.

The words, "motion for a new trial," as used in Massachusetts Stat., 1842, ch. 89, § 2, are intended to include all cases which are continued, on the motion of a dissatisfied party, with a view

to obtain some new disposition thereof, in order to relieve himself from a verdict. *Springfield v. Worcester*, 2 Cush. (Mass.) 52.

New trials may be had in actions for partition. *Jones v. Jones*, 91 Ind. 72.

Proceedings *in rem*. *Crutcher v. Crutcher*, 11 Humph. (Tenn.) 377.

In insolvency cases. *Van Waggoner v. Coe*, 25 N. J. L. 197; *People v. Rosborough*, 29 Cal. 415.

In *quo warranto* proceedings. *People v. Sackett*, 14 Mich. 243. And in divorce cases. *Conger v. Conger*, 77 N. Y. 432; *Amory v. Amory*, 6 Robt. (N. Y.) 514; *Rindge v. Rindge*, 22 Ind. 31; *Gibbs v. Gibbs*, 18 Kan. 419; *Folsom v. Folsom*, 55 N. H. 78. Though they will be granted with great reluctance, if at all, after second marriage. See *Sheafe v. Sheafe*, 29 N. H. 269; *Lawrence v. Lawrence*, 73 Ill. 577; *Olin v. Hungerford*, 10 Ohio 268; *Johnson v. Johnson*, Walk. (Mich.) 309; *Dunn v. Dunn*, 4 Paige (N. Y.) 425; *Evans v. Evans*, 5 B. Mon. (Ky.) 278; *Lucas v. Lucas*, 3 Gray (Mass.) 136; *Edson v. Edson*, 108 Mass. 590.

In New York a new trial may be had in the appellate court on an appeal from the judgment of a justice of the peace, where a judgment is demanded for a sum exceeding \$50.00, but this does not apply to a proceeding to recover possession of real estate. *Brown v. Cassidy*, 34 Hun (N. Y.) 55; *Hinkley v. Troy etc. R. Co.*, 42 Hun (N. Y.) 281. So a superior court may, on *certiorari* to a justice's court, remit the case for a new trial. *Luff v. Pope*, 5 Hill (N. Y.) 413. But not on a *certiorari* to the marine court. *Luff v. Pope*, 5 Hill (N. Y.) 413.

5. See *Pulliam v. Pulliam*, 10 Fed. Rep. 53; *Samis v. King*, 40 Conn. 298; *Creich v. Richards*, 76 Ga. 36; *Ashton v. Thompson*, 28 Minn. 330; *Arellano v. Chacon*, 1 N. Mex. 269.

A petition for a rehearing of a cause after final judgment under the Alabama Code, §§ 3161-6, must be presented to

and the grounds upon which a rehearing may be had are as numerous and various as the cases themselves. Whenever the court is called upon to determine a question, either of law or of fact, the decision may be the subject of an application for a rehearing.<sup>1</sup> Where a court of chancery directs issues to be tried at law, to inform the conscience of the court, the verdict being designed merely for the advisement of the court, it will nicely balance the facts and the evidence on both sides, and if it thinks that injustice has been done, or that error has been committed, or if it is dissatisfied with the verdict, a new trial or rehearing will be ordered.<sup>2</sup> Subject to the above qualifications, the court will ordinarily be governed by the rules and principles applied to such motions in suits at law.<sup>3</sup>

the judge in person; filing with the clerk is insufficient. *Ex parte* Johnson, 60 Ala. 429.

The rulings of the court on exceptions of law to a master's report do not form grounds for a motion for new trial after verdict. *Taylor v. Central R. & Banking Co.*, 67 Ga. 122.

1. 2 Danl. Ch. Pr. (5th ed.) 1462. And see *Baker v. Whiting*, 1 Story (U. S.) 218; *Hunter v. Marlboro*, 2 Woodb. & M. (U. S.) 168; *Brunagin v. Chew*, 19 N. J. Eq. 337; *Cairo etc. R. Co. v. Titus*, 30 N. J. Eq. 502; *Buena Vista Co. v. Iowa Falls etc. R. Co.*, 55 Iowa 157.

New trials are peculiar to courts of common law where jury trials prevail, and a rehearing belongs to chancery jurisdiction, and as the probate court is not provided with a jury, and has no chancery jurisdiction, it cannot grant a new trial or rehearing after deciding a contested election for justice of the peace under the statute. *Arellano v. Chacon*, 1 N. Mex. 269.

An erroneous decree upon a correct verdict is to be corrected by exceptions made at the time, and not by a motion for a new trial. *Greer v. Willis*, 67 Ga. 43; *Taylor v. Central R. & Banking Co.*, 67 Ga. 122.

A new trial involving the right of a receiver to fees allowed him should not, ordinarily, be granted after his death, his character being put in issue. *Morgan v. Hardee*, 71 Ga. 736.

A rehearing and new trial will not be allowed in *Alabama* for other grounds than those mentioned in the Revised Code, 1871. *Lawson v. Moore*, 45 Ala. 519.

2. See *Larabee v. Grant*, 70 Me. 79; *Snouffer v. Hausbrough*, 79 Va. 166; *Bates v. Sage*, 45 Cal. 127; *Clark v.*

*Brooks*, 2 Abb. Pr., N. S. (N. Y.) 385; s. c., 2 Daly (N. Y.) 159; *Forrest v. Forrest*, 25 N. Y. 501, 512; *Lansing v. Russell*, 13 Barb. (N. Y.) 510; s. c., 2 N. Y. 563; s. c., 4 How. Pr. (N. Y.) 213; *Apthorp v. Comstock*, 2 Page (N. Y.) 482; *Mulock v. Mulock*, 1 Edw. Ch. (N. Y.) 14; *Patterson v. Ackerson*, 1 Edw. Ch. (N. Y.) 96; *Head v. Head*, 1 Turn. & Russ. (Eng.) 138, 141; *Barker v. Ray*, 2 Russ. (Eng.) 63; *Bootle v. Blundell*, 19 Ves. (Eng.) 503; *Pemberton v. Pemberton*, 11 Ves. (Eng.) 52; *Warden of St. Paul's Church v. Morris*, 9 Ves. (Eng.) 165; *Slaney v. Wade*, 7 Sim. (Eng.) 595; *Swinfen v. Swinfen*, 27 Beav. (Eng.) 148; *Ex parte The Freeman etc.*, 1 Drew (Eng.) 148; *Waters v. Waters*, 2 DeG. & S. (Eng.) 591; *Faulconberg v. Peirce*, Amb. (Eng.) 210; *Locke v. Colman*, 2 N. & C. (Eng.) 42.

But where, in an equity action, specific questions of fact are ordered to be tried by jury, and their verdict is produced and used upon the trial of the action, no application having been made to set it aside, the general term has no authority to set it aside and order a new trial, on appeal from the judgment. *Jackson v. Andrews*, 59 N. Y. 244.

And in ejectment, where the answer set up, with other defences, was an equitable counter-claim which was dismissed, on trial of the issue thereon at an equity term of the court, and the other issues were tried afterwards, and a verdict for plaintiff was had, the defendant was entitled to a new trial of the other issues, but not to a new trial of the equitable issue. *Post v. Moran*, 10 Daly (N. Y.) 502.

3. *Clark v. Congregational Society*, 45 N. H. 331. And see *Doe v. Vallejo*, 29 Cal. 385; *Long v. Bullard*, 69 Ga. 678.



**2. Who May Apply.**—It is a rule of general application that a party to the action or proceeding, only, may make an application for a new trial.<sup>1</sup> Where a stranger, who is not a party to the record, becomes a purchaser of, or otherwise interested in, the interest of one of the litigants, he cannot on that ground make the application;<sup>2</sup> he must first procure his substitution as a party in the place of the person whose interest he purchased.<sup>3</sup> A motion for a new trial may be prosecuted by the representative of a deceased party, where the motion was made by the party before his death,<sup>4</sup> and this rule applies in actions which do not survive, if the motion is made by the representative of a defendant who has died since the judgment was rendered.<sup>5</sup>

On application by petition after the expiration of the term of court at which the judgment was rendered, all persons should be made parties who were parties to the original action.<sup>6</sup> Under stat-

The question, whether a new trial should be granted in a chancery suit, on the ground that by reason of newly discovered evidence a further hearing would be equitable, is a question of fact to be decided at the trial term. *Brooks v. Howard*, 58 N. H. 91.

A motion for a new trial of an equity cause, as well as an action at law, on the ground that the verdict did not cover the issues, must specify wherein. *Bessman v. Girardey*, 66 Ga. 18.

1. *Central R. etc. Co. v. Craig*, 59 Ga. 185; *Estate of Aveline*, 53 Cal. 259; *Brown v. Cody* (Ind.), 18 N. E. Rep. 9.

In an action against defendant, in which judgment is recovered for a tort committed by him as agent for another, it is error to grant a new trial on an application made by the principal in defendant's name, but against his will. *Rogers v. Hœnig*, 46 Wis. 361.

In *New York* judgment in ejectment may be vacated and a new trial ordered "upon the application of the party against whom it was rendered, his heir, devisee, or assignee." *Howell v. Leavitt*, 90 N. Y. 238.

**Application by Agent.**—A demand for a second trial in an action for the recovery of real property may be made by the party himself, and a notice embodying such demand, made in his name by an agent authorized by him to make such demand, if seasonably served, is sufficient. *West v. St. Paul R. Co.*, 40 Minn. 189. And see *Sacla v. O'Connor*, 58 How. Pr. (N. Y.) 420.

2. *Packard v. Smith*, 9 Wis. 184; *Ward v. Clark*, 6 Wis. 509.

3. *Cook v. Kent Circuit Judge*, 70

Mich. 94; *Brown v. Cody*, 115 Ind. 484.

**Bond.**—Where the applicant for a new trial has filed the bond prescribed by law, a substituted plaintiff need give no new bond, but the order granting the new trial and the filing of the bond enure to the benefit of the new plaintiff. *Brown v. Cody*, 115 Ind. 484.

4. *Gates v. Treat*, 25 Conn. 71. And see *Turner v. Booker*, 2 Dana (Ky.) 334.

In *Gates v. Treat*, 25 Conn. 71, the court said, "According to the rules of practice which prevail in the superior court, that is the only mode in which he can revise the proceedings on the trial of the case. To refuse to allow him to prosecute this motion would, therefore, be to establish the principal with the creditors and heirs of the deceased person, and those otherwise interested in his estate would be remediless against errors which may have intervened on the trial, a doctrine which would be palpable and most unjust and opposed to the principles of the given law by which, in all personal actions, an erroneous judgment may be reversed by the representatives of either party who is prejudiced by it."

5. *Turner v. Booker*, 2 Dana (Ky.) 334; *Gates v. Treat*, 25 Conn. 71.

**Entering Judgment Nunc Pro Tunc.**—Where the entry of judgment has been delayed by a motion for a new trial, and during the pendency of such motion the plaintiff dies, and afterwards the motion is denied, the judgment may be entered *nunc pro tunc* as of the time when the trial terminated. *Fitzgerald v. Stewart*, 53 Pa. St. 347.

6. *Carver v. Compton*, 51 Ind. 451.

utes conferring the right to move for a new trial upon "the party aggrieved," a person not a party to the action cannot, in a legal sense, be considered as a "party aggrieved,"<sup>1</sup> and the question, Is there a judgment against him? is usually the test as to whether or not a party is aggrieved;<sup>2</sup> but a party may be aggrieved by a judgment though it is in his favor, if it is inadequate to furnish the proper relief, or if based on erroneous conclusions.<sup>3</sup>

A joint motion for a new trial by several parties can be made only when each and all of them are entitled to make it,<sup>4</sup> and such a motion may be denied if the verdict is justified as to either or any of the defendants.<sup>5</sup> But though the judgment or verdict is joint, either may make the motion without joining the other.<sup>6</sup> This rule applies also to a motion by the defendants in actions

And see *post*, subtit. APPLICATION BY PETITION OR COMPLAINT.

After final judgment in a trustee process the supreme court will not grant a new trial on petition of some of the claimants, all parties not being joined, for the purpose of readjusting the priorities of the several claimants. *Wing v. Woodward*, 56 Vt. 723.

1. *Thomp. on Trials*, § 2719.

This provision has been made by a large number of the States. See statutes of the different States. And see *Physio. Medical College v. Wilkinson*, 89 Ind. 233; *Hines v. Deiver*, 100 Ind. 315; *Stout v. Duncan*, 87 Ind. 383; *Estate of Aveline*, 53 Cal. 259; *Central R. etc. Co. v. Craig*, 59 Ga. 185; *Rogers v. Hoenig*, 46 Wis. 361.

2. The opinion is entertained to some extent that the construction given to the words "party aggrieved" in statutory provisions relative to appeals should apply with relation to new trials. *Hayne on New Trials*, § 203. And see *Adams v. Wood*, 8 Cal. 306; *South v. Hoy*, 3 Bibb (Ky.) 523; *Swan v. Picquet*, 3 Pick. (Mass.) 443; *William v. Gwyn*, 2 Saund. (Eng.) 46.

The fact that a judgment is erroneous or void does not affect the question, as such a judgment is appealable, and until vacated or set aside, it is regarded as valid. *Livermore v. Campbell*, 52 Cal. 75; *Bond v. Pacheco*, 30 Cal. 530.

3. *Mariani v. Dougherty*, 46 Cal. 27; *Hall v. The Emily Banning*, 33 Cal. 522; *McDonald v. Walters*, 40 N. Y. 551. And see *Brady v. Feisel*, 54 Cal. 180.

4. *Feeney v. Mazelin*, 87 Ind. 226; *First Nat. Bank v. Colter*, 61 Ind. 153. And see *Titer v. Hinders*, 19 Ind. 73; *Estep v. Burke*, 19 Ind. 87.

Where a finding and judgment are for one defendant and against another,

a joint motion for a new trial will avail neither of them. *Robertson v. Garshwiler*, 81 Ind. 463.

Upon a joint motion for a new trial, the assignment of errors must show that each of the parties joining in the motion are entitled to make it. See *Boyd v. Anderson*, 102 Ind. 217; *Feeney v. Mazelin*, 87 Ind. 226; *Carver v. Carver*, 77 Ind. 498; *Wolfe v. Kable*, 107 Ind. 565; *First Nat. Bank v. Colter*, 61 Ind. 153.

5. *Miller v. Adamson* (Minn.), 47 N. W. Rep. 452; *Dutcher v. State*, 16 Neb. 30.

A motion for a new trial is indivisible, and when made jointly by two or more parties, if it cannot be allowed as to all, must be overruled as to all. *Dorsey v. McGee* (Neb. 1890), 46 N. W. Rep. 1018. And where judgment is rendered against two on a joint contract, a new trial granted on the motion of one of them vacates the judgment as to both. *Hughes v. Lindsey*, 10 Ark. 555.

6. *Brown v. Burrus*, 8 Mo. 26; *Palmer v. Kennedy*, 7 J. J. Marsh. (Ky.) 498; *Sprague v. Childs*, 16 Ohio St. 107; *London v. Coleman*, 59 Ga. 653; *Sperry v. Dickinson*, 82 Md. 135; *Gorden v. Pitt*, 3 Iowa 385. And see *Allen v. Leland*, 10 B. Mon. (Ky.) 306; *Roberts v. Heffner*, 19 Tex. 129. But see, to the contrary, *Boswell v. Jones*, 1 Wash. (Va.) 322; *Cochran v. Ammon*, 16 Ill. 316, where it was held that in trespass against two, if one be found guilty and the other be acquitted, a new trial cannot be granted on motion of the former.

Where two or more parties are sued jointly, and a verdict and judgment rendered against them, either defendant desiring to raise a question peculiar to himself in the motion for a new trial

against two or more joint tort feasons,<sup>1</sup> and a verdict may be set aside as to one and judgment entered against the other.<sup>2</sup>

Both at common law and under the systems of practice in use in most of the States, the court may, upon its own motion, in a proper case, direct a new trial in the exercise of its inherent power to correct errors which may have been committed to the prejudice of either party.<sup>3</sup>

**3. To What Court.**—The power to entertain a motion for and to grant a new trial, is a judicial function not possessed by legislative bodies,<sup>4</sup> though where final judgment has been rendered in favor of a State, its legislature may waive the benefit of such judgment and permit the adverse party to retry the action.<sup>5</sup>

The power of courts of general jurisdiction to entertain motions

should file a separate motion, and not join with the others. *Wiggenhorn v. Kountz*, 23 Neb. 600.

Where two are jointly tried for murder, and one acquitted and the other convicted, the latter may have a new trial, on showing the materiality of the testimony of the former in his defence. *Rich v. State*, 1 Tex. App. 206.

But where one only of two parties against whom verdict has been rendered moves for a new trial, he cannot take advantage of any errors in the verdict against the other. *Flood v. Joyner*, 96 Ind. 459.

1. *Tenpenning v. Gallup*, 8 Iowa 75; *Hayden v. Woods*, 16 Neb. 306; *Heffner v. Moyst*, 40 Ohio St. 112.

2. *Hayden v. Woods*, 16 Neb. 306. And see *Houston v. Bruner*, 39 Ind. 376.

Two notes, depending on the same evidence, were sued upon in two actions, and in one a verdict was given for the plaintiff, and in the other for the defendant. Motions for new trials were made by both unsuccessful parties, and both were granted. *Phillips v. M'Dowall*, 2 Mill Const. (S. Car.) 70.

3. *McCabe v. Lewis*, 76 Mo. 301; *State v. Adams*, 12 Mo. App. 436; s.c., 84 Mo. 315; *Simpson v. Blunt*, 42 Mo. 544; *Richmond v. Wardlaw*, 36 Mo. 313; *State v. McCrea* (La. 1888), 3 S. Rep. 380. And see, as to the common law, *Williams v. Circuit Court*, 5 Mo. 248; *Rex v. Holt*, 5 T. R. (Eng.) 438; *Rex v. Atkinson*, 5 T. R. (Eng.) 437 n.; *Rex v. Morris*, 2 Burr. (Eng.) 1189; *Mills v. Scott*, 99 U. S. 25; *Ex parte Henry*, 24 Ala. 634; *Gould v. Tatum*, 21 Ark. 330; 3 Black. Com. 389.

In *State v. McCrea* (La. 1888), 3 So. Rep. 380, the court held that a justice of the peace had power to grant a new

trial upon his own motion, inferring by its decision that there was no limit upon the exercise of such power. The court said it was discretionary with the justice, as with all judges, to set aside his previous proceedings, if he thought them erroneous, and to rehear the case.

In *State v. Adams*, 84 Mo. 310; s.c., 12 Mo. App. 436, the court limits its right to set aside a verdict and grant a new trial, upon its own motion, to cases in which the triers of fact have erred in a matter of law or have been guilty of misbehavior, basing their decision upon a statute providing that only one new trial shall be allowed to either party, except (1) Where the triers of the fact shall have erred in a matter of law. (2) Where the jury shall be guilty of misbehavior.

In *Lloyd v. Brink*, 35 Tex. 1, the court held that where a jury renders a verdict in proper form and responsive to the issues presented to them, by the court, no discretionary power is vested in the court to set the verdict aside upon its own motion, notwithstanding the verdict may be against the weight of evidence or in disregard of the instructions of the court. See also *Bartling v. Jamison*, 44 Mo. 141; *State v. Rombauer*, 44 Mo. 595.

It is held in *California* that when the right to move for a new trial is gone, the court has no power to vacate the judgment and grant a new trial. *Hegeler v. Henckell*, 27 Cal. 491.

4. *De Chastellux v. Fairchild*, 15 Pa. St. 18; *Young v. State Bank*, 4 Ind. 301; *Davis v. Menasha*, 21 Wis. 491; *Taylor v. Place*, 4 R. I. 324; *Atkinson v. Dunlap*, 50 Me. 111.

5. *Calkins v. State*, 21 Wis. 501; *People v. Frisbie*, 26 Cal. 135.

for new trials existed at common law, and is inherent in them.<sup>1</sup> And a statutory provision with reference to new trials should be considered rather as a limitation upon than a grant of power in the premises.<sup>2</sup> Courts of inferior or limited jurisdiction, however, cannot, in the absence of statutory provision, thus control their verdicts or judgments,<sup>3</sup> but power to grant new trials has been conferred by statute on probate courts in many of the States,<sup>4</sup> as well as upon justices of the peace,<sup>5</sup> though that conferred upon justices of the peace is usually limited to nonsuits and judgments by default.<sup>6</sup>

1. *McNamara v. Minnesota Cent. R. Co.*, 12 Minn. 388; *Bartling v. Jamison*, 44 Mo. 141; *Arellano v. Chacon*, 1 N. Mex. 269; *Horn v. Queen*, 4 Neb. 108; *Eufaula etc. Ins. Co. v. Plant*, 37 Ga. 672; *Spars v. Smith*, 7 Ga. 436; *Holbert v. Montgomery*, 5 Dana (Ky.) 11.

The power to grant and refuse new trials is vested in the justices alone, and not in them and the jury. *State v. Lethe*, 9 La. An. 182; *State v. Jackson*, 6 La. An. 593; *State v. Hannah*, 10 La. An. 131.

2. *Bartling v. Jamison*, 44 Mo. 141; *Commonwealth v. McElhaney*, 111 Mass. 439; *Commonwealth v. Green*, 17 Mass. 515.

The superior court, under the Conn. Rev. Stat., tit. 1, § 155, can allow a motion for a new trial for a verdict against the evidence, only where it is of opinion that the verdict is of that character; but it is not necessary that this opinion should be certified by the court in allowing the motion. *Reboul v. Chalker*, 27 Conn. 114.

3. *Helimch v. Johnson*, 1 Morr. (Iowa) 89; *McDaniel v. Coleman*, 14 Ark. 545; *Booth v. Stamper*, 6 Ga. 172; *Downing v. Garner*, 1 Mo. 751; *People v. Sessions of Chenango*, 2 Cal. Cas. (N. Y.) 319. And see *Haynes on New Trials*, § 6; *Brayton v. Dexter* (R. I. 1888), 12 Atl. Rep. 132.

This rule has been held to apply to probate courts. *Bartling v. Jamison*, 44 Mo. 141.

The courts of common pleas, in New Jersey, since the act of 1846, "constituting courts for the trial of small causes," cannot grant a new trial in cases of appeal to them; and this applies to appeals pending at the time the statute passed, inasmuch as the general repealing act of that year did not apply to this act, it being merely a restraining act on the previous powers of the courts of common pleas. *Cortleyou v. Ten Eyck*, 22 N. J. L. 45.

4. See *Re Clark*, 40 Hun (N. Y.) 233; *Carvill v. Carvill*, 73 Me. 136; *McKenney v. Alvord*, 73 Me. 221; *Coughlan v. Poulson*, 2 McArthur (D. C.) 208.

The power given by N. Y. Code, § 2481, to the surrogate to grant a new trial "for fraud, newly discovered evidence, clerical error, or other sufficient cause," is to be exercised in accordance with the rules governing superior courts generally. *Re Olmstead*, 17 Abb. N. Cas. (N. Y.) 320; s. c., 4 Den. (N. Y.) 44.

5. See *Kerner v. Petigo*, 25 Kan. 652; *Halton v. Grunwell*, 4 Dana (Ky.) 633. And see, *ante*, tit. JUSTICE OF THE PEACE, 12 Am. & Eng. Encyc. of Law 490, 491.

6. *Downing v. Garner*, 1 Mo. 751; *Brayton v. Dexter* (R. I. 1888), 12 Atl. Rep. 132; *Fenton v. Russell*, 6 Mo. 143; *Cason v. Tate*, 8 Mo. 45; *Gambill v. Gambill*, 89 N. Car. 201. And see *Murfree's Justice Pr.*, § 584.

In most of the States, statutes have been enacted on the subject. Some of them conferring the same power enjoyed by courts of general jurisdiction, and others conferring power of a more or less limited nature. See, *ante*, tit. JUSTICES OF THE PEACE, 12 Am. & Eng. Encyc. of Law 490, 491.

In *New York* a demand for judgment for a sum exceeding \$50 in the pleading of one of the parties, entitles the parties to a new trial in the appellate court upon an appeal from a judgment. *Brown v. Cassaday*, 34 Hun (N. Y.) 55; *Ovenshire v. Adey*, 27 How. Pr. (N. Y.) 368; *Merrill v. Pattison*, 44 How. Pr. (N. Y.) 289; *Hayes v. Kedzie*, 11 Hun (N. Y.) 577; *Thompson v. Pine*, 5 Hun (N. Y.) 647; *Hobbs v. Wetherwax*, 38 How. Pr. (N. Y.) 389.

But it is not in every case that the defendant will be entitled to demand and obtain a new trial in the appellate court by virtue of such demand, and an improper pleading cannot be made the

In the absence of statutory regulations, the general rule is that an application for a new trial must be addressed to the court in which the cause was tried,<sup>1</sup> and, under circumstances rendering it necessary, it may be made to the judge who presided at the trial, during vacation.<sup>2</sup> This rule is particularly applicable, and of nearly universal application in case of motions for new trial for errors of fact.<sup>3</sup> Where a judge dies or goes out of office, however, his successor may entertain the motion,<sup>4</sup> and where a cause has been transferred from one district to another by a change of lines or otherwise, such a motion may be heard by the proper tribunal in the new

basis of a demand for a new trial. *Dernitson v. Trimmer*, 27 Hun (N. Y.) 393; *Harvey v. Van Dyke*, 66 How. Pr. (N. Y.) 396; *Houghton v. Kenyon*, 38 How. Pr. (N. Y.) 107.

1. *Malone v. Eastin*, 2 Port. (Ala.) 182; *Indiana etc. R. Co. v. McBroom*, 103 Ind. 310; *Dearborn v. Tufts*, 10 Ind. 421; *Griffin v. Lynch*, 10 Ind. 217; *McDonald v. Stader*, 10 Ind. 171; *Gates v. Meredith*, 10 Ind. 275; *Adams v. Kellogg*, 1 Root (Conn.) 255; *Thompson v. Child*, 6 Mo. 162; *Tuttle v. Stickney*, 3 N. H. 319; *Fitzgerald v. Quann*, 62 How. Pr. (N. Y.) 331; *Spatz v. Lyons*, 55 Barb. (N. Y.) 476; *Thompson on Trials*, § 2724; *Lowe v. Foulke*, 103 Ill. 58; *State v. Lochlin*, 81 Me. 251; *Cruts v. Wray*, 19 Neb. 581; *McKilver v. Manchester*, 1 Wash. Ter. 255. And see *Blodgett v. Town of Royalton*, 16 Vt. 497; *Minkler v. Minkler*, 14 Vt. 558.

Though the regular term of court is being held by a special judge on account of disability of the regular judge as to certain cases, the latter may, at the same time, and in any room of the court house which his discretion approves, hear and dispose of a motion for a new trial of a case tried before him during that term. *Niagara Ins. Co. v. Lee*, 73 Tex. 641.

The responsibility of passing upon and deciding a motion for a new trial is upon the circuit judge before whom the case is tried, and should not be cast upon the appellate court in the first instance. The practice of overruling such a motion *pro forma* is anomalous, and should not be indulged. *Penn v. Oglesby*, 89 Ill. 110; *State v. Summers* (Kan. 1890), 24 Pac. Rep. 1099. Even if the case is submitted to the court for trial without a jury, by the agreement of the parties. *State v. Summers* (Kan.), 24 Pac. Rep. 1099.

Where a trial court is composed of several judges, the motion for a new trial should be addressed to the one

who presided at the trial, and he is not at liberty to transfer the cause to any of his colleagues, or to refuse to hear it. *Voullaire v. Voullaire*, 45 Mo. 602.

The supreme court cannot entertain a motion for a new trial in the surrogate's court. *Howell v. Howell*, 30 Hun (N. Y.) 625.

The Supreme Court of Rhode Island has no power to grant a new trial of a case decided at a special court of common pleas, of which a full trial has been had. *Vaughan v. Allen*, 3 R. I. 122.

2. *Spann v. Clark*, 47 Ga. 369.

But after a rule *nisi* for a new trial is made returnable at the next term, a judge has no right to consider and dismiss the rule in vacation, though the court subsequently order the decision to be entered on the minutes *nunc pro tunc*. *Johnson v. Bemis*, 4 Ga. 157.

Where Made.—Petitions for new trials must be brought in the county where the trial was had. *Adams v. Kellogg*, 1 Root (Conn.) 255.

3. *Alley v. Hampton*, 2 Dev. L. (N. Car.) 11; *Giraudat v. Korn*, 8 Daly (N. Y.) 406; *Inland etc. Coasting Co. v. Hull*, 124 U. S. 121.

4. *American Cent. Ins. Co. v. Neff*, 43 Kan. 457; *Ott v. McHenry*, 2 W. Va. 73; *Field v. Thornton*, 1 Ga. 306; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. (U. S.) 291; *Chicago etc. R. Co. v. Town of Marseilles*, 107 Ill. 313. And see *Edwards v. James*, 13 Tex. 52; *Watkins v. Paine*, 57 Ga. 30.

A motion for new trial is more properly considered by the judge before whom the trial was had; but a judge sitting subsequently at the same term is not precluded from considering such motion. *Malone v. Eastin*, 2 Port. (Ala.) 182.

A subsequent judge may hear and determine a motion to set aside a verdict of a jury and grant a new trial, where such motion was made before a

district,<sup>1</sup> while power to entertain such motions has been conferred by statute in many and perhaps all of the States upon courts other than those in which the trial took place, in cases and under circumstances and conditions differing greatly in the different States.<sup>2</sup> Where two courts have concurrent jurisdiction to enter

preceding judge and left undetermined; but, in doing so, he must act upon the evidence upon which the verdict was founded. What that evidence was may be ascertained by the notes of the judge who presided at the trial, by his affidavit, or that of the counsel in the case, or by a re-examination of the witnesses, or by any other mode that may be lawful. *Ott v. McHenry*, 2 W. Va. 73.

1. *Woodfolk v. Tate*, 25 Mo. 597; *Bass v. Swingley*, 42 Kan. 729.

Where, after an order has been made giving plaintiff till the first day of the next term to move for a new trial, the county is placed in a newly created district, the new judge has jurisdiction to grant a new trial. *Manufacturers' Mut. F. Ins. Co. v. Daboll*, 79 Mich. 241.

But if a court before which a case is tried is abolished before a motion for a new trial is made, no new trial can be granted by an appellate court, to which its business has been transferred. *Cummings v. White*, Mt. R. Co., 43 N. H. 114.

2. See *Chicago etc. R. Co. v. Town of Marseilles*, 107 Ill. 313; *Lowe v. Foulke*, 103 Ill. 58; *Commonwealth v. McElhaney*, 111 Mass. 439.

A new trial, in *Georgia*, may be granted by a judge who did not preside at the first trial; but the brief of the testimony should be presented to the judge who presided, unless prevented by some providential cause. *Field v. Thornton*, 1 Ga. 306. And where, in the District of Columbia, issues are sent by the orphans' court to the special term, to be tried by a jury, and a verdict thereon rendered, a motion for a new trial on a bill of exceptions will be heard in the supreme court of the District, at general term in the first instance. *Coughlan v. Poulson*, 2 MacArthur (D. C.) 208.

In *Rhode Island*, the supreme court has power to entertain a petition of a party erroneously nonsuited by the court of common pleas, filed within one year of the nonsuit, when he had a right to the judgment of the jury on his case, not having had "a full, fair and impartial trial," in the sense of

the statute. *Thurston v. Schroeder*, 6 R. I. 272.

In *New York*, a motion for a new trial may be made at a special term upon any of the grounds for which a motion for a new trial may be entertained. See *Lusk v. Lusk*, 4 How. Pr. (N. Y.) 418; *Graham v. Milliman*, 4 How. Pr. (N. Y.) 435; *Ball v. Syracuse etc. R. Co.*, 6 How. Pr. (N. Y.) 198; *Droz v. Lakey*, 2 Sandf. (N. Y.) 681; *Haight v. Prince*, 2 Sandf. (N. Y.) 720; *Lusk v. Smith*, 8 Barb. (N. Y.) 570; *Clarke Ward*, 4 Duer (N. Y.) 206; *Seeley v. Chittenden*, 10 Barb. (N. Y.) 303; *Anderson v. Dickie*, 17 Abb. Pr. (N. Y.) 83; *Lane v. Bailey*, 1 Abb. Pr., N. S. (N. Y.) 407; *Potter v. Chadsey*, 18 Abb. Pr. (N. Y.) 146; *Howard v. Freeman*, 3 Abb. Pr., N. S. (N. Y.) 292; *Knickerbocker Ice Co. v. Mayor*, 3 N. Y. Law Bull. 63; *Meyer v. Fiegelt*, 38 How. Pr. (N. Y.) 428.

A motion for a new trial on the ground of surprise and newly discovered evidence must, under New York Code, § 1002, be made at a special term. And jurisdiction to hear such motion is not conferred upon the trial judge simply by the appearance of the parties before him, and by the argument of the motion on the merits alone. *Newhall v. Appleton*, 46 N. Y. Super. Ct. 6.

So under §§ 2548, 2588 a motion for a new trial, on the question of undue influence as invalidating a will, where the surrogate's decree sustaining the will has been reversed at the general term of the supreme court, must be made at the special term. *Re Clark*, 40 Hun (N. Y.) 233.

But where the motion is founded upon an allegation of error in a finding of fact or ruling upon the law made by the judge upon the trial, it cannot be heard at a special term held by another judge, unless the judge who presided at the trial is dead, or his term of office has expired, or he specifically directs the motion to be heard before another judge. See *Giraudat v. Korn*, 8 Daly (N. Y.) 406.

A motion for a new trial may be made upon the judge's minutes at the term during which the cause was tried,

tain motions for a new trial, after a refusal in one, an application cannot be made in the other.<sup>1</sup>

Where it would have been proper for a court of law to grant a new trial if the application had been made while the court had the power, it is equally proper for a court of equity to do so if the application is made when the court of law has no means of granting it.<sup>2</sup> But courts of equity have always evinced great hesitation about interfering with the determinations of courts of law, to the end that litigation should

upon exceptions taken or because the verdict is excessive, inadequate, contrary to the law, or contrary to evidence. See *Moore v. New York El. R. Co.*, 24 Abb. N. Cas. (N. Y.) 77; s. c., 18 Civ. Proc. Rep. 146.

And a trial court may make an order directing a hearing in a motion for a new trial upon exceptions in cases of jury trials to be had at the general term in the first instance. See *McNaughton v. Osgood*, 114 N. Y. 574; *Snell v. Loucks*, 12 Barb. (N. Y.) 385; *Rogers v. Goodwin*, 64 N. Car. 278. But a mere motion for a new trial, on exceptions cannot be heard at general term, when judgment has been already rendered and no appeal has been taken. *Merchants' Bank v. Scott*, 59 Barb. (N. Y.) 641.

An order at circuit, directing a case and exceptions to be heard in the first instance at general term, may be vacated at special term, and permission be given to move for a new trial upon the case and exceptions at special term. *Post v. Hathorn*, 54 N. Y. 147. And such an order will be deemed waived by proceeding at special term. *Ely v. McNight*, 30 How. Pr. (N. Y.) 97.

It seems that the general term of the supreme court can, at its discretion, grant a new trial, although no exceptions were taken on the trial. *Standard Oil Co. v. Amazon Ins. Co.*, 79 N. Y. 506. But the judge who tries a cause is not authorized to entertain a motion made upon his minutes to set aside a verdict as contrary to the instructions of the court. *Tinson v. Welch*, 51 N. Y. 244.

In the District of Columbia the legal effect of an order that a motion for a new trial, in the supreme court, be heard at the general term in the first instance, is equivalent to a refusal of the presiding justice to entertain the motion upon his minutes of the trial; and the case can then only be heard at the general term upon a bill of exceptions to

be settled by the justice. *Doddridge v. Gaines*, 1 MacArthur (D. C.) 335.

The federal courts follow the State courts, and all motions in a suit at common law, which are required by the practice of the State courts to be made at a special term of a State court, may be made at a stated term of a federal court. *Emma Silver Min. Co. v. Park*, 14 Blatchf. (U. S.) 411.

1. *Newby v. Territory*, 1 Oreg. 163.

Where the judge who presided at a trial in the circuit court refused a motion for a new trial, based upon the ground of excessive damages, and an appeal was taken to the supreme court, and dismissed for want of jurisdiction, another judge of the circuit court has no power to grant an application for a new trial upon a case settled, but based upon the same grounds as the former motion. *Steele v. Charlotte etc. R. Co.*, 14 S. Car. 324.

2. *Colyer v. Langford*, 1 A. K. Marsh (Ky.) 237; *Deputy v. Tobias*, 1 Blackf. (Ind.) 311; s. c., 12 Am. Dec. 243; *Ballance v. Loomis*, 22 Ill. 82; *Hoskins v. Hattenbach*, 14 Iowa 319; *Horn v. Queen*, 4 Neb. 108; *Harkey v. Tillman*, 40 Ark. 551; *Bond v. Epley*, 48 Iowa 600; *Laughlin v. Ettinger*, 14 Ill. App. 335; *McGehee v. Gold*, 68 Ill. 215; *Knifong v. Hendricks*, 2 Gratt. (Va.) 212; *Ward v. Chiles*, 3 J. J. Marsh. (Ky.) 487; *Gregg v. Brower*, 67 Ill. 532; *Wierich v. De Zoya*, 7 Me. 385; *Abrams v. Camp*, 4 Ill. 290; *Hubbard v. Hobson*, 1 Ill. 190.

When a judge of a circuit court is disabled by sudden sickness from disposing of a motion for a new trial during the term at which the judgment was rendered, the party filing the motion may, upon showing the facts in his complaint, and that he was guilty of no negligence and had a meritorious defence or cause of action, obtain relief in equity. *Leigh v. Armor*, 35 Ark. 123.

In Georgia, whenever a court of

be ended,<sup>1</sup> and they will do so only where a party is deprived of the means of defence by circumstances beyond his control,<sup>2</sup> and then only when it is made to appear that at the trial of the cause injustice was done,<sup>3</sup> and that the applicant has been guilty of no laches, and has done everything that could reasonably be required of him in order to obtain relief at law.<sup>4</sup> Where such a motion has been made at law, and denied, it will not be entertained by a court of equity.<sup>5</sup> The court of equity does not in direct terms grant a new trial, but compels the party in whose favor the decision was rendered to submit to a new trial, or be perpetually enjoined from proceeding on his victory.<sup>6</sup> This jurisdiction of equity has gone largely into disuse, courts of law having been

equity has power to grant a new trial, such new trial can be granted on the common law side of the superior court, upon precisely the same principles. *Eufaula etc. Ins. Co. v. Plant*, 37 Ga. 672.

1. *Simpson v. Hart*, 1 Johns. Ch. (N. Y.) 91; *Anderson v. Roberts*, 18 Johns. (N. Y.) 533; *Powers v. Butler*, 4 N. J. Eq. 465; *Marriott v. Hampton*, 7 T. Rep. (Eng.) 269; *White & T. Lead. Cas. Eq.* 1378; and see *Smith v. Lowry*, 1 Johns. Ch. (N. Y.) 320; *Bateman v. Willox*, 1 Sch. & L. (Eng.) 201; *Curtis v. Smallridge*, 1 Chan. Cas. (Eng.) 43; *Tovey v. Young*, Pric. Ch. (Eng.) 193; *Sewel v. Frustow*, 1 Ch. Cas. (Eng.) 65; *Richards v. Symes*, 2 Atk. (Eng.) 319; *Bright v. Eynon*, 1 Burr. (Eng.) 390.

In order to relief in equity for a refusal to grant a new trial at law on the ground of accident or newly discovered evidence, three elements must concur: That the complainant made every effort in his power to discover the evidence and failed; that such evidence, if seasonably known, would probably have produced a different result; and that the judgment is unjust. *Brown v. Luehrs*, 95 Ill. 195.

A court of equity will not grant a new trial in a case at law, on ground of newly discovered evidence, for the purpose of impeaching witnesses. *Woodside v. Morgan*, 92 Ill. 273.

2. *Doubleday v. Makepeace*, 4 Blackf. (Ind.) 9; *Carrington v. Holabird*, 17 Conn. 530; *Deputy v. Tobias*, 1 Blackf. (Ind.) 311; s. c., 12 Am. Dec. 243; *Wilday v. McConnel*, 63 Ill. 238; *Lawlers v. Reese*, 3 Bibb (Ky.) 486; *Rust v. Ware*, 6 Gratt. (Va.) 50; *Land v. Elliott*, 1 Smed. & M. (Miss.) 608; *Cox v. Mobile etc. R. Co.*, 44 Ala. 611; *Horn v. Queen*, 4 Neb. 108; *Loomis v. McKenzie*, 48 Iowa 416.

Equity will not order a new trial of a cause at law solely upon the ground of error in the judgment, and that the law court adjourned before a motion for a new trial could be made and disposed of there. *Johnson v. Branch*, 48 Ark. 535.

On a bill in equity for relief against a judgment at law, and a new trial on account of newly discovered evidence, the complainant will not be entitled to relief unless such evidence is incontrovertible and conclusive. *Bucklelew v. Chipman*, 5 Cal. 399.

3. *Kirkpatrick v. Utley*, 14 Lea (Tenn.) 96. And see *Seay v. Hughes*, 5 Sneed (Tenn.) 155.

4. *Faulkner v. Harwood*, 6 Rand. (Va.) 125; *Pleasants v. Clements*, 2 Leigh (Va.) 74; 2 Story's Eq. Jur. § 875; *Dixon v. Graham*, 16 Iowa 310; *Barrow v. Jones*, 1 J. J. Marsh. (Ky.) 470; *Taylor v. Bradshaw*, 6 B. Mon. (Ky.) 45; *Glover v. Hedges*, 1 N. J. Eq. 113; *Green v. Robinson*, 5 How. (Miss.) 80; *Hoomes v. Kuhn*, 4 Call (Va.) 274; *Harrison v. Harrison*, 1 Litt. (Ky.) 140; *Ward v. Chiles*, 3 J. J. Marsh. (Ky.) 487; *Veech v. Pennebaker*, 2 Bibb (Ky.) 326; *Cairo etc. R. Co. v. Titus*, 32 N. J. Eq. 397.

5. *Bush v. Craig*, 4 Bibb (Ky.) 168; *Davis v. Bass*, 4 Ind. 313. And see *Davis v. Staples*, 45 Mo. 567, *Eyster's Appeal*, 65 Pa. St. 473.

6. 3 *Graham & W. on New Trials* 1456; *Floyd v. Jane*, 6 Johns. Ch. (N. Y.) 479; *Banks v. Shain*, 6 Litt. Sel. Cas. (Ky.) 451; *Hunt v. Boyer*, 1 J. J. Marsh. (Ky.) 484; s. c., 15 Am. Dec. 116; and see *Withers v. Butts*, 7 Dana (Ky.) 329.

**The New Trial.**—Where a judgment has been recovered at law, and there has been an injunction from proceeding thereon, and a new trial has been or-



authorized by statute to grant new trials in all but very extraordinary and unusual cases.<sup>1</sup>

**4. When the Application May be Made.**—At common law and in courts of chancery, no positive time was fixed within which an application for a new trial must be made, and where the court had no rule on the subject it was left largely to the discretion of the judge to whom the application was made.<sup>2</sup> Statutory provisions have been made, however, in nearly if not all the States, a large number of which provide that the motion must be made at the same term of court during which the cause was tried,<sup>3</sup> while others declare that the motion must be brought on or

dered, the new trial may be had in chancery or at law, at the discretion of the chancellor, and unless the party who recovered judgment consents to such new trial, he will be perpetually enjoined from enforcing his judgment. *Cairo etc. R. Co. v. Titus*, 35 N. J. Eq. 384.

1. *Doubleday v. Makepeace*, 4 Blackf. (Ind.) 9.

2. *Conklin v. Hinde*, 16 Minn. 457; *Grant v. Shelton*, 3 B. Mon. (Ky.) 420; *Gorman v. McFarland*, 13 Tex. 237; 2 Danl. Ch. Pr. (5th ed.) 1136.

The statute giving the right to make a motion for a new trial not fixing any limit of time within which it must be made, it may be made after judgment, although that could not be done at common law, if there was no reasonable opportunity to make it before, and if the party uses due diligence to make it as soon afterwards as possible. *Kimball v. Palmerlee*, 29 Minn. 302.

Applications for new trials being always addressed to the discretion of the court, such an application was refused after the lapse of eleven years. *M'Daniel v. Will*, 2 Bibb (Ky.) 550.

Where an act of the legislature giving a new trial provides for new entry of the action, without naming at what term, it shall be intended as restricted to the next term of the court at which an entry is admissible. *Pearl v. Allen*, 2 Tyler (Vt.) 325.

3. See *Malone v. Eastin*, 2 Port. (Ala.) 182; *Hundley v. Yonge*, 69 Ala. 89; *Beals v. Beals*, 20 Ind. 163; *Jones v. Jones*, 91 Ind. 72; *Foushee v. Lea*, 4 Call (Va.) 279; *Harris v. Ray*, 15 B. Mon. (Ky.) 628; *Horn v. Gartman*, 1 Fla. 63; *Graddy v. Hightower*, 1 Ga. 252; *Pease v. Pease*, 66 Ga. 277; *People v. Pearson*, 4 Ill. 406; *Campbell v. Conover*, 26 Ill. 64; *Suman v. Cornelius*, 78 Ind. 506; *Laird v. Ashley*, 1 Iowa 570; *Hannum v. Belchertown*, 19

*Pick. (Mass.)* 311; *Prentiss v. Danaher*, 20 Wis. 311; *Dunbar v. Hollinshead*, 10 Wis. 505; *Baptist v. Farwell Transp. Co.*, 29 Fed. Rep. 180; *Ex parte Holmes*, 21 Neb. 324; *Roggencamp v. Dobbs*, 15 Neb. 620; *Niagara Ins. Co. v. Lee*, 7 Tex. 641; *Earls v. Earls*, 27 Kan. 538; *East Tennessee etc. R. Co. v. Whitlock*, 75 Ga. 77; *Hinsom v. Catoe*, 10 S. Car. 311; *Kruger v. Adams etc. Harvester Co.*, 9 Neb. 526; *Gans v. Harmison*, 44 Wis. 323; *Gomer v. Chaffe*, 5 Colo. 383; *Fox v. Meacham*, 6 Neb. 530; *Kurtz v. Craig*, 53 Ind. 561; *Herkimer v. McGregor (Ind.)*, 26 N. E. Rep. 44; *Emison v. Shepard*, 121 Ind. 184; s. c., 22 N. E. Rep. 883; *Fitzpatrick v. Hill*, 9 Ala. 783; *Coopwood v. Prewitt*, 30 Miss. 206; *Palatka etc. R. Co. v. State (Fla.)*, 3 So. Rep. 158; *Catlin v. Lowry*, 2 Vt. 401; *Hanum v. Belchertown*, 19 *Pick. (Mass.)* 317; *Spann v. Fox*, 1 Ga. Dec. 1; *Phelps v. Norton*, 35 Conn. 327.

The fact that the trial court has adjourned on the last day of the term, and is only waiting to sign the minutes of the term and the record of the case last tried, does not render it too late to present affidavits showing that the verdict in that case is a gambling verdict, and to have it set aside, although a motion for a new trial has been made and overruled, where the facts showing the character of the verdict were not discovered until the motion had been made. *East Tennessee etc. R. Co. v. Winters*, 85 Tenn. 240.

Where judgment was rendered in favor of the defendant, upon his demurrer to the plaintiff's evidence, on May 22nd, and the next day the court adjourned to June 20th, a motion for a new trial, filed on the latter day, was made too late. *Pratt v. Kelley*, 24 Kan. 111.

It is the duty of the judge who has presided during the term to act upon and decide a motion for a new trial made in a case tried by him during the

filed within a fixed period of time after the verdict or decision.<sup>1</sup>

term, even though the regular term of court is being held at the time by a special judge who is one of the attorneys in the case in which the motion for a new trial is being made, the term expiring that day. The attorneys for the parties having had proper notice, he is still bound to hear the motion before the expiration of the term. *Niagara Ins. Co. v. Lee*, 73 Tex. 641.

**A motion for a new trial on the minutes** must, as a general rule, both at common law and under the statutes, be made at the trial term. *Whitney v. Karner*, 44 Wis. 563; *Gans v. Harmon*, 44 Wis. 323; *Prentiss v. Danaher*, 20 Wis. 311; *Dunbar v. Hollinshead*, 10 Wis. 505; *Molair v. Port Royal etc. R. Co.*, 31 S. Car. 510; *Thayer Mfg. Co. v. Steman*, 58 How. Pr. (N. Y.) 315; *Ennis v. Broderick*, 45 N. Y. Super. Ct. 92; *Ibbotson v. King*, 42 N. Y. Super. Ct. 207; *Courtney v. Baker*, 60 N. Y. 1; *Prentiss v. Danaher*, 20 Wis. 311; *Dunbar v. Hollinshead*, 10 Wis. 505.

Under the New York Code of Procedure, a motion may be made at special term for a new trial, after entry or judgment upon the verdict, on the ground that the verdict is against the weight of evidence, or of surprise or newly discovered evidence, or misconduct of the jury. *Tracey v. Altmayer*, 46 N. Y. 598.

**1. Two Days.**—See *Gill v. Rogers*, 37 Tex. 628; *Henning v. Western Union Tel. Co.*, 41 Fed. Rep. 864; *Edwards v. James*, 13 Tex. 52. After special verdict in *California*. *People v. Hill*, 16 Cal. 113.

**Three Days.**—See *Gruble v. Ryus*, 23 Kan. 195; *Imperial Fire Ins. Co. v. Kiernan*, 83 Ky. 468; *Osborne v. Hamilton*, 29 Kan. 1; *Aultman v. Leahey*, 24 Neb. 286; *Houston v. Kidwell*, 83 Ky. 301; *Boardman v. Beckwith*, 18 Iowa 292; *McWillie v. Perkins*, 20 La. An. 168; *Ruhrwein v. Gebhardt* (Ky. 1890), 13 S. W. Rep. 447; *Nichols v. Shearon*, 49 Ark. 75; *Stiles v. Borkin*, 30 Iowa 60; *Harris v. Ray*, 15 B. Mon. (Ky.) 628; *Long v. Hughes*, 1 Duv. (Ky.) 387; *White v. Crutcher*, 1 Bush (Ky.) 472; *Humphreys v. Walton*, 2 Bush (Ky.) 581; *Wells v. Priston*, 3 Neb. 444; *Fox v. Meacham*, 6 Neb. 530; *Markward v. Doriat*, 21 Ohio St. 637.

**Four Days.**—*Williams v. Circuit Court*, 5 Mo. 248. In county court in Nebraska. *Vaughn v. O'Connor*, 12

Neb. 478; *Neier v. Missouri Pac. R. Co.* (Mo. 1886), 1 S. W. Rep. 387.

**Five Days.**—See *Stevens v. North Western Stage Co.*, 1 Idaho (U. S.) 604.

**Ten Days.**—*Sullivan v. City of Helena* (Mont.), 25 Pac. Rep. 94; *Smith v. Brown*, 47 Ga. 570. After notice of decision in trials by court or referee in *California*. *Gay v. Winder*, 77 Cal. 525; s. c., 20 Pac. Rep. 525; *Brazi v. Howes*, 66 Cal. 496.

**Fifteen Days.**—*Deputy v. Betts*, 4 Harr. (Del.) 352.

As to miscellaneous provisions for particular cases, see *Chase v. Evoy*, 58 Cal. 348; *Ellasser v. Hunter*, 26 Cal. 279; *Hodgdon v. Griffin*, 56 Cal. 610; *Carpentier v. Thurston*, 30 Cal. 123; *Mahoney v. Caperton*, 15 Cal. 313; *Dennison v. Smith*, 1 Cal. 437; *Soper v. Medberry*, 24 Kan. 128; *United States v. Simmons*, 14 Blatchf. (U. S.) 473; *Conrad v. Commercial Mut. Ins. Co.*, 81½ Pa. St. 66; *Tuttle v. Stickney*, 3 N. H. 319; *Deweese v. Hudgeons*, 1 Tex. 192; *Anderson v. Meredith* (Ky. 1888), 9 S. W. Rep. 407; *Rodman v. Reynolds* (Ind.), 16 N. E. Rep. 516; *Custinger v. Nebeker*, 58 Ind. 401; *Roush v. Layton*, 51 Ind. 106; *Deering v. Johnson*, 33 Minn. 97; *Burrough v. Hill*, 15 R. I. 190; *Bellocq v. United States*, 13 Ct. of Cl. (U. S.) 195; *Schweizer v. Raymond*, 6 Abb. N. Cas. (N. Y.) 378.

Although the language of the statute is that, in certain cases, "the court must make an order for a new trial," the right to insist upon the order being made may be lost by laches. *Fleet v. Kulbfleisch*, 43 Hun (N. Y.) 443.

**Presumption of Laches.**—Where the record showed no date when the motion for a new trial was filed, but the hearing thereon was thirteen days after judgment, it will be presumed that the motion was not filed in time. *Hover v. Tenney*, 27 Kan. 133.

**Notice of Decision.**—Where, after a decision rendered by the court, the party against whom decision is made applies for time to file a motion and statement for a new trial, such application is not a waiver of the notice of decision under Laws Utah 1884, § 536, which provides that the party moving for a new trial must, within ten days after notice of decision by the court, serve on the opposite party notice of

The two provisions being, in some instances and in some States, united, requiring the motion to be made at the term at which the verdict was rendered, and within a specified number of days after its rendition,<sup>1</sup> and in some requiring the application to be made before judgment is perfected upon the objectionable verdict or decision.<sup>2</sup>

his motion. *Burlock v. Shupe* (Utah 1888), 17 Pac. Rep. 19.

**Notice Actual Knowledge.**—A notice of intention to move for a new trial, filed and served fourteen years after entry of judgment, is not given in time, though the moving party had no formal notice of the judgment; the record showing that he had actual knowledge of it at or about the time it was rendered. *Gray v. Winder*, 77 Cal. 525. And see *Soper v. Medberry*, 24 Kan. 128.

**Failure to Receive and File Notice.**—Where a party desiring a new trial sends his written motion by mail to the clerk of the court, and such letter is not received by the clerk until one day after the expiration of the time for filing such motion, but it was in the postoffice on the day previous, but not called for by the clerk, such motion filed by the clerk on the day of its receipt, was filed too late. *Mercer v. Ringer*, 40 Kan. 189.

1. See *Fox v. Meacham*, 6 Neb. 530; *Blair v. Russell*, 1 Ind. 516; *Neier v. Missouri Pac. R. Co. (Mo.)*, 1 S. W. Rep. 387; *McWillie v. Perkins*, 20 La. An. 158. And see the statutes of the different States.

When no notice of intention to move for a new trial is made within two days of the rendition of judgment, the court, by adjourning in the meantime, loses jurisdiction of the case, and has no authority subsequently to grant leave to give the notice *nunc pro tunc*. *Killip v. Empire Mill etc. Co.*, 2 Nev. 34.

Judicial acts by a judge after the expiration of his term are absolutely void; thus a motion for a new trial, granted by a circuit judge in vacation after the four months allowed by statute, is void; nor will the consent of parties be effectual to confer the power derived by statute, so that the appearance by a party defending the suit gives no validity to the trial, and judgment will be entered by this court on the verdict irrespective of the order for the new trial. *Coopwood v. Prewett*, 30 Miss. 206.

Provisions which define the time for

making applications for new trials do not apply to cases pending and untried when the act was passed. *Smith v. Davis* (Ga. 1890), 11 S. E. Rep. 1024.

2. See *Groh v. Bassett*, 7 Minn. 325; *Citizens' Bank v. Bellocq*, 19 La. An. 376; *Pope v. Pope*, 4 Pick. (Mass.) 129; *Ball v. Syracuse etc. R. Co.*, 6 How. Pr. (N. Y.) 108; *Van Rensselaer v. Dole*, 1 Johns. Cas. (N. Y.) 279; *Case v. Shepherd*, 1 Johns. Cas. (N. Y.) 245; *Earls v. Earls*, 27 Kan. 538; *Sheldon v. Stryker*, 42 Barb. (N. Y.) 284; s. c., 27 How. Pr. (N. Y.) 387; *Jackson v. Fassitt*, 33 Barb. (N. Y.) 645; *Anthony v. Smith*, 4 Bosw. (N. Y.) 503; *Barnes v. Roberts*, 5 Bosw. (N. Y.) 73; *Gurney v. Smithson*, 7 Bosw. (N. Y.) 396; *Magnus v. Trischet*, 2 Abb. Pr., N. S. (N. Y.) 175.

Under the New York Code Civ. Proc., § 1005, however, providing that entry, collection, or other enforcement of a judgment does not prejudice a subsequent motion for a new trial, such a motion does not come too late, where the judgment is entered on the 29th day of June, the case is settled and filed and notice of the motion served in the following September, and the motion is heard on the 1st of October. *Holmes v. Roper*, 10 N. Y. Supp. 284.

In *Nebraska* a new trial can only be granted after judgment for specific causes, which must be assigned in the motion therefor. *Spencer v. Thistle*, 13 Neb. 227.

In *Indiana* under the revised statutes of 1881, § 561, declaring that a motion for a new trial may be made either before or after judgment, provided it be made and filed at the term at which the verdict or "decision" is rendered, it is proper practice to move for a new trial immediately after a finding of facts by the court. *Herkimmer v. McGregor* (Ind. 1890), 26 N. E. Rep. 44.

A motion for a new trial may be filed after judgment has been entered, and the court is not bound to delay the entry of a judgment until it has been filed. *Cox v. Baker*, 113 Ind. 612.

**Judgment as Security.**—Plaintiff hav-

These statutory provisions are usually held to be mandatory,<sup>1</sup> and if a motion is made or filed after the prescribed time, it is of no avail,<sup>2</sup> and must be overruled unless it is established by the applicant that he was unavoidably prevented from making the motion in season.<sup>3</sup> The stringency of this rule is not relieved by the fact that the verdict was a special one, and that the entry of judgment was delayed by the court.<sup>4</sup> But the rights of

ing recovered a verdict, defendant was allowed time to make a case, with the privilege to plaintiff to enter his judgment as security. This did not deprive defendant of the right to move for a new trial on the ground that the verdict was against evidence. *Benedict v. Caffé*, 3 Duer (N. Y.) 669.

1. *Fox v. Meacham*, 6 Neb. 530; *Hinson v. Catoe*, 10 S. Car. 311; *Gill v. Rodgers*, 37 Tex. 628. *Contra*, so far as the action of the court is concerned, *Gomer v. Chaffee*, 5 Colo. 383; *Kuner v. Union Pac. R. Co.*, 34 Fed. Rep. 871; *Rodman v. Reynolds*, 114 Ind. 148.

A motion for a new trial, made after the term at which judgment was entered, cannot be reviewed on appeal from such judgment. *Leary v. Leary*, 68 Wis. 662.

In *Nebraska* error lies to the district court for granting a new trial on a petition filed after the adjournment of the term, on the ground of newly discovered evidence. *Kruger v. Adams etc. Harvester Co.*, 9 Neb. 526.

2. *Fox v. Meacham*, 6 Neb. 530; *Soper v. Medberry*, 24 Kan. 128; *Evansville v. Martin*, 103 Ind. 206; *Patterson v. Jack*, 59 Iowa 633; *Deering v. Johnson*, 33 Minn. 97; *Kimball v. Palmerlee*, 29 Minn. 302; *Conklin v. Hinds*, 16 Minn. 457; *Richmond v. Wardlaw*, 36 Mo. 313. And see cases as to time of application above cited.

Conversely, after a new trial has been granted, it is too late to object that the motion therefor was not made in time. *Geiss v. Franklin Ins. Co.* (Ind. 1890), 24 N. E. Rep. 99.

The proper practice, where a motion for a new trial is not made in time, is to move for its dismissal on its hearing, not to move to dismiss a writ of error to the refusal of a new trial. *Cook v. Cook*, 67 Ga. 381.

But a court may vary its own rule of practice in permitting a motion for a new trial to be filed *nunc pro tunc* within the term after the time required by the standing rule. *Lance v. Bonnell*, 105 Pa. St. 46.

3. Nearly all the statutes prescribing the time within which the application must be made, contain in words or in substance the proviso "unless the party is unavoidably prevented." See *Campbell v. Conover*, 26 Ill. 64; *Patterson v. Jack*, 59 Iowa 632; *Clinton Nat. Bank v. Graves*, 48 Iowa 228; *Boardman v. Beckwith*, 18 Iowa 292; *Soper v. Medberry*, 24 Kan. 128; *McDonald v. Cooper*, 32 Kan. 60; *Osborne v. Hamilton*, 29 Kan. 1; *Mitchell v. Milhoan*, 11 Kan. 617; *United States v. Simmonds*, 14 Blatchf. (U. S.) 473; *Imperial Fire Ins. Co. v. Kiernan*, 83 Ky. 468; *McLaughlin v. Upton*, 2 Wyo. 27; *Buckner v. Conly*, 1 B. Mon. (Ky.) 3.

Where a rule of a federal court requiring notice of motion for a new trial, with the grounds thereof, to be "filed with the clerk, and served on the opposite party within two days after the rendition of the verdict, unless the time be enlarged by the court," is not complied with because of counsel's belief that the practice of the court conforms to that of the State courts, the time for filing such motion will be enlarged, even after the expiration of such two days, when the same can be done at the term at which the verdict was rendered. *Henning v. Western Union Tel. Co.*, 41 Fed. Rep. 884.

In extraordinary cases, where the cause is still under the power of the court which tried it, if the justice of the case requires it, the court may grant a new trial after the expiration of the term at which it was tried. *Candler v. Hammond*, 23 Ga. 493.

Where the time within which a motion is to be made is not otherwise provided for it is sometimes held in analogy to appeals, that it may be made at any time within which an appeal could be taken. See *Kimball v. Palmerlee*, 29 Minn. 302; *Cochrane v. Halsey*, 25 Minn. 52; *Groh v. Bassett*, 7 Minn. 325. This is statutory in some States.

4. *Imperial Fire Ins. Co. v. Kiernan*, 83 Ky. 468.

... for a new trial within the prescribed time are ... delay on the part of the court,<sup>1</sup> and where a verdict is rendered, the application to vacate it need not necessarily be made at the term at which it was rendered.<sup>2</sup> Where the application has been made in due season, the court may allow the grounds to be afterwards filed, in its discretion.<sup>3</sup>

**UNKNOWN AT THE TIME OF TRIAL.**—Where the grounds on which a new trial is desired do not appear upon the record, and the grounds could not with reasonable diligence have been discovered before the expiration of the prescribed time for filing such grounds may be presented by petition after the expiration of the term.<sup>4</sup> And in some States this may be done even after the entry of the judgment on appeal.<sup>5</sup> Such an application,

*See* *Union Pac. R. Co., 34*  
*Gomer v. Chaffe, 5*  
*Rodman v. Reynolds, 114*

... order was taken that the judge should take with him the motion for a new trial and pass upon it "within thirty days in vacation." It was held that the failure of the judge to decide the motion within thirty days should not prejudice the moving party, as being in no way chargeable with his failure. *Johnston v. Simmons, 77*

After the term when rendered, a judgment cannot be vacated for a new trial on the ground that the verdict was against law and evidence—where the verdict is to show cause why the same should not be vacated was issued at the last day of the term, and the motion therefor, by consent of parties, set for hearing at a day fixed of the next term. *Ward v. Harmison, 44 Wis. 323.*

Under the Indiana Stat., § 561, providing that "the application for a new trial may be made at any time during the term, . . ." and § 562, providing that "the application must be made by motion upon written cause filed at the time of making the motion," it is not sufficient to merely file with the clerk during the term a motion for a new trial. *Emison v. Shepard, 121 Ind. 184.*

The mere procurement of permission to move for a new trial is not making the motion, and if the motion does not follow in the prescribed season, it cannot be entertained. *Whipley v. Dewey, 17 Cal. 314.*

In *South Carolina* it is held that a motion on the minutes for a new trial, made at the same term with the trial, must be heard and decided at that term

under the provisions of the code. *Hinson v. Catoe, 10 S. Car. 311.*

2. *Eason v. Miller, 18 S. Car. 381.*

3. *Houston v. Kidwell, 83 Ky. 301.*

The right of a party to insist on the requirement as to the time of filing additional causes for a new trial, may be waived, as any other legal right. *Northcutt v. Buckles, 60 Ind. 577.* But a notice of intention to move for a new trial cannot be abandoned and a second notice served, after the time limited by statute. *Cooney v. Furlong, 66 Cal. 520.*

4. *Darrance v. Preston, 18 Iowa 397; Dewes v. Hudgeons, 1 Tex. 192; Porter v. Dugat, 6 Martin (La.) 121; Burrough v. Hill, 15 R. I. 190; Anderson v. Meredith (Ky. 1888), 9 S. W. Rep. 407; Alger v. Merritt, 16 Iowa 121; Roush v. Layton, 51 Ind. 106; Bond v. Epley, 48 Iowa 600; Gray v. Coan, 48 Iowa 424; Eason v. Miller, 18 S. Car. 381; Smith v. Smith, 51 Wis. 665.* And see *Tuttle v. Stickney, 3 N. H. 319; Bellocq v. United States, 13 Ct. of Cl. (U. S.) 195; Kurtz v. Craig, 53 Ind. 561.* And see *Riggs v. Savage, 7 Ill. 400; Davis v. Terry, 33 Tex. 426.*

A motion for a new trial or rehearing, on the ground of newly discovered evidence, may now be made and granted after judgment is entered on the report of referees, though it was otherwise in *New York* before the Code of Procedure. *Mersereau v. Pearsall, 6 How. Pr. (N. Y.) 293.*

5. See *Spanagel v. Dillinger, 38 Cal. 278; Sheffield v. Mullin, 28 Minn. 251; Johnston v. Paul, 23 Minn. 46; Tracy v. Altmayer, 46 N. Y. 598; Blydenburg v. Johnson, 9 Abb. Pr., N. S. (N. Y.) 459; Tucker v. White, 27 How. Pr. (N. Y.) 97.*

After judgment upon a partial de-

however, must be made with due diligence after the discovery.<sup>1</sup> And many of the States have provided a limit of time by statute, beyond which, even in such cases, an application for a new trial will not be entertained.<sup>2</sup>

(b) **WHEN UNAVOIDABLY PREVENTED FROM MOVING IN SEASON.**—The qualification "unless unavoidably prevented," or equivalent words, found in most of the statutory provisions prescribing the time within which to move, refers to circumstances beyond the control of the moving party, and does not excuse mere neglect.<sup>3</sup> But when such circumstances appear, the usual practice is to permit the application to be made after the expiration

fence, and an appeal therefrom, the defendants discovered facts making a complete and perfect defence. *Held*, notwithstanding the entry of the judgment and appeal, that a motion for a new trial might be granted more than a year after the party had notice of the judgment, the case being an equitable action. *Nash v. Wetmore*, 33 Barb. (N. Y.) 155.

1. *Kimball v. Palmerlee*, 29 Minn. 302; *Cochrane v. Halsey*, 25 Minn. 52; *Groh v. Bassett*, 7 Minn. 325; *Stuckslager v. McKee*, 40 Iowa 212; *First Nat. Bank v. Murdough*, 40 Iowa 26; *Boot v. Brewster* (Iowa, 1888), 36 N.W. Rep. 649; *Steineman v. Beath*, 36 Iowa 73; *Miller v. Albaugh*, 24 Iowa 128; *Scott v. Scott*, 82 Ky. 328; *Deweese v. Hudgeons*, 1 Tex. 192; *Burrough v. Hill*, 15 R. I. 190.

Where new evidence is discovered after the trial and during the term at which it took place, but so near the close of it that it was impossible to make the application for the new trial before adjournment, it may be made the basis of a petition for a new trial after adjournment. *Alger v. Merritt*, 16 Iowa 121.

If the materiality of absent evidence is first discovered during the trial, a continuance must be asked for, or a new trial, on the ground of newly discovered evidence, will be refused. *Klockenbaum v. Pierson*, 22 Cal. 160.

2. **Within One Year.**—See *Roush v. Layton*, 51 Ind. 106; *Burrough v. Hill*, 15 R. I. 190; *Bond v. Epley*, 48 Iowa 600; *Gray v. Coan*, 48 Iowa 424; *Smith v. Smith*, 51 Wis. 665; *Deering v. Johnson*, 33 Minn. 97; *Kimball v. Palmerlee*, 29 Minn. 302; *Conklin v. Hinds*, 16 Minn. 457.

**Two Years.**—See *Bellocoq v. United States*, 13 Ct. of Cl. (U. S.) 195; *Cut-singer v. Nebeker*, 58 Ind. 401.

**Three Years.**—See *Anderson v. Meredith* (Ky. 1888), 9 S. W. Rep. 407; *Tuttle v. Stickney*, 3 N. H. 319.

**Five Years.**—See *Conrad v. Commercial Mut. Ins. Co.*, 81½ Pa. St. 66; *Deweese v. Hudgeons*, 1 Tex. 192.

In *Kentucky*, the motion must be made not later than the second term after discovery, and within three years. *Anderson v. Meredith* (Ky. 1888), 9 S. W. Rep. 407; *Scott v. Scott*, 82 Ky. 328.

3. *Roggencamp v. Dobbs*, 15 Neb. 620. See *Henning v. Western Union Tel. Co.*, 41 Fed. Rep. 864; *Nichols v. Shearon*, 49 Ark. 75; *Western etc. R. Co. v. Johnson*, 59 Ga. 626; *Odell v. Sargent*, 3 Kan. 80.

In a petition for a new trial, where no motion therefor was filed at the term of court at which the adverse judgment was rendered, an allegation that petitioner's counsel and other attorneys whom he asked refused to file such motion, unsupported by an affidavit of neglect of duty by petitioner's counsel, is not a sufficient excuse for the delay. *McGloin v. McGloin*, 70 Tex. 634.

It is not an "extraordinary" ground for which, under Georgia Code, §§ 3719, 3721, a new trial should be granted, that the presiding judge absented himself from his court, whereby the term was terminated, so that the ordinary motion for a new trial could not be heard during the term. *East Tennessee etc. R. Co. v. Whitlock*, 75 Ga. 77.

Neither does the abandonment of the cause by the defendant's attorney because of the nonpayment of his fees constitute an extraordinary ground. *Cobb v. State*, 78 Ga. 801.

It is no excuse for not moving for a new trial that the party managing the cause was not present when the verdict was rendered, and the court adjourned

of the prescribed time.<sup>1</sup> Some of the statutes requiring the motion to be made at the trial term, and within a specified time, however, have been construed to permit a motion after the expiration of such time, but not after the trial term.<sup>2</sup>

(c) COMPUTATION OF THE TIME.—A motion for a new trial before verdict, or the decision of the cause and filing of the findings is premature, and presents no question for consideration,<sup>3</sup> but where the main issue is tried and decided, the time begins to run, although there may be incidental matters remaining to be disposed of,<sup>4</sup> and when the computation is to be made from an

the next day; nor will the discovery of new testimony, which was known to one of the witnesses for the party seeking a new trial, entitle him to relief. *Paul v. Williams*, 2 B. Mon. (Ky.) 265.

1. *Thomp. on Trials*, § 2338; *Fudge v. St. Louis etc. R. Co.*, 31 Kan. 146; *Hemme v. School District*, 30 Kan. 377; *Graddy v. Hightower*, 1 Ga. 253.

In *Georgia*, where the mover establishes an "extraordinary case," and the court still has control of the cause, a rule *nisi* may be moved after the expiration of the term, but only one such motion should be allowed. *Candler v. Hammond*, 23 Ga. 493. In such a case the motion may be made before a judge in vacation. *Spann v. Clark*, 47 Ga. 369.

2. See *State v. Dougherty*, 70 Iowa 439; *State v. Hughes*, 35 Kan. 632; *Com. v. Weymouth*, 2 Allen (Mass.) 144; *Ex parte Holmes*, 21 Neb. 324.

3. *Duff v. Duff*, 71 Cal. 513; *Hinds v. Gage*, 56 Cal. 486; *Careaga v. Fernald*, 66 Cal. 351; *Kird v. Beavus*, 106 Ind. 483; *Pence v. Garrison*, 93 Ind. 345; *Dominguez v. Mascotte*, 74 Cal. 269.

A judgment on motion on the pleadings is not a trial or verdict requiring that a motion for a new trial, or in arrest, be filed within four days thereafter, as required by Missouri Rev. Stat., § 3707; and the unsuccessful party will not lose the benefit of his appeal by failure to file such motion, if the final action of the court be upon motion, and exceptions thereto be properly saved. *Todd v. Missouri Pac. R. Co.*, 33 Mo. App. 110.

In a probate proceeding, the court, of its own motion, submitted two issues of fact to a jury, empanelled for that purpose, which found on these issues, and was discharged. It was held that this was merely advisory to the judge; and a notice of intention to move for a new

trial, and the presentation of the statement for settlement, were premature. *James v. Superior Ct.*, 78 Cal. 107.

If for any reason the judgment is entered up before the findings are filed, it must be regarded as in the nature of a provisional action which only becomes perfected when the findings are completed. And the time for moving for a new trial should date from that time. *People v. Kent Circuit Judge*, 34 Mich. 62. And see *Stansell v. Corning*, 21 Mich. 242.

Under a statute requiring a motion for a new trial to be made during the term within which judgment is entered, the right is not lost by reason of a previous motion for judgment upon special findings of the jury, which judgment was reversed and judgment afterwards entered on a general verdict. The motion for a new trial is in time during the term of such last judgment. *Chicago etc. R. Co. v. Dimick*, 96 Ill. 42.

In a case tried without a jury, the decision of the court is distinct from the findings, and the time within which notice of intention to move for a new trial must be given begins to run from the announcement of the judgment. *Robinson v. Benson*, 19 Nev. 331. And see *Crowther v. Rowlandson*, 27 Cal. 376.

4. *Ashton v. Thompson*, 28 Minn. 330; *Burrough v. Hill*, 15 R. I. 190; *Jacks v. Adair*, 33 Ark. 161; *Hazletine v. Simpson*, 61 Wis. 427. And see *Gray v. Coan*, 48 Iowa 424.

Any party has the right, within three judicial days from the rendition of judgment, to move for a new trial, notwithstanding the judgment may have been prematurely signed, unless the court has sooner adjourned. *McWillie v. Perkins*, 20 La. An. 168.

The constitution of Georgia requires two concurrent verdicts of special juries before a final and conclusive divorce can be decreed. This provision does

act done, the day on which the act was done must be included, but when the computation is to be from the day on which the act was done, the rule is otherwise.<sup>1</sup> Neither a recess taken by the court during the term,<sup>2</sup> nor the time during which an appeal is pending is to be excluded,<sup>3</sup> but in estimating statutory days, court days only are considered, Sundays not being included.<sup>4</sup>

(d) EXTENSION OF TIME.—The rule is adopted in many of the States that the statutes fixing the time within which a motion for a trial may be made are imperative, and that the court has no power to extend it,<sup>5</sup> but in others it is considered as directory only, leaving it to the discretion of the court to extend

not preclude the defendant from moving to set aside the first verdict before a second is rendered. *Gholston v. Gholston*, 31 Ga. 625.

The time within which notice of intention to move for a new trial must be given begins to run from the announcement of the judgment, where the trial was without a jury. A statement not served within the statutory time must be disregarded. *Robinson v. Benson*, 19 Nev. 331. But when the defeated party gives notice of his intention to move for a new trial, without waiting for the service on him of a notice of the decision, he waives such notice, and if the motion is denied, he cannot have recourse to a new motion. *Thorne v. Finn*, 69 Cal. 251.

1. *White v. Crutcher*, 1 Bush (Ky.) 472; *Pugh v. Reat*, 107 Ill. 440; *Protection Ins. Co. v. Palmer*, 81 Ill. 88; *Roan v. Rohrer*, 72 Ill. 582; *People v. Hatch*, 33 Ill. 14; *Ewing v. Bailey*, 5 Ill. 420; *Long v. Hughes*, 1 Duv. (Ky.) 387; *Chiles v. Smith*, 13 B. Mon. (Ky.) 460; *Batman v. Megowan*, 1 Metc. (Ky.) 548.

Under a *Vermont* statute, requiring a petition for a new trial to be brought within two years next after the rendition of the original judgment, such time is to be reckoned from the last day of the term at which judgment is rendered. *Bradish v. State*, 35 Vt. 452. But not so under the *Illinois* statute. *Emmons v. Bishop*, 14 Ill. 152.

In *Louisiana*, the "three days," until after the lapse of which a judgment of the supreme court does not become final, are three judicial days. The last day to apply for a rehearing does not expire at 6:30 A. M. merely because the court adjourned *sine die* at that hour on that day. *State v. Stillman*, 31 La. An. 162.

In *California*, the time within which

notice of intention to move for a new trial must be given begins to run from the expiration of the ten days allowed by the *California* statute, not from the time within that ten days when the judge grants the order extending the time beyond the statutory period. *Emeric v. Alvarado*, 64 Cal. 529.

2. *Ewaldt v. Farlow*, 62 Iowa 212. See *East Tennessee R. Co. v. Whitlock*, 75 Ga. 77.

3. *Jacks v. Adair*, 33 Ark. 161; *Gibson v. Maully*, 15 Ill. 140. And see *Gray v. Coan*, 48 Iowa 424; *Bond v. Epley*, 48 Iowa 600; *Chautauqua Co. Bk. v. White*, 23 N. Y. 347.

4. *Clerks' Sav. Bank v. Thomas*, 2 Mo. App. 367. And see *Thayer v. Felt*, 4 Pick. (Mass.) 354; *Cattell v. Despatch Pub. Co.*, 88 Mo. 356; s. c., 15 Mo. App. 587; *Lewis v. Schwenn*, 15 Mo. App. 342; *National Bank v. Williams*, 46 Mo. 17; *Anonymous*, 2 Hill (N. Y.) 375; *People v. Luther*, 1 Wend. (N. Y.) 42; *Jackson v. Richards*, 2 Cal. (N. Y.) 343. See also, *post*, tit. *SUNDAY*.

The provision of the *Kentucky* Code, that a motion for a new trial must be made "within three days after the verdict or decision rendered," means three judicial days, and does not include Sundays, but the day of the decision and the day of the motion must both be computed. *Long v. Hughes*, 1 Duv. (Ky.) 387.

5. *Cutsinger v. Nebeker*, 58 Ind. 401; *Greenup v. Crooks*, 50 Ind. 410; *Hinkle v. Margerum*, 50 Ind. 240; *Whaley v. Gleason*, 40 Ind. 405; *McNiel v. Farne-man*, 37 Ind. 203; *Wilson v. Vance*, 55 Ind. 394; *Carter v. Van Zandt Co.*, 75 Tex. 286.

But when a trial is pending at the close of a term the court may progress with it until it is concluded, and the additional time thus required



the time,<sup>1</sup> or open a default and entertain the motion after the expiration of the statutory period.<sup>2</sup> Some of the authorities, while they hold to the doctrine, that the court can neither extend the time nor open a default, assert that the court may, of its own motion, grant a motion for a new trial after the expiration of the prescribed time, if justice requires it.<sup>3</sup> The parties are as a general rule permitted to extend the time to move for a new trial by agreement,<sup>4</sup> but in such case time is of the essence of the

will be held to be within the legal term. *Krutz v. Craig*, 53 Ind. 571.

When the application for a *recordari* is for the purpose of obtaining a new trial, it is in the nature of an extension of the power of appeal. The application must be made speedily, and any delay after the earliest time in the power of the party to apply must be accounted for. *Webb v. Durham*, 7 Ired. (N. Car.) 130.

1. *Stone v. Taylor*, 63 Ga. 309; *Johnson v. Jackson*, 60 Ga. 57; *Einina Silver Min. Co. v. Park*, 14 Blatchf. (U. S.) 411; *McLaughlin v. Upton*, 2 Wyo. 27; *Cottle v. Leitch*, 43 Cal. 320; *Gomer v. Chaffe*, 5 Colo. 383. The power is expressly conferred upon the courts in some of the States by statute.

Rules of practice fixing the time of motions for new trials merely import a matter of right, unless specifically expressed as intended to interfere with the common-law discretion of the court to extend or shorten the time. *People v. Judge of Wayne Circuit Court*, 20 Mich. 220.

An order granted by the court, on motion of a party, that he be allowed until a named day to perfect and file a motion for a new trial, does not import any stipulation with the opposite party (whose consent was not invoked to the passage of the order) that a motion will not be made after that day. It is no obstacle to moving for a new trial on any day during the term. *De Pauw v. Kaiser*, 77 Ga. 176.

A verbal order of the judge, extending the time for filing a statement on motion for a new trial, is not good, although the omission to have the order entered of record was an oversight. *Campbell v. Jones*, 41 Cal. 515. And an order extending the time for giving notice of a motion for a new trial, made after the time for giving notice has expired, is in excess of jurisdiction and is void. *Clark v. Crane*, 57 Cal. 629.

2. *Bartolet v. Faust*, 5 Phila. (Pa.)

316; *De Pauw v. Kaiser*, 77 Ga. 176; *Lance v. Bonnell*, 105 Pa. St. 46; *George v. Taylor*, 55 Tex. 97; *Linn v. Le Compte*, 47 Tex. 440; *Gill v. Rodgers*, 37 Tex. 628; *Maloy v. State*, 33 Tex. 599; *Aldridge v. Mardoft*, 32 Tex. 205.

The application must be made at the term at which the verdict or decision is rendered, except it be for cause discovered afterwards; and the court cannot, without the agreement or waiver of the parties, grant time beyond the term to make the application, for a cause other than one discovered afterwards. *Krutz v. Craig*, 53 Ind. 561.

Under the Nebraska Code, § 316, providing that a motion for a new trial must be made during the term a verdict is rendered, and within three days thereafter, unless unavoidably prevented, the supplemental motion, being filed within three days after the rendition of the verdict, is an amended motion, and a substitute for the one filed on the day previous, and it is unnecessary to obtain leave of court to file it. *Lincoln v. Beckman*, 23 Neb. 677.

Under the New York Code, § 999, a motion for a new trial, made on the judge's minutes, can only be made before him at the same term at which the trial was had. An omission so to move cannot be cured by a subsequent direction that the motion be made at the special term on the judge's minutes. *Thayer Mfg. Co. v. Steinau*, 58 How. Pr. (N. Y.) 315.

3. See *State v. Knight*, 46 Mo. 84; *State v. Rombauer*, 44 Mo. 590; *Williams v. Circuit Court*, 5 Mo. 248; *Doug.* 171; 2 *Tidd's Pr.* 820.

4. *Wilson v. Vance*, 55 Ind. 394; *Krutz v. Craig*, 53 Ind. 561; *Jones v. Jones*, 91 Ind. 72; *Beems v. Chicago etc. R. Co.*, 58 Iowa 150; *Eckel v. Walker*, 48 Iowa 225. And see *Cutsinger v. Nebeker*, 58 Ind. 401; *Greenup v. Crooka*, 50 Ind. 410; *Hinkle v. Margerum*, 50 Ind. 240; *Whaley v. Gleason*, 40 Ind. 405; *McNiel v. Farneman*, 37 Ind. 203.

Opens All Questions.—The consent

agreement, and any excuse for not conforming to it must be on the grounds of overpowering necessity.<sup>1</sup> Where leave to file a motion for a new trial is granted after the expiration of the prescribed time, upon the appearance of the parties without objection, the restrictions with reference to time are waived.<sup>2</sup>

(c) WHEN MADE IN CRIMINAL PRACTICE.—The period within which a motion for a new trial must be made in criminal actions, like that in civil actions, is usually, if not always, fixed by statute. And while the two classes of actions are usually provided for by different statutes, there is a substantial similarity between them, and the courts uniformly apply the same principles of construction,<sup>3</sup> except that in criminal cases the power to grant new trials for good cause shown after judgment and conviction is more generally conceded than in civil cases.<sup>4</sup>

entered of record extending the time for filing a motion for a new trial, in the absence of any stipulation as to what causes shall be included in the motion, has the effect to extend the time for filing a motion for all the causes for which, at any time, a motion may be filed. *Eckel v. Walker*, 48 Iowa 225.

1. *Western etc. R. Co. v. Johnson*, 59 Ga. 626; *Robinson v. Benson*, 19 Nev. 331. And see *Sullivan v. Wallace*, 73 Cal. 308; *Pendergrass v. Cross*, 73 Cal. 475; *Abbott v. Renaud*, 64 N. H. 89.

2. *Northcutt v. Buckles*, 60 Ind. 577. And see *Wilson v. Vance*, 55 Ind. 394.

Where a trial was had at one term of court, and a motion for a new trial was made and the motion continued until the next term, at the instance of the mover, and at such term the motion was withdrawn, it was held that the adverse party might then move for a new trial; the case having been continued for the benefit of the former mover, it remained open for the benefit of both. *Constantine v. Foster*, 57 Ill. 36.

3. **Motion at Trial Term.**—See *Smith v. State*, 64 Ga. 439. And before judgment. See *People v. Sing Lum*, 61 Cal. 538; *Calvert v. State*, 91 Ind. 473; *Burke v. State*, 72 Ind. 392; *State v. Bixby*, 39 Iowa 465. Except in case of sentence of death. *People v. Bradner*, 107 N. Y. 1; *State v. Alphin*, 81 N. Car. 566. *Ex parte Holmes*, 21 Neb. 324.

**Within Three Days.**—See *Ex parte Holmes*, 21 Neb. 324; *Bradshaw v. State*, 19 Neb. 644.

**Four Days.**—See *Brooks v. Missouri*, 124 U. S. 394.

Other periods are fixed by the statutes of different States ranging from

those above stated to one year from the rendition of the verdict.

As to defendant being unavoidably prevented from presenting his application in the prescribed time, see *Ex parte Holmes*, 21 Neb. 324.

In *Illinois*, application for a new trial in a criminal case should be made at the first opportunity. Where there is an unreasonable delay, the cause of the delay should be distinctly stated in the affidavits upon which the application is founded. *Cochlin v. People*, 93 Ill. 410.

**Extension of Time.**—If a defendant convicted of crime desires extension of time in which to prepare and present a motion for a new trial, he must show reasonable grounds; facts should be stated showing the necessity for the delay. *Bullner v. People*, 95 Ill. 394. And see generally *Ross v. State*, 65 Ga. 127.

In *England*, as in some of the American States, the rule is that after the expiration of the time allowed for making it, no motion for a new trial can be entertained, but that where justice requires it, the court may, upon its own motion, grant a new trial to the defendant. *Rex v. Atkinson*, 5 T. R. (Eng.) 437; *King v. Holt*, 5 T. R. (Eng.) 446.

In *Pennsylvania*, in a criminal case, a new trial must be moved for at once. Defendant has not four days within which to move. *Com. v. Cannon*, 13 Phila. (Pa.) 456. And in *Virginia*, on conviction for a misdemeanor, a new trial was granted, although the motion was not made until the second term after the verdict was rendered. *Com. v. Crump*, 1 Va. Cas. 172.

4. See *State v. Robinson*, 20 W. Va. 713; *Smith v. State*, 64 Ga. 439; *Dennis*

5. **What to be Included in the Motion.**—A motion for a new trial should be directed, not against the judgment, but against the decision;<sup>1</sup> and ordinarily the application must be made as to the whole case.<sup>2</sup> So, all known errors should be included as grounds for the motion,<sup>3</sup> for after the court has once heard and decided a motion for a new trial, it is *res adjudicata*, and the parties have no right to file a new motion.<sup>4</sup> And where the trial judge has denied a motion, it cannot be granted or heard on affidavits by

*v. State*, 103 Ind. 142; *People v. Vanderpool*, 1 Mich. (N. P.) 157. But see, to the contrary, *People v. Donnelly*, 21 How. Pr. (N. Y.) 406; *Calvert v. State*, 91 Ind. 473; *State v. Heenan*, 8 Minn. 144; *State v. Ozaukee Co. Circuit Ct.*, 71 Wis. 595; *State v. Gilman*, 70 Me. 329.

Circuit courts of the United States have power to grant a new trial, after conviction, for good cause shown, both in misdemeanors and felonies. *United States v. Williams*, 1 Cliff. (U. S.) 5.

A new trial may be granted in a capital case, after issuance of the governor's warrant for execution of the sentence. *Com. v. McElhaney*, 111 Mass. 439. But see *United States v. Simmons*, 14 Blatchf. (U. S.) 473.

Under Texas Code, as a general rule, a new trial must be applied for within two days after the conviction; but in cases of felony the court, for good cause shown, may allow the application to be made at any time before the adjournment of the court for the term. *Bullock v. State*, 12 Tex. App. 42.

The procedure, on a motion for a new trial, generally, is governed by the same rules in criminal as in civil cases. *Grayson v. Com.*, 6 Gratt. (Va.) 712; *Hilliard on New Trials* (2nd ed.) 114, § 2.

1. *Sawyer v. Sargent*, 65 Cal. 259; *Martin v. Matfield*, 49 Cal. 42.

2. See *Mills v. State*, 52 Ind. 187; *Veatch v. State*, 60 Ind. 291; *Morris v. State*, 1 Blackf. (Ind.) 37; *Ex parte Bradley*, 48 Ind. 548; *Richter v. Koster*, 45 Ind. 440; *Johnson v. McCulloch*, 89 Ind. 270.

Where a litigation proceeds to judgment on any substantive cause of action in which a new trial as of right is not allowable, though it embraces other causes in which a new trial as of right is allowable, a new trial as of right is not proper. *Bradford v. School Town of Marion*, 107 Ind. 208.

An action to recover possession of land cannot properly be joined with an action to foreclose a mortgage there-

on, and if such actions are improperly joined a new trial as of right ought to be granted, even where the misjoinder has not been objected to, and, if granted, the order granting it should be vacated and such new trial refused. *Butler University v. Conard*, 94 Ind. 353.

In Iowa, while as a general rule a new trial when granted is awarded for the entire case, yet when not attended by confusion, and when it will not result in prejudice to the rights of the parties, it may be granted as to one or more causes of action set up in a petition, and refused as to the others. *Woodward v. Horst*, 10 Iowa 120. See also *Bond v. Wabash etc. R. Co.*, 67 Iowa 713.

In an action for *divorce*, where the issues involved the title to real estate in which the judgment adjudges title to one of the parties, the other is entitled to move for a new trial upon this issue, but not upon the divorce issue. *Schmitt v. Schmitt*, 32 Minn. 130. And see *Lake v. Bender*, 18 Nev. 361.

3. *Moon v. Jennings*, 119 Ind. 130.

4. *People v. Center*, 61 Cal. 191; *Thompson v. Lynch*, 43 Cal. 482; *Coombs v. Hibberd*, 43 Cal. 453; *Wright v. Boynton*, 40 N. H. 353; *Branger v. Buttrick*, 28 Wis. 450; *Moll v. Benckler*, 28 Wis. 611; *Rodgers v. Hoenig*, 46 Wis. 361; *Kabe v. Eagle*, 25 Wis. 108; *Cothren v. Connaughton*, 24 Wis. 134.

But a provision to the effect that the determination is without prejudice to a new application may be inserted in the order, which will entitle the party to a reargument on the same grounds. *Branger v. Buttrick*, 28 Wis. 450.

A motion to set aside a verdict for misconduct of the sheriff in respect to the jury, having been denied, because no proof of misconduct was offered, a subsequent motion for leave to file affidavits in regard to the same at any time during the term *nunc pro tunc*, was also properly denied. *Cross v. State*, 55 Wis. 261.

another judge.<sup>1</sup> But the denial of a motion for a new trial is no cause for a refusal to listen to a second motion, if made on different grounds, which were unknown and unknowable at the time of the former motion,<sup>2</sup> or where good reasons are shown for not having incorporated both grounds in the first motion.<sup>3</sup>

**6. Waiver of Right to Apply.**—A party may waive a future contingent right as well as one which he presently has, and effect will therefore be given to a stipulation waiving the right to a new trial.<sup>4</sup> So the right to move may be waived or lost by the acts or neglect of the party aggrieved,<sup>5</sup> the principle being applicable to criminal cases as well as to civil,<sup>6</sup> but the person who claims

After the court has heard and denied a motion for a new trial in a suit at law, and a judgment has been rendered and paid, and satisfied, it has no power to grant leave to reargue the motion for a new trial. *Smith v. Town of Ontario*, 17 Blatchf. (U. S.) 240.

But a judge may entertain a formal motion for a new trial, although he has denied a motion upon his minutes, from which order of denial an appeal is pending. *Schmidt v. Cohn*, 12 Daly (N. Y.) 134.

1. *Reich v. McCrea*, 7 N. Y. Supp. 600; *Knapp v. Post*, 10 Hun (N. Y.) 35.

In *Knapp v. Post*, 10 Hun (N. Y.) 35, the court said: "It was nothing more than a retrial of the cause upon affidavits. If the practice here pursued should be authoritatively established, few verdicts would stand. It costs defeated parties little effort to show by *ex parte* affidavits that their defeat was attributable to error and manifest injustice, rather than their own neglect and mistakes, and it is far easier to get rid of a verdict and judgment in that way than by appeal. The law does not allow such a practice."

Although, after a final judgment has been entered, and an application for a new trial overruled, it is irregular to entertain a second motion for that object, yet, after the court has granted such new trial, the plaintiff, by appearing and amending his declaration, waives the irregularity. *Powers v. Bridges*, 1 Greene (Iowa) 235.

2. *White v. Perkins*, 16 Ind. 358; *Hughes v. McGee*, 1 A. K. Marsh. (Ky.) 28; *Malone v. Hopkins*, 49 Ga. 221; *Bryorly v. Clark*, 48 Tex. 345.

The court should not allow a second motion for a new trial in the same case for the same cause or causes; but for a cause which the party, though using due diligence, had failed to discover

until his original motion was determined, a second or even a third motion may be properly allowed. *White v. Perkins*, 16 Ind. 358; *Hayes v. Kenyon*, 7 R. I. 531.

3. *Hughes v. McGee*, 1 A. K. Marsh. (Ky.) 28. And see *Graham & W. on New Trials* 537.

In *Scully v. Daniel*, 3 N. J. L. 431, however, the court refused to hear the application upon the preliminary objection that a rule had been formerly taken for the same purpose.

4. *Ladd v. Hildebrandt*, 27 Wis. 135; *McClellan v. Hurd*, 11 Colo. 126.

**Waiver by Attorney.**—Under the Minnesota statutes authorizing an attorney to bind his client in any of the proceedings in an action or special proceeding, an attorney for defendant, in ejectment, may bind his client by a stipulation to dismiss a demand by defendant, under the statute, for a second trial. *Bray v. Doheny*, 39 Minn. 355.

**Waiver by Client.**—A client has a right to waive errors and exceptions, and to waive the right to move for a new trial, and he will be bound by such waiver unless it is made invalid by some cause pertaining to the client, it cannot be set aside by any one else. *Hackley v. Muskegon Circuit Judge*, 58 Mich. 454.

5. See *Emmerich v. Hefferan*, 33 Hun (N. Y.) 54; *Hibernia Sav. & L. Soc. v. Moore*, 68 Cal. 156; *Kent v. Lawson*, 12 Ind. 675; *Fountain Co. v. Bilsland*, 12 Ind. 668; *Ellsassar v. Hunter*, 26 Cal. 279.

When a motion for a new trial has been granted, the moving party may waive his right under the order without prejudice to his right to appeal from the judgment afterwards entered. *Gutwillig v. Stumes*, 47 Wis. 428.

6. *State v. Hall*, 26 W. Va. 236; *State v. Suthin*, 22 W. Va. 771.

the benefit of a waiver is required to establish it beyond question.<sup>1</sup> Thus a question of law available but not raised, by an exception duly taken to the ruling, at the time of the trial, is waived and cannot be raised for the first time on motion for a new trial.<sup>2</sup> So, the attention of the court must be called to improper conduct of the jury at the time of discovery, or as soon as there is an opportunity, in order to make it an available ground for a motion for a new trial, unless it is of such a character that it could not be obviated by the action of the court.<sup>3</sup> The failure to move or to take any of the necessary steps in the proceeding is a waiver.<sup>4</sup> It has been held that errors in the admission or exclu-

1. *Munch v. Williamson*, 24 Cal. 167.  
 2. *Holdsworth v. Tucker*, 147 Mass. 572; *Walker v. State*, 4 Ark. 87; *Froman v. Patterson* (Mont. 1890), 24 Pac. Rep. 692; *Patent Brick Co. v. Moore*, 75 Cal. 205; *Harman v. Moses*, 39 Ga. 708; *Evans v. State*, 33 Ga. 4; *Stoddard v. Long Island R. Co.*, 5 Sandf. (N. Y.) 180; *Cheatham v. Roberts*, 23 Ark. 651; *Poullain v. Poullain*, 79 Ga. 11; *Fitzgerald v. Garvin*, Charl. (Ga.) 281; *Tapsey v. Weaver*, 44 Ala. 131; *McVean v. Scott*, 46 Barb. (N. Y.) 379; *Darrance v. Preston*, 18 Iowa 396; *New York etc. R. Co. v. Cook*, 2 Sandf. (N. Y.) 732; *Real v. Hollister*, 17 Neb. 661; *Newton v. Brown*, 1 Utah 287; *Clark v. Gridley*, 35 Cal. 398; *Burnside v. Grand Trunk R. Co.*, 2 N. H. 554; *Davidson v. Bridgeport*, 8 Conn. 472; *Nichols v. Alsop*, 10 Conn. 263; *Torry v. Holmes*, 10 Conn. 499; *Flint v. Clark*, 13 Conn. 361; *Thurman v. Cameron*, 24 Wend. (N. Y.) 87; *Wilcox v. Green*, 28 Conn. 572; *State v. Toole*, 29 Conn. 342; *Gillham v. State Bank*, 3 Ill. 245; *Harmon v. Thornton*, 3 Ill. 351; *Dickey v. Maine Tel. Co.*, 46 Me. 483; *How v. Simms*, 16 Mo. 431; *Cook v. Hill*, 3 Sandf. (N. Y.) 341. And see, *post*, subtit. DECISION OF THE MOTION.

The facts that material witnesses discovered before trial were absent at the trial, and that there was not time after such discovery to take their testimony by interrogatories, are not ground for new trial, where a continuance was not applied for on account of such absence. *Crawford v. Georgia Pac. R. Co.* (Ga.), 12 S. E. Rep. 176.

The refusal of the court below to allow a question to be put to a witness, is not ground for granting a new trial upon motion, unless the offer was made in such a manner as to enable the judge

to see the materiality of the evidence. *Pratt v. Strong*, 3 Abb. App. Dec. 620.

But when the rule of damages adopted on the trial is fundamentally erroneous the verdict may, in some cases, be set aside, although no objection was made to the introduction of the evidence on which such rule was founded. *Hatfield v. Central R. Co.*, 33 N. J. L. 251. And the court will, notwithstanding defendant's counsel omitted to make the request at the trial, look into the whole case, and may, in furtherance of substantial justice, set aside the verdict and grant a new trial, although objection cannot be taken, on appeal from the judgment, that the court erred in directing a verdict, unless a request is made at the trial to submit a question of fact to the jury. *Lennox v. Hoppock*, 1 Sweeny (N. Y.) 466.

3. *Flesher v. Hale*, 22 W. Va. 43; *State v. Tuller*, 34 Conn. 280; *Martin v. Tidwell*, 36 Ga. 332; *Oleson v. Meader*, 40 Iowa 662; *Dolloff v. Stimpson*, 33 Me. 546; *Fox v. Hazelton*, 10 Pick. (Mass.) 275; *Lee v. McLeod*, 15 Nev. 158; *State v. Daniels*, 44 N. H. 385; *Parks v. State*, 4 Ohio St. 234; *Dillworth v. Com.*, 12 Gratt. (Va.) 689; *Coleman v. Moody*, 4 Hen. & M. (Va.) 1; *Dower v. Church*, 21 W. Va. 23.

The knowledge of the attorney is the knowledge of the client, and *vice versa*. An objection to the competency of a juror, or to his conduct, must be proved to have been unknown both to the party and to his attorney before the juror was sworn. *Russell v. Quinn*, 114 Mass. 103; *Kent v. Charlestown*, 2 Gray (Mass.) 281; *Hallock v. Franklin Co.*, 2 Metc. (Mass.) 558; *Fessenden v. Sager*, 53 Me. 531; *Parker v. State*, 55 Miss. 414; *Cox v. People*, 80 N. Y. 500.

4. See *Cooney v. Furlong*, 66 Cal.

sion of evidence are waived as a ground for a motion for a new trial, by demurring to them,<sup>1</sup> but this rule is not believed to be general.<sup>2</sup> So, error in any ruling or order of the court can be taken advantage of only when prompt objections or exceptions were taken.<sup>3</sup>

(a) **WAIVER BY INCONSISTENT STEPS.**—It is a general, though not a universal rule, that a motion for a new trial and an appeal from the judgment in the same action are inconsistent with each other, and that the appeal is a waiver of the right to present the application for a new trial.<sup>4</sup> And as a general rule, a motion for

520; *Thompson v. Lynch*, 43 Cal. 482; *Campbell v. Jones*, 41 Cal. 515; *Stoyell v. Cole*, 19 Cal. 602.

As to failure to move in season, see, *ante*, subtit. **WHEN THE APPLICATION MAY BE MADE.**

As to failure to file notice of intention, see, *post*, subtit. **NOTICE OF MOTION.**

As to failure to file bill of exceptions or brief of evidence, see, *post*, subtit. **MOTION PAPERS**, and, *ante*, tit. **BILL OF EXCEPTIONS**, 2 Am. & Eng. Encyc. of Law 223.

1. See *Stockwell v. State*, 101 Ind. 1; *Ruddell v. Tyner*, 87 Ind. 529; *Radcliff v. Radford*, 96 Ind. 482.

2. See *Missouri etc. R. Co. v. Goodrich*, 38 Kan. 224; *Kent v. Lawson*, 12 Ind. 675.

One who excepts to conclusions of law does not thereby preclude himself from moving for a new trial. *Bertelson v. Bower*, 81 Ind. 512.

The right to move, on the judge's minutes, to set aside the verdict for insufficiency of evidence, is not waived by failure, during the trial, to make any motion on that ground, such as a motion for nonsuit. *Shearman v. Henderson*, 12 Hun (N. Y.) 170.

If a motion to dismiss the complaint is refused, and the refusal duly excepted to, the defendant does not lose his right to demand a new trial by omitting to except to a direction of a verdict for the plaintiff. *Durant v. Abernethy*, 44 N. Y. Super. Ct. 463.

3. See *Brazier v. State*, 44 Ala. 387; *Sayles v. Sims*, 73 N. Y. 551; *Borchus v. Saylor*, 90 Ind. 439.

It is too late to ask for a new trial, in addition to an amendment, where the party did not apply for an amendment before he was nonsuited. *Balcom v. Woodruff*, 7 Barb. (N. Y.) 13.

Appellants failed, at the time it was made, to except to an order, upon an oral motion, granting a new trial.

*Held*, that they thereby waived their right to object to it. *Cox v. Dill*, 85 Ind. 334.

If an order granting a new trial is reviewable upon appeal from the final judgment (a question not decided in *Wisconsin*), still, if the party excepting to such order afterwards notices the cause for trial, accepts costs awarded him as terms of granting a change of venue, and goes to trial without objection, in the court to which the cause is removed, these acts are a waiver of his exception to the order for new trial. *Maxwell v. Kennedy*, 50 Wis. 645.

4. *McArdle v. McArdle*, 12 Minn. 122; *Corbett v. Swift*, 6 Nev. 194; *Walker v. Hall*, 16 Ala. 26. To the contrary, see *Naglee v. Spencer*, 60 Cal. 10; *Cook v. Smith*, 58 Iowa 607; *Kirk v. Grant*, 67 Md. 418; *Berryhill v. Jacobs*, 20 Iowa 246. But see *Com. v. Peck*, 1 Metc. (Mass.) 428.

The defendant, by taking out a stay of execution, waives his right to apply for a new trial. *Banks v. Hitchcock*, 20 Neb. 315.

On decision of a case, made after judgment, for review upon the facts, a new trial cannot be awarded; the facts are supposed to be all before the court, and the decision upon them disposes of the case. *Barman v. Carhart*, 10 Mich. 338.

After verdict, and before judgment, the court in which an action was pending was abolished, and the business transferred to an appellate court, by which the appeal was lost. It was held that the court had no power to set aside the verdict to give another trial. *Cummings v. White Mountains R. Co.*, 43 N. H. 114.

But when a writ of error is dismissed without a hearing on the merits, the plaintiff in error is not precluded from moving, in the court below, for a new trial on any sufficient ground not specified in the original bill of ex-

a new trial cannot be made after a motion in arrest of judgment;<sup>1</sup> but it has been held that the two motions may be pending at the same time,<sup>2</sup> and that it will be presumed that they were disposed of in their proper order.<sup>3</sup> Where, by any process, a judgment of an inferior court has become a judgment of a superior, the right to move for a new trial of the cause in the former court is lost.<sup>4</sup> The rule has been laid down, however, that a motion for a new trial, and a motion for judgment notwithstanding the verdict, are

ceptions. *Perry v. Gunley*, 42 Ga. 41.

1. *Candler v. Hammond*, 23 Ga. 493; *Cincinnati etc. R. Co. v. Case*, 122 Ind. 310; *Hall v. Nees*, 27 Ill. 411; *Craig v. Mississippi Mills*, 12 Mo. App. 585; *Carrington v. Hancock*, 23 Mo. App. 299; *McComas v. State*, 11 Mo. 116; *Hord v. Noblesville*, 6 Ind. 55; *Van Pelt v. Corwine*, 6 Ind. 363; *Sherry v. State Bank*, 6 Ind. 397; *McKinney v. Springer*, 6 Ind. 453; *Doe v. Clark*, 6 Ind. 466; *Chrisman v. Melne*, 6 Ind. 487; *Marion etc. R. Co. v. Lomax*, 7 Ind. 406; *Mason v. Palmerton*, 2 Ind. 117; *Rogers v. Maxwell*, 4 Ind. 243; *Smith v. Porter*, 5 Ind. 429; *Bates v. Reiskenhianzer*, 9 Ind. 178; *Gillespie v. State*, 9 Ind. 380; *Shrewsbury v. Smith*, 12 Ind. 317; *Dailey v. Nuttman*, 14 Ind. 339; *Respublica v. Lacaze*, 2 Dall. (U. S.) 118; *Hipp v. Ingram*, 3 Tex. 17. To the contrary, *Jewell v. Blandford*, 7 Dana (Ky.) 472; *Hayden v. Johnson*, 59 Ga. 104; *Pope v. Latham*, 1 Ark. 66.

In *Texas*, it is error to refuse to entertain a motion for a new trial in a criminal cause, because a motion in arrest had been previously made and overruled. *Mathews v. State*, 33 Tex. 102.

In *Georgia*, where objections arising upon the face of the verdict are urged against the making of a decree, and are overruled, the same matters, if appropriate to a motion for a new trial, may be included, with others, in such motion subsequently made during the term. The prior decision on the objections will be considered as rendered subject to a more formal and regular examination of the several matters by motion for a new trial. *Lake v. Hardee*, 55 Ga. 667.

After the conviction of a defendant in a circuit court of the United States, he moved in arrest of judgment, and the case went to the supreme court on a certificate of a division of opinion. After a decision by that court, the de-

fendant moved in the circuit court for a new trial. *Held*, that it was too late to make such a motion. *United States v. Simmons*, 14 Blatchf. (U. S.) 473.

In *England*, whether a motion for a new trial can be made after an unsuccessful motion in arrest of judgment is more a matter of practice than a legal rule, the practice being different in different courts. *Candler v. Hammond*, 23 Ga. 493. And see *Lane v. Crockett*, 7 Price (Eng.) 556; 1 *Sellon's Pr.* 497; *Tidd's Pr.* 913.

2. *Habersham v. Wetter*, 59 Ga. 11; *Jewell v. Blanford*, 7 Dana (Ky.) 473; *Pope v. Latham*, 1 Ark. 66.

Where a judgment of the court below should have been arrested for error, the record showing that a motion in arrest of judgment had been filed, and afterwards, on the same day, a motion for a new trial had been filed; inasmuch as the motions were disposed of in their logical order, the fact that they had been filed in the inverse order was not open to objection on appeal, and that the motion for a new trial had not been waived. *Farmers' Bank v. Bayliss*, 41 Mo. 274.

3. *Water & Imp. Co. v. Gildersleeve*, 4 N. Mex. 171.

4. *Lawrence v. Isear*, 27 S. Car. 244.

**New Trial as to Portion of Defendants.**—Under an order, on a motion by defendant for a new trial, directing a new trial of the action, unless plaintiff should elect to take judgment against three of the defendants for a specified sum, and against another of them for a specified part of that sum, plaintiff cannot take judgment against the three as specified in it, and have a new trial as to the other. *First Nat. Bank v. Lincoln*, 39 Minn. 473.

**Motion Pending Reference.**—A motion for a new trial should not be made while proceedings are pending before a referee, to whom the case has been referred, after certain findings by the court, to take and state an account. *Crowther v. Rowlandson*, 27 Cal. 376.

not inconsistent,<sup>1</sup> and a motion for a new trial is not waived by a motion for judgment on special findings *non obstante veredicto*.<sup>2</sup> So, where a party excepts to conclusions of law, in a special finding or an interlocutory judgment, he is not thereby concluded from controverting the facts stated therein, and he is not bound to abstain from taking such steps as will protect his interests and secure a favorable final judgment.<sup>3</sup>

**7. Effect of the Application.**—At common law a motion for a new trial suspended the judgment and all its effects until the motion was disposed of,<sup>4</sup> and the same rule has been adopted by a few of the States,<sup>5</sup> but in a large majority of them it has been superseded by statutory provisions, under which the courts are usually empowered to temporarily stay the operation of the judgment, to the end that justice may be attained.<sup>6</sup> A motion for a new trial operates as a waiver of all objections made and exceptions taken previous to the motion, and not embodied in it;<sup>7</sup> and

1. *Fisk v. Henarie*, 14 Oreg. 29. And see *Nixon v. Downey*, 49 Iowa 166.

A motion for judgment on answers to interrogatories, notwithstanding a general verdict, does not preclude a motion for a new trial. *Indianapolis etc. R. Co. v. McCaffrey*, 62 Ind. 552.

2. *Fisk v. Henarie*, 15 Oreg. 89; *Chicago etc. R. Co. v. Dimick*, 96 Ill. 42; *Indianapolis etc. R. Co. v. McCaffrey*, 62 Ind. 552; *Brannon v. May*, 42 Ind. 92. The contrary was held in *Nixon v. Downey*, 49 Iowa 166; but this case was distinguished in *Stone v. Hawkeye Ins. Co.*, 68 Iowa 737, holding that the reason for the ruling in the former case was that the two motions were filed at the same time, and were therefore regarded as inconsistent, but that in the latter case the motion for a new trial was made after the motion for judgment had been overruled, and was at that time proper.

A motion for a *venire de novo* is not a waiver of a motion for a new trial. *Jenkins v. Parkhill*, 25 Ind. 473.

3. *Barker v. White*, 58 N. Y. 204; *Lockwood v. Dills*, 74 Ind. 56. And see *Robinson v. Snyder*, 74 Ind. 110.

If a party duly takes exception to the granting of a new trial, his appearance on the second trial does not amount to a waiver of his objections thereto. *Gann v. Worman*, 69 Ind. 458.

Where the defendant obtains a verdict and the trial judge awards a new trial, defendant, by entering upon the new trial, waives his right to appeal from the order. *Grunberg v. Blumenlahl*, 66 How. Pr. (N. Y.) 62.

4. *Thompson on Trials*, § 2730.

A motion for a new trial does not, under the law and practice in *Maryland*, expire with the term of the court at which it is made; and, until such motion is disposed of, further proceedings in the case are suspended. *Truett v. Legg*, 32 Md. 147.

5. See *Turner v. Booker*, 2 Dana (Ky.) 334; *Wright v. Haddock*, 7 Dana (Ky.) 254; *Reynolds v. Horine*, 13 B. Mon. (Ky.) 235; *People v. Gary*, 105 Ill. 264; *Hearson v. Grandine*, 87 Ill. 115; *Lurvey v. Wells*, 4 Cal. 106.

The pendency of a motion to set aside an order overruling a motion for a new trial has no effect upon the judgment. *Louisville Rock & Lime Co. v. Kerr*, 78 Ky. 12.

In *Illinois*, if a judgment is entered before a motion for a new trial is made, the motion will not operate in any way to suspend the judgment or to impair its force or conclusiveness. *Parr v. Van Horne*, 40 Ill. 122.

6. *Church v. Goodin*, 22 Kan. 527; *People v. Loucks*, 28 Cal. 68; *Eaton v. Caldwell*, 3 Minn. 134.

Motion for a new trial does not suspend the entering of judgment after a verdict, but execution will be stayed on application to the court. *Arnold v. Jones, Bee* (U. S.) 104.

And a motion for a new trial, or in arrest of judgment, is a waiver of the benefit of a stay of execution agreed upon by the parties. *Brent v. Coyle*, 2 Cranch (C. C.) 348.

7. *Johnson v. State*, 43 Ark. 391. To the contrary, see *United States v. Dashiell*, 4 Wall. (U. S.) 182.

An unlimited motion for a new trial



in some States a motion to have a verdict set aside, made and persisted in, is a waiver of exceptions to rulings of law taken in the progress of the trial.<sup>1</sup> Such a motion retains the cause in the trial court, and, while pending, prevents final judgment within the provisions regulating appeals.<sup>2</sup>

**8. Manner of Making the Application.**—By the practice of the various States, a motion for a new trial may be made by an ordinary motion upon the minutes of the court, upon affidavits, by bill of exceptions, or by a statement of the case.<sup>3</sup> The common law method of presenting the application was by a motion for a rule to show cause why a new trial should not be granted,<sup>4</sup> but in nearly all the States the practice is regulated by statutes differing in different States, the first step prescribed by these statutes being, in perhaps a majority of the States, the presentation of the motion to the trial court.<sup>5</sup>

(a) NOTICE OF APPLICATION.—No notice of motion is usually required when the application is made to the trial court, at the term during which the objectionable verdict or decision was rendered;<sup>6</sup> but where the application is made at a different term, or to a different court, the opposing party is entitled to notice.<sup>7</sup>

operates to set aside all the special findings. *Ruble v. Atkins*, 39 Iowa 694.

1. *Cole v. Bruce*, 32 Me. 512; *Dinsmore v. Weston*, 33 Me. 256; *Schweickhart v. Stuewe*, 75 Wis. 157.

A new trial will not be granted where the party has a right to a review, unless he will relinquish such right. *Cogswell v. Brown*, 1 Mass. 237; *Byrnes v. Piper*, 5 Mass. 363; *Meeker v. Boylan*, 27 N. J. L. 262.

Pending a motion for a new trial, if a party tender a bill of exceptions he must elect whether he will waive his motion so far as it is based on questions of law that might be embodied in a bill of exceptions, but the presenting of the bill does not itself waive motion. *Preble v. Bates*, 37 Fed. Rep. 772.

2. See *Brown v. Evans*, 18 Fed. Rep. 56; *New York etc. R. Co. v. Doane*, 105 Ind. 92; *Louisville etc. Works v. Com.*, 8 Bush (Ky.) 181.

The motion, in order to have this effect, must have been filed in season. If filed late it cannot carry the case over to the next term. *Taylor v. Genail*, 10 Mo. App. 250.

3. *Thomp. on Trials*, § 2747.

4. *Hilliard on New Trials* (2nd ed.), § 16; *Gouldin v. Crawford*, 30 Ga. 674; *Powell v. Howell*, 21 Ga. 214; *Spence v. Holman*, 30 Ga. 646; *Vernon v. Hankey*, 2 Term Rep. (Eng.) 113.

In *England* and at common law new trials were afterwards granted upon

affidavits. 3 Black. Com. 388; *Graham & W. on New Trials* 38; 3 Stephens Com. 625.

A rule nisi for a new trial may be moved for without previous notice. *Gauldin v. Crawford*, 30 Ga. 674; *Powell v. Howell*, 21 Ga. 214.

5. See the statutes of the different States. And see *Thomp. on Trials*, § 2747.

A motion for leave to make a motion for a new trial is a nullity, no leave being necessary to do that which the mover has a clear and undoubted legal right to do. *Odell v. Sargent*, 3 Kan. 80.

6. *Ryerson v. Grover*, 1 N. J. L. 392; *Werner v. Edmiston*, 24 Kan. 147; *Murray v. Kelly*, 27 Ind. 42.

In *New York*, notice of motion for a new trial, accompanied by a judge's certificate, was substituted for the former practice of a rule to show cause. If the party neglects to obtain a certificate, and a judgment is consequently duly entered up, the court will not then hear an argument to set the verdict aside. *Case v. Shepherd*, Col. & C. Cas. (N. Y.) 94.

7. *Stanley v. Holliday*, 113 Ind. 525; *Darke v. Ireland*, 4 Utah 192; *Overseers of Poor of Guilford v. Jamaica*, 2 D. Chip. 102; *Calderwood v. Brooks*, 28 Cal. 151.

**New Trial as a Matter of Right.**—It has been held that applications for new

And notice is usually required, in an action before a justice of the peace, in those jurisdictions in which he is empowered to grant new trials.<sup>1</sup> Such notice of application may be waived by appearance, or otherwise.<sup>2</sup> When a notice is necessary, it is usually required to set forth the grounds upon which the motion is to be made.<sup>3</sup>

(1) *Notice of Intention*.—The statutes of a number of the States require the applicant to file and serve upon the opposite party a notice of intention to move for a new trial.<sup>4</sup> This notice should designate the grounds upon which the motion is to be made,<sup>5</sup>

trial as of right, after the close of the term at which judgment is rendered, under Indiana Rev. Stat., 1881, § 1065, do not require any prior notice to the adverse party. *Stanley v. Holliday*, 113 Ind. 525; *Brown v. Cody*, 115 Ind. 484. But the better rule probably is that the rules stated in the text are applicable also to that class of cases. See *Stanley v. Holliday*, 113 Ind. 525; *Nitche v. Earle*, 117 Ind. 270; *Callanan v. Lewis* (Iowa, 1890), 44 N. W. Rep. 892. And see cases above cited.

*Service by Mail*.—Where a notice of motion for a new trial was filed in the clerk's office on the eleventh day after the notice of decision was served by mail, and the record showed that the distance between the place of deposit and place of address of the notice of decision was over 70 miles, under the California Code Civil Proc., giving an extension of time in certain cases of service by mail, the notice of motion was filed in time. *Sullivan v. Wallace*, 73 Cal. 307.

In *Wisconsin*, the adverse party must be served with the motion together with the papers upon which it is founded, to give him opportunity to present affidavits or other evidence against the motion. *McWilliams v. Baumstor*, 42 Wis. 301.

In *Pennsylvania*, notice of motion for a new trial must be given in writing. *Galloway v. Negle*, 1 Yeates (Pa.) 103.

1. See *Barons v. Anderson*, 37 Kan. 399. See also the statutes of the different States. And see generally, *ante*, tit. JUSTICE OF THE PEACE, 12 Am. & Eng. Encyc. of Law 391.

Where an action is continued by consent to a certain day, but, through the mistake of the justice, taken advantage of by the plaintiff, is tried, and judgment rendered against defendant in his absence, and after judgment has been rendered, and before the hour to which the case had been continued, the attor-

ney for the defendant told an attorney for plaintiff that he would be at the justice's court at that hour, and does go there, makes a motion to vacate the said judgment, and for a new trial; and, while so doing, the partner of one of the attorneys for plaintiff comes to the justice's office, and is notified what is being done, this was a reasonable notice to plaintiff of the motion for a new trial. *Barons v. Anderson*, 37 Kan. 399.

2. *Jester v. Lekite*, 5 Har. (Del.) 19. And see *Case v. Shepherd, Col. & C.* (N. Y.) Cas. 94.

Filing a counter statement is a waiver of want of notice of the motion. *Williams v. Gregory*, 9 Cal. 76.

If the parties to a suit stipulate in writing that the statement on motion for a new trial, and the judgment roll are correct, and may be used as such without further certificate or identification, it will be held that notice of motion for a new trial was regularly served, and that all technical objections to the statement are waived. *Godchaux v. Mulford*, 26 Cal. 316.

3. See *Hart v. Kimball* (Cal.), 13 Pac. Rep. 852; *Rutherford v. Talent*, 6 Mont. 112. And see, *post*, subtit. STATEMENT OF GROUNDS.

4. See *Coveny v. Hale*, 49 Cal. 552; *Stevens v. North Western Stage Co.*, 1 Idaho, N. S. 604; *Robinson v. Benson*, 19 Neb. 331; *Hall v. Harris* (S. Dak. 1890), 46 N. W. Rep. 931; *Powell v. Howell*, 21 Ga. 214; *White v. Superior Ct.*, 72 Cal. 475; *Heinlen v. Heilbron*, 71 Cal. 557; *Bell v. Marsh*, 80 Cal. 411; *Markward v. Doriatt*, 21 Ohio St. 637.

5. *Powell v. Howell*, 21 Ga. 214; *Caney v. Silverthorne*, 9 Cal. 67; *White v. Superior Ct.*, 72 Cal. 475; *Heilbron v. Heinlen* (Cal.), 12 Pac. Rep. 673; *Hall v. Harris* (S. Dak. 1890), 46 N. W. Rep. 931; *Griswold v. Boley*, 1 Mont. 545.

A notice of intention to move for a new trial need not state that the party moving will ask that the verdict or de-

and a failure to file and serve such notice within the time prescribed by statute, will be deemed a waiver of the right to move.<sup>1</sup> The court has power to extend the time,<sup>2</sup> but no power to open a default,<sup>3</sup> and in an action tried by the court or a referee the time begins to run from the announcement of the decision or judgment.<sup>4</sup> The notice of intention must be in writing, or given in open court, and entered upon the minutes.<sup>5</sup> It need not state that the mover will ask that the verdict or decision be vacated that follows as a matter of course.<sup>6</sup> And it is not objectionable

cision be vacated. *Heinlen v. Heilbron*, 71 Cal. 557. And it need not in terms state an intention to move that the judgment be vacated. That follows as of course. *Bauder v. Tyrrel*, 59 Cal. 99.

An objection to notice of intention to move for a new trial is waived by a failure to object on admitting service. *Schieffery v. Tapia*, 68 Cal. 184.

1. *Caney v. Silverthorne*, 9 Cal. 67; *White v. Superior Ct. (Cal.)*, 14 Pac. Rep. 87; *Coveny v. Hale*, 49 Cal. 552; *Powell v. Howell*, 21 Ga. 214.

Appellant gave notice of intention to move for a new trial on the 4th of May. On the 11th of the same month he gave new but like notice, and on the 16th filed his statement. On a motion to strike out the statement, it was held that, having elected to give notice on the 4th, he was bound by it; that he could not give a second notice and file his statement within five days from the second notice, but more than five days from the first. *Le Roy v. Rassette*, 32 Cal. 171.

**Presumption of Regularity.**—Where the order denying a new trial purports to be based on the ground that "a motion for a new trial is not the proper remedy," it will be presumed that the notice of intention to move for a new trial was in all respects regular, and that the motion was not denied on the ground that such notice was not given in time or not at all. *Bank of Healdsburg v. Hitchcock (Cal.)*, 18 Pac. Rep. 648.

2. *Harper v. Minor*, 27 Cal. 108; *Pickett v. Wallace*, 54 Cal. 148; *Sullivan v. Wallace*, 73 Cal. 307.

In *Clark v. Crane*, 57 Cal. 629, however, the court held that the time ends with the period which the law allows for giving such notice, and when such time ends, to hold that the court or judge can extend it would be to affirm that the court or judge can dispense with the requirements of the statutes.

An order of the court directing a stay of execution on the judgment in the case, to a period beyond the time within which notice of intention to move for a new trial should be given, is not an order extending the time for giving such notice. *Stevens v. North Western Stage Co.*, 1 Idaho, N. S. 604.

3. *Killip v. The Empire Mill Co.*, 2 Nev. 34; *State v. First Nat. Bank*, 4 Nev. 358. And see *White v. Superior Ct.*, 72 Cal. 475; *Powell v. Howell*, 21 Ga. 214; *Clark v. Crane*, 57 Cal. 629.

If an inferior court insists upon hearing a motion for a new trial, when no notice of intention to move has been filed, the superior court will issue a writ of prohibition to prevent it. *White v. Superior Ct.*, 72 Cal. 475.

4. *Robinson v. Benson*, 19 Nev. 331; *Biagi v. Howes*, 66 Cal. 649; *Emeric v. Alvarado*, 64 Cal. 529; *Chase v. Evoy*, 50 Cal. 348; *Burnett v. Stearns*, 33 Cal. 468; *Roussin v. Stewart*, 33 Cal. 208.

In a case tried as in equity, and submitted to the jury on special issues, notice of an intention to move for a new trial, filed and served by plaintiff within ten days after the decision of the court, was in time, though nearly nine months after the verdict of the jury was filed, as the verdict of the jury in such a case is not a "decision." *Bell v. Marsh*, 80 Cal. 411.

Applying for time in which to file notice of intention to move and statement of ground, is not a waiver of notice of decision. *Burlock v. Shupe (Utah, 1888)*, 7 Pac. Rep. 19.

5. *Killip v. Empire Mill Co.*, 2 Nev. 34; *Bear River etc. Co. v. Boles*, 24 Cal. 354; *Borland v. Thornton*, 12 Cal. 440.

In *Indiana*, by express provision of section 652, Rev. Stat. 1881, an application for a new trial must be "by motion upon written causes, filed at the time of making the motion." *La Follette v. Higgins*, 109 Ind. 241.

6. *Heinlen v. Heilbron*, 71 Cal. 557;

because it states more than one of the statutory methods, as the manner in which the motion is to be made,<sup>1</sup> but where a certain method is designated it cannot be so amended as to designate another and different method.<sup>2</sup>

(b) STATEMENT OF GROUNDS.—A motion for a new trial must, as a general rule, be in writing,<sup>3</sup> or, if made orally, it must be entered upon the minutes of the court;<sup>4</sup> and it should partic-

Bauder v. Tyrell, 59 Cal. 99; Wittenbrock v. Bellmer, 57 Cal. 12; Fulton v. Hanna, 40 Cal. 278.

1. See Hart v. Kimball, 72 Cal. 283; Gamer v. Glenn, 8 Mont. 371.

Under a provision that "the party intending to move for a new trial must serve upon the adverse party a notice of his intention, designating the statutory grounds upon which the motion will be made, and whether the same will be made upon affidavits, or the minutes of the court or bill of exceptions, or a statement of the case," a notice that motion for new trial would be made "on the minutes of the court and a bill of exceptions" is not uncertain as to the mode of making the motion, and a refusal to dismiss it on that ground is proper. Hall v. Harris (S. Dak. 1890), 46 N. W. Rep. 931.

2. See Cooney v. Furlong, 66 Cal. 520; Clark v. Crane, 57 Cal. 630; Thomson v. Lynch, 43 Cal. 482; Le Roy v. Rasette, 32 Cal. 171; Ellsasser v. Hunter, 26 Cal. 279; Bear River etc. Co. v. Boles, 24 Cal. 354; People v. Hill, 16 Cal. 113.

A notice of intention to vacate a judgment cannot be made the basis of an amendment transforming it into a notice of intention to move for a new trial, after the time for giving such notice has passed. Little v. Jacks, 67 Cal. 165.

**Neglect to Prosecute.**—A notice of intention to move for a new trial cannot be stricken out for want of diligence in prosecuting the motion. Heilbron v. Heinlen, 70 Cal. 482.

Where a proper notice has been filed within ten days, an additional notice and affidavit specifying the further ground of newly discovered evidence cannot be served and filed after the expiration of the ten days. Sullivan v. Helena (Mont. 1890), 25 Pac. Rep. 94.

3. Whaley v. Gleason, 40 Ind. 405; Shover v. Jones, 32 Ind. 141; Stevens v. Nevitt, 15 Ind. 224; Lagro etc. Plank Road Co. v. Eriston, 10 Ind. 342; Nutter v. State, 9 Ind. 178; Addleman v. Erwin, 6 Ind. 494; Faucett v. Voss,

12 Ind. 525; Hollowell v. Cheek, 12 Ind. 614; Banks v. Hempstead, 12 Ind. 618; Thompson v. Shaefer, 9 Ind. 500; Davis v. Bolton, 16 Ind. 139; Hopkins v. Commonwealth, 3 Bush (Ky.) 480; Taylor v. Giger, Hard. (Ky.) 595; Reed v. Miller, 1 Bibb (Ky.) 142; Goldsbury v. May, 1 Litt. (Ky.) 254; McAllister v. Conn. Mut. L. Ins. Co., 78 Ky. 535; Brown v. Swan, 1 Mass. 202; Hoffman v. Gordon, 15 Ohio St. 211; La Follette v. Higgins, 109 Ind. 241; Galloway v. Negle, 1 Yeates (Pa.) 103. And see the statutes of the different States.

Unless the record shows that the motion for a new trial was in writing, the insufficiency of the evidence to sustain the verdict is not available as error in the supreme court. Stevens v. Nevitt, 15 Ind. 224.

An oral motion for a new trial, or one in writing in which no cause or causes for a new trial are assigned, will not justify the granting of a new trial; nor will the overruling of such a motion be sufficient to present errors of law to either the trial or reviewing court. Phoenix Ins. Co. v. Readinger (Neb. 1890), 44 N. W. Rep. 864.

**New Trial as a Matter of Right.**—In *Indiana* a motion for a new trial, in an action to recover possession of real property, need not be in writing. Zimmerman v. Marchland, 23 Ind. 474.

In *California*, in criminal cases, the statute does not require nor contemplate the making of the motion in writing, the grounds for the motion must be embodied in a bill of exceptions and can be reviewed in no other way. People v. Ah Sam, 41 Cal. 645. And neither a statement or brief of evidence, nor the reporter's notes need be filed; it may be heard without a bill of exceptions. People v. Keyser, 53 Cal. 183; People v. Fisher, 51 Cal. 319.

4. See Bear River etc. Co. v. Boles, 24 Cal. 354; Borland v. Thornton, 12 Cal. 440.

A recital in a record that "thereupon the defendant filed his motion for a new trial, as follows," which is followed

ularly specify the grounds or reasons upon which it is made, with a view to direct the attention of the court, as well as of opposing counsel to the precise error complained of.<sup>1</sup> The grounds must be set forth with such certainty that it may be known by a person of good understanding what is relied upon,<sup>2</sup> but the words of

by a full and formal motion, including the style of the case in which it was filed, the grounds upon which it was based, and purporting to be signed by counsel, fairly implies that the motion was in writing, and should be so treated when its sufficiency is challenged in this court. *Osborne v. Ehrhard*, 37 Kan. 413.

Where one is entitled as of right to a new trial, application may be made orally as well as in writing. *Physio-Medical College v. Wilkinson*, 89 Ind. 23; *Stout v. Duncan*, 87 Ind. 383; *Doster v. Sterling*, 33 Kan. 381.

1. See *Coleman v. Gilmore*, 49 Cal. 340; *Mullard v. American Legion of Honor (Cal.)*, 21 Pac. Rep. 825; *Hill v. Weisler*, 49 Cal. 146; *Calderwood v. Peyser*, 42 Cal. 110; *Ford v. Clark*, 12 Ark. 99; *Berry v. Singer*, 10 Ark. 483; *Danley v. Robbins*, 3 Ark. 144; *Rooney v. Grant*, 40 Ga. 191; *Ottawa etc. R. Co. v. McMath*, 91 Ill. 104; *Humpries v. Marshall*, 12 Ind. 609; *Mercer v. Patterson*, 41 Ind. 440; *Burt v. Hoettinger*, 28 Ind. 214; *Kimball v. Whitney*, 15 Ind. 280; *Ward v. Patrick*, 41 Ind. 438; *Marbourg v. Smith*, 11 Kan. 554; *Ohio Valley R. etc. Co. v. Kuhn* (Ky. 1887), 5 S. W. Rep. 419; *Helm v. Coffey*, 80 Ky. 176; *Todd v. Louisville etc. R. Co.* (Ky. 1889), 11 S. W. Rep. 8; *Putnam v. Hannibal etc. R. Co.*, 22 Mo. App. 589; *Huppert v. Weisgerber*, 25 Mo. App. 95; *Fox v. Young*, 22 Mo. App. 386; *Raymond v. Thexton*, 7 Mont. 299; *Demers v. McCormick*, 5 Mont. 234; *First Nat. Bank v. McAndrews*, 5 Mont. 251; *Phoenix Ins. Co. v. Readinger* (Neb. 1890), 44 N. W. Rep. 864; *Spencer v. Thistle*, 13 Neb. 228; *Tamance v. Byrnes*, 17 Nev. 197; *Jones v. Adams*, 17 Nev. 84; *Neil v. Wynecoop*, 9 Nev. 46; *Street v. Lemon Mill & Min. Co.*, 9 Nev. 251; *McLean v. Dibble*, 13 Bush (Ky.) 207; *George Jennings*, 4 Hun (N. Y.) 66; *Dawson v. Baum* (Wash. 1888), 19 Pac. Rep. 46; *McLain v. Dibble*, 13 Bush (Ky.) 297; *State v. Gallagher*, 16 La. An. 388.

When a motion for a new trial does not set out the grounds upon which it is based, affidavits in support of it must be rejected. *Beal v. Stone*, 22 Iowa

447. But if a notice of a motion is insufficient in failing to state the grounds, the defect is cured by a stipulation that a statement of the case may be used on the motion. *Rutherford v. Talent*, 6 Mont. 112.

Mere statements in a motion for a new trial, that certain rulings were made by the court and excepted to by a party, amount to nothing, unless it is shown by the bill of exceptions that such rulings were made and excepted to. It is the office of a motion for a new trial to show the grounds on which the new trial is asked, but such grounds are not to be taken as true unless shown to be so by the bill of exceptions. *Seifrath v. State*, 35 Ark. 412.

Where a party made a motion, calling it a motion for an arrest of judgment, but assigned only causes proper in support of a motion for a new trial, which in substance and effect it was, the motion must be considered as for the latter purpose. *Salinas v. Wright*, 11 Tex. 572. But the statute requiring that a demand for a new trial should appear on the record, is not satisfied by the record of intention to appeal in a case where there might be a new trial, but could be no appeal. *Huber v. Cherry*, 17 Ohio St 562.

**Must be Certified.**—Where the grounds of a motion for a new trial are not certified by the presiding judge, they cannot be considered. *Puffer v. Peabody*, 59 Ca. 295.

In *Missouri* a motion for a new trial need not be accompanied by a written specification of the reasons upon which it is founded, under Rev. Code 1855, 1026. *State v. Marshall*, 36 Mo. 400.

The statutes of Arizona, Missouri, Oregon and Texas, and perhaps other States, declare that no grounds other than those specified shall be considered upon the motion. And see to the same effect, *Shipley v. Eiswald*, 54 Ga. 520; *Spurrier v. Briggs*, 17 Ind. 529.

2. *Louisville etc. R. Co. v. McCoy*, 81 Ky. 403; *Irwin v. Smith*, 72 Ind. 482. And see *Kimball v. Whitney*, 15 Ind. 280; *Burt v. Hoettinger*, 28 Ind. 214; *Harnett v. Central Pac. R. Co.*, 78 Cal. 31; *Brumagim v. Bradshaw*, 39

the statute need not be followed, if the statement substantially complies with its requirements.<sup>1</sup> Thus, a specification of "errors of law occurring at the trial and excepted at the time" is too vague and indefinite.<sup>2</sup> So, "irregularities in the proceedings of the court,"<sup>3</sup> or "that the judgment of the court was contrary to law," or "against the law,"<sup>4</sup> is not a sufficient specification. "That the damages are excessive is a sufficient specification

Cal. 24; *Jones v. Layman*, 123 Ind. 569; *Butterfield v. Central Pac. R. Co.*, 37 Cal. 381.

And the court is not bound to help it out by any favorable construction or supposition. *Hoey v. Hoey*, 36 Conn. 386; *Rooney v. Crant*, 40 Ga. 191; *Bartlett v. Lewis*, 58 Me. 350.

Although a specification of error upon an application for a new trial is insufficient under the subdivision where placed, if it is sufficient under another subdivision this is enough. *Jones v. Adams*, 17 Neb. 84.

Where there are two verdicts, and a motion for a new trial, "because the verdict," etc., the court will not refuse to reverse because the application is in the singular. *Lyon v. Stewart*, 5 J. J. Marsh. (Ky.) 676.

A motion for a new trial for cause, regularly filed by the losing party after verdict and before entry of judgment against him on the verdict, is a sufficient demand of another trial and compliance with the statute requiring notice on the journal. *Marietta v. Emerson*, 5 Ohio St. 288.

1. *Humphries v. Marshall*, 12 Ind. 609.

In *Kentucky* and *Montana* specifications in the language of the statute are held to be insufficient. *Ohio Valley R. etc. Co. v. Kuhn* (Ky. 1887), 5 S. W. Rep. 419; *Dawson v. Baum* (Wash. 1888), 19 Pac. Rep. 46. But this is probably not the general rule in cases in which apt words describing the grounds have been used. See *Walrath v. State*, 8 Neb. 88; *Moore v. State*, 114 Ind. 414; *Lake Erie etc. R. Co. v. Acres*, 108 Ind. 548. And see cases above cited.

2. *Elliott v. Woodward*, 18 Ind. 183; *Snodgrass v. Hunt*, 15 Ind. 274; *Bernard v. Graham*, 14 Ind. 322; *Meaux v. Meaux*, 81 Ky. 475. See *Reed v. Gallagher*, 34 Conn. 498.

On a motion for a new trial, an assignment of error, in form, the statement "the court erred in overruling defendant's motion for a new trial and to modify and amend the decree," is not

sufficiently specific. *Patterson v. Jack*, 59 Iowa 632. But a motion for a new trial, based upon the absolute refusal of the court to permit a person called as a witness to testify need not specify what fact was proposed to be proved by him. If, on appeal, it appears that the witness was competent to testify generally in the cause, the judgment may be reversed. *Sutherland v. Hankins*, 56 Ind. 343.

Where the court, in admitting certain evidence, notified the parties that it would be withdrawn from the jury if it should, on further examination, conclude that it was not admissible, and after the evidence was all in, the court said to the jury that it had concluded that the testimony so admitted was inadmissible, that the same was withdrawn, and they should not consider it; this was not an instruction, but simply a ruling of the court, withdrawing the evidence in question from the jury, and was properly referred to as such in the motion for a new trial. *Lawler v. McPheeters*, 73 Ind. 577.

3. *Gomer v. Densmore*, 8 Neb. 384; *Lowrie v. France*, 7 Neb. 192.

But a specification that the finding of the court is contrary to law, will be enough to present the question that the trial was had without arraignment or plea when this fact appears on the record. *Bowen v. State*, 108 Ind. 411; *Shoffner v. State*, 93 Ind. 519; *Tindall v. State*, 71 Ind. 314.

4. *Howcott v. Kilbourn*, 44 Ark. 213; *Ferguson v. Ehrenberg*, 39 Ark. 420; *Gilbertson v. Miller Min. etc. Co.*, 4 Utah 46.

That "the court erred in its judgment" is not good. *Rohrer v. Brockhage*, 15 Mo. App. 16.

That the verdict was contrary to law and evidence is a sufficiently specific assignment of error on a motion for a new trial; but under such assignment the evidence in the case must be taken and considered as a whole; if it was intended to insist on any particular defect of proof, such defect ought to be specially assigned. *Hillebrant v. Brewer*, 5 Tex. 566.

where that ground is relied on,"<sup>1</sup> and where the ground is that the verdict is against evidence, the statement must specify the particulars wherein it is claimed that the evidence is insufficient.<sup>2</sup> An assignment of "error of law in admitting illegal evidence" or "in excluding competent evidence," is not sufficiently definite,<sup>3</sup>

1. *Lake Erie etc. R. Co. v. Acres*, 108 Ind. 548; *Dix v. Akers*, 30 Ind. 431; *Frank v. Kessler*, 30 Ind. 8. And see *Ray v. Thompson*, 26 Mo. App. 431; *Menk v. Home Mut. Ins. Co. (Cal.)*, 14 Pac. Rep. 837.

"Error in the assessment of the amount of the recovery" is a proper statement in a contract action. *Lake Erie etc. R. Co. v. Acres*, 108 Ind. 548. See also *Mazhewitz v. Pimental*, 83 Cal. 450; *Allgro v. Duncan*, 24 How. Pr. (N. Y.) 210.

That the court erred in assessing any amount is not a proper assignment. *McGrimes v. State*, 30 Ind. 140.

On motion for a new trial of an action upon a sheriff's bond, for breach of official duty in making an execution sale, where the fifth statutory cause for a new trial is not assigned, namely, "error in the assessment of the amount of recovery, where the action is upon contract," the fourth statutory cause, which is assigned, viz, "excessive damages," does not call in question the assessment of the amount of recovery, as the action is upon contract. *Moore v. State*, 114 Ind. 414.

In an action for damages for personal injuries sustained by plaintiff, a specification of errors in the statement on a motion for a new trial, to the effect that the injuries of plaintiff were very serious, and that the sum found by the verdict was unreasonably and grossly inadequate, is a sufficient specification. *Bennett v. Hobro*, 72 Cal. 178.

The ground of "excessive damages" as a cause for a new trial is not embraced in the assignment that the verdict "is not sustained by sufficient evidence, or is contrary to law." *Spurrer v. Briggs*, 17 Ind. 529. And the ground of "errors of law occurring at the trial," does not cover the erroneous admission of testimony; but, on an assignment of excessive damages, the question of improper testimony will be examined. *Oiler v. Bodkey*, 17 Ind. 600.

2. *Coleman v. Gilmore*, 49 Cal. 340; *Carlton v. Townsend*, 28 Cal. 219; *Parker v. Reay*, 76 Cal. 103; *Eddelbuttel v. Durrell*, 55 Cal. 277; *School District*

*v. Lynch*, 33 Conn. 330; *Fitch v. Bunch*, 30 Cal. 208; *Helene v. Morrison*, 13 Mo. App. 577; *Hill v. Weisler*, 49 Cal. 147; *Coveny v. Hale*, 49 Cal. 552.

An assignment as error that the finding of the jury is "against the weight of the evidence," affords no ground for reversing the judgment. It is implied by this form of the reason, that there was some evidence on which the jury might have found as they did. *Waggoner v. Liston*, 37 Ind. 357. And in an application, on the ground that the evidence does not justify the decision, a specification that the evidence is insufficient to justify the judgment is not sufficient. *Kelly v. Mack*, 49 Cal. 524.

A paper headed "motion for new trial," containing a notice that a new trial would be moved for on a specified day, and that the motion would be founded on certain grounds, viz, that the evidence is insufficient, etc., and comprising a statement that certain writings, notices, etc., would be relied on in support of the motion, was held a sufficient statement to support the motion, although informal. *Van Valkenburg v. Huff*, 1 Nev. 142.

A motion for a new trial on the ground that the verdict was rendered without sufficient evidence, and against the law, sufficiently refers the court to the exceptions previously taken, and renders them available for the purposes of the motion in the trial court, and, on error, in the upper court. *Granger v. Lewis*, 2 Wyo. 228.

In *Indiana*, it is held that the statement "that the decision is contrary to," or "not sustained by the evidence" is sufficiently definite. *Collins v. McGhee*, 32 Ind. 268; *Weston v. Johnson*, 48 Ind. 1; *Edmonds v. State*, 34 Ark. 720.

3. *Cheek v. State*, 37 Ind. 533; *Eden v. Lingenfelter*, 39 Ind. 19; *Welch v. Bennett*, 39 Ind. 136; *Dorsch v. Rosenthal*, 39 Ind. 209; *Tucker v. Call*, 45 Ind. 31; *Parks v. Hill*, 45 Ind. 172; *McGee v. Robbins*, 58 Ind. 463; *Stitson v. Lawrence Co.*, 45 Ind. 173; *Wolfington v. State*, 53 Ind. 343; *Miller v. Lebanon Lodge*, 88 Ind. 286; *Vankenren v. Howard*, 39 Ind. 291; *Cass v. Krimbill*, 39 Ind. 357; *Call v. Byram*, 39 Ind. 499;

it should indicate specifically the evidence thus improperly admitted or excluded,<sup>1</sup> which may be done by a direct reference to a bill of exceptions, properly prepared and filed, setting forth the objections relied on.<sup>2</sup> A specification for alleged error in giving or refusing instructions, must specifically point out the instructions claimed to have been erroneously given, or refused,<sup>3</sup> but this may be done by designating them by number, or by any other appropriate method of certain identification.<sup>4</sup> A mere statement that the instructions were contrary to law, or that the charge was erroneous, or that error of law occurred upon the trial of the cause, will raise no question,<sup>5</sup> unless errors appear in the bill of exceptions.<sup>6</sup> In cases in which the motion must be made on affidavits,

Pittsburgh etc. R. Co. v. Hennigh, 39 Ind. 509. And see *Worthing v. Cutts*, 8 Nev. 118; *Musselman v. Musselman*, 44 Ind. 106.

1. *Hill v. Weisler*, 49 Cal. 147; *Ball v. Balfie*, 41 Ind. 221; *Sparks v. Davis*, 41 Ind. 526; *Rogers v. Rogers*, 46 Ind. 1; *Freitag v. Burke*, 45 Ind. 38; *Sparks v. Hentage*, 45 Ind. 66; *Cheek v. State*, 37 Ind. 533; *Dorsch v. Rosenthal*, 39 Ind. 209; *Eden v. Lingenfelter*, 39 Ind. 19; *Welch v. Bennett*, 39 Ind. 136; *Reeves v. Plough*, 41 Ind. 204; *Grant v. Westfall*, 57 Ind. 121; *Coryell v. Stone*, 62 Ind. 307; *Galvin v. State*, 64 Ind. 96; *Evans v. State*, 67 Ind. 68; *Louisville etc., R. Co. v. Thompson*, 107 Ind. 442; *Sertil v. Graeter*, 112 Ind. 117.

2. See *Elliott v. Russell*, 92 Ind. 526; *Arbuckle v. Biederman*, 94 Ind. 168; *Ellis v. Central Pac. R. Co.*, 5 Nev. 255.

But a motion for a new trial, which refers to the evidence as contained in a bill of exceptions not yet filed, presents no question. *Harvey v. Huston*, 94 Ind. 527; *Cain v. Goda*, 94 Ind. 555; *Arbuckle v. Biederman*, 94 Ind. 168; *Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212. And the statement, in a motion for a new trial, of an objection made to evidence admitted, or of an exception taken to a ruling admitting evidence over objection, cannot be taken as true, though such motion is contained in a bill of exceptions. *Wiler v. Mauley*, 51 Ind. 169.

3. *Alley v. Gavin*, 40 Ind. 446; *Jeffersonville etc. R. Co. v. Bowen*, 40 Ind. 545; *Estep v. Larsh*, 21 Ind. 183; *Beal v. Stone*, 22 Iowa 447.

A specification, as ground for a new trial, that the court erred in refusing to submit the questions propounded by defendant's counsel, and in its instructions, is sufficiently explicit. *Louisville etc.*

*R. Co. v. McCoy*, 81 Ky. 403. But a motion for a new trial below, or an assignment of error in this court, on the ground that "the court erred in all the instructions it gave, and in refusing instructions asked for by the appellant," is insufficient, for not pointing out, with reasonable certainty, the particular instructions in which the court is supposed to have erred. *Peck v. Hensley*, 21 Ind. 344. To allege that the court erred in giving or refusing to give charges to the jury, or in receiving or rejecting evidence is not a sufficiently definite assignment of reasons for a new trial. *Waggoner v. Liston*, 37 Ind. 357.

4. *Wofsinger v. Reynolds*, 52 Ind. 218; *Grant v. Westfall*, 57 Ind. 121; *Douglass v. Blankenship*, 50 Ind. 160; *Reeves v. Plough*, 41 Ind. 204; *Weir v. Burlington etc. R. Co.*, 19 Neb. 212; *Ellis v. Central Pac. R. Co.*, 5 Nev. 255.

5. See *Bartholomew v. Langsdale*, 35 Ind. 278; *Dawson v. Coffman*, 28 Ind. 220; *Horton v. Wilson*, 25 Ind. 316; *Hastings etc. R. Co. v. Ingalls*, 15 Neb. 123; *Darnell v. State*, 15 Tex. App. 70. But see *Horne v. Williams*, 23 Ind. 37; *Elliott v. Woodward*, 18 Ind. 183; *Snodgrass v. Hunt*, 15 Ind. 274; *Robinson v. Hadley*, 14 Ind. 417; *Darnell v. State*, 15 Tex. App. 70.

A motion for a new trial, on the ground of error in refusing or giving instructions, must specify the instructions alleged to have been given, which were incorrect, and those refused, which should have been given. So also a motion for a new trial on the ground of the improper admission of evidence, must point out the evidence improperly admitted. *Reeves v. Plough*, 41 Ind. 204; *Marley v. Noblett*, 42 Ind. 85; *Holding v. Smith*, 42 Ind. 536.

6. *Cleveland Paper Co. v. Banks*, 15 Neb. 20. And see *Weybright v. Flem-*



the same rules apply as to the sufficiency of the specifications as those applicable to ordinary motions upon the record.<sup>1</sup>

(1) *Filing and Service of Statement.*—A party moving for a new trial must, as a general rule, file his statement of grounds within a specified time after verdict or decision,<sup>2</sup> and in some States it is required to be served upon the opposite party.<sup>3</sup>

9. *The Motion Papers.*—If a motion is founded upon a question of law, it is presented by a bill of exceptions; if founded upon the facts, it is presented as a case, or it may be made upon both, in which case it should be presented by a case and exceptions.<sup>4</sup> Where the grounds for the motion are *dehors* the record, they must be established by extrinsic proof.<sup>5</sup> Where errors occurring upon the trial are relied upon, each error must be specifically

ming, 40 Ohio St. 52; *Baker v. Pendergast*, 32 Ohio St. 494.

The motion for a new trial must specifically indicate the evidence offered and excluded, and the bill of exceptions must show that the evidence offered was that indicated by the motion. *Sertel v. Graeter*, 112 Ind. 117.

1. *Thomp. on Trials*, § 2759.

On application for a new trial, the affidavits of the parties are admissible to show the grounds on which it is made. *Sherrard v. Olden*, 6 N. J. L. 344.

Where an assignment of error in the action of the circuit court is that it has overruled a motion for a new trial, the bill of exceptions presented to the appellate court need not show that the party who made the motion has filed in writing any points specifying the grounds of his motion for a new trial. *Ottawa etc. R. Co. v. McMath*, 91 Ill. 104.

*Misconduct.*—A motion to set aside a verdict for misconduct of jurors, must specify their names and the nature of the alleged communications to them. *Lennox v. Knox etc. R. Co.*, 62 Me. 322.

*Absence of Counsel.*—A motion for a new trial in an action to remove a cloud from title, on the ground of the absence of plaintiff's counsel from the trial on account of sickness, and of the plaintiff's having a good cause of action, is defective in not setting out the chain of title relied on by plaintiff. *Montgomery v. Carlton*, 56 Tex. 431.

2. *Adams v. Oakland*, 8 Cal. 510; *Stevens v. North Western Stage Co.*, 1 Idaho, N. S. 604.

An order for a new trial will be set aside where the "statement of the grounds on which a party moves for a

new trial" was not filed. *Hill v. White*, 2 Cal. 306.

*Computation of Time.*—When leave is granted to file a statement of the grounds of a motion for a new trial within 20 days, the time runs from the date of the order, and not from the time of giving notice of the motion. *Easterby v. Larco*, 24 Cal. 179; *Jenkins v. Frink*, 27 Cal. 337.

3. In *California*, omission to serve the statement on a motion for a new trial, upon the adverse party, may be ground for denying the motion, but cannot warrant an order striking the statement from the files. *Calderwood v. Peyser*, 42 Cal. 110.

When there has been no legal notice of a motion for a new trial, the statement cannot be made the foundation of such a motion, nor annexed to the record of the judgment or order from which the party may appeal. *Flateau v. Lubeck*, 24 Cal. 364.

It is not necessary, in *New Jersey*, for the party making a motion for a new trial to give notice of it to the opposite party, or to file the reasons for the application. *Ryerson v. Grover*, 1 N. J. L. 392.

4. 1 *Burr. Pr.* 261, 469.

5. *Cochrane v. Knowles*, 3 *Greene* (Iowa) 115; *Wheeler v. Schilds*, 3 Ill. 348; *State v. Camp*, 23 *Vt.* 551.

Where a party applies for a new trial because the court refused to give him time to prepare a showing in reference to any matter, he should support his application by proof that he could have made a good showing by affidavit or otherwise. *Davis v. Hardy*, 76 Ind. 272.

In *Vermont*, on a petition for a new trial, the supreme court will not proceed to the hearing upon the merits,

presented to the court,<sup>1</sup> and when such errors are not apparent upon the face of the record proper, consisting of the petition, summons or writ, and the other pleadings in the action or proceeding, including the verdict, or decision and judgment, they must be incorporated into it by a bill of exceptions, or a brief, or statement of evidence.<sup>2</sup> So, except in motions made upon the minutes of the court, if the motion is made for reasons which do not appear either upon the record proper or as made up by a bill of exceptions, or a brief, or statement of evidence, the general practice is to require such grounds to be set forth in affidavits in

until furnished with a properly authenticated copy of the minutes of the judge who tried the case in the county court, or evidence showing that such copy has been applied for and could not be obtained, in which case only the court will dispense with such copy, and admit the affidavits of the attorneys as to what passed at the trial. *Durkee v. Marshall*, 14 Vt. 559.

Where defendant in execution interposes a claim as executor, and his counsel thereafter withdraws it, and, damages having been given against him for the delay, he moves for a new trial, but produces no affidavits as to the reason of his absence when damages were given, nor as to the merits of the claim, nor his reasons for filing it, the motion should be refused. *National Exch. Bank v. Walker* (Ga.), 4 S. E. Rep. 763.

**Compulsory Execution of Affidavits.**—Upon proper application by a party, the court will compel a refractory person to make his affidavit as to facts within his knowledge, in support of a motion for a new trial, assigning such facts as cause. The court has the same power to compel such a person's attendance, and to require him to make his affidavit, as it has to compel the attendance of a witness, and to require him to testify orally. *Huston v. Vail*, 51 Ind. 299.

But, in *Louisiana*, it is held that the accused is not entitled to compulsory process to obtain witnesses in support of a motion for a new trial. *State v. Gauthreaux*, 38 La. An. 608.

1. *Ham v. Carroll*, 17 Ind. 442; *McCammoch v. Clark*, 16 Ind. 320; *Raymond v. Thexton*, 7 Mont. 299; *Cropsey v. Wiggenshorn*, 3 Neb. 108; *Joiner v. Van Alstyne*, 20 Neb. 578.

The proper procedure, in *Rhode Island*, to obtain a new trial on the ground of erroneous rulings and because the verdict is contrary to the evidence, is by petition, alleging each as a

separate ground, with a report of the evidence. *Eddy v. Wilkinson* (R. I. 1889), 18 Atl. Rep. 202.

2. *Bateson v. Clark*, 37 Mo. 31; *Lenox v. Pike*, 2 Ark. 14; *Cole v. Driskill*, 1 Blackf. (Ind.) 16; *Freshour v. Logansport etc. Co.*, 104 Ind. 463; *Jones v. Evans*, 28 Wis. 168; *Brush v. Kohn*, 14 Abb. Pr. (N. Y.) 51. And see *Kesler v. Meyers*, 41 Ind. 543; *Miles v. Buchanan*, 36 Ind. 490; *Cochnowar v. Cochnowar*, 27 Ind. 253; *Ewing v. Ewing*, 24 Ind. 468; *Hays v. McKee*, 2 Blackf. (Ind.) 11; *Shields v. Cunningham*, 1 Blackf. (Ind.) 86; *Gist v. Higgins*, 1 Bibb (Ky.) 303; *Whitmore v. Shiverick*, 3 Nev. 288.

In the supreme court the statement of facts in a motion for a new trial is not regarded as true unless its truth is shown by bill of exceptions. *Bake v. Smiley*, 84 Ind. 212. And the motion cannot supply facts omitted from the bill of exceptions. *Carroll v. Bowler*, 40 Ark. 168.

Instructions copied into a motion for a new trial are not a part of the record. *Clafin v. Cottman*, 77 Ind. 58. And that an affidavit to support a motion for a new trial is copied into the record, does not make it a part of the record; to make it such it must be incorporated into a bill of exceptions. *Saunders v. M'Collins*, 5 Ill. 419. Where, on a motion for a new trial, leave is denied to file certain affidavits, but their contents are substantially embodied in the bill of exceptions, there is no error. *Pennsylvania R. Co. v. Connell*, 127 Ill. 419.

A new trial will not be ordered by the Supreme Court of New Mexico on the application of a plaintiff in error, on the ground that by the resignation of the judge before whom the cause was tried he has lost his right to have the judgment reviewed, when both the record and bill of exceptions have been struck from the files of the supreme court for not being signed and sealed

support of the motion,<sup>1</sup> and in some cases the motion may be made simply upon affidavits, without either bill of exceptions or statement of evidence.<sup>2</sup> The effect of a failure to incorporate errors occurring upon the trial into the record, by neglecting to properly make and file a bill of exceptions, or a statement of evidence, is to confine the motion to a consideration of such errors as appear in the judgment roll, and such exceptions as are contained in it only.<sup>3</sup>

by the judge who tried the cause. *Wheeler v. Fick*, 4 N. Mex. 149.

1. See *Patterson v. Jack*, 59 Iowa 632; *Slone v. Slone*, 2 Metc. (Ky.) 431; *State v. Stanley*, 4 Nev. 71; *Leonard v. Schuler*, 34 Mo. 475; *Howland v. Reeves*, 25 Mo. App. 458; *Chandler v. Thompson*, 30 Fed. Rep. 38; 3 *Estees Pl.* (3rd ed.), § 4854; *Whittmore v. Shiverick*, 3 Nev. 288; *North Chicago City R. Co. v. Gastka*, 27 Ill. App. 518; *Campbell v. Buller*, 33 Mo. App. 646.

There being no *Missouri* statute regulating affidavits in support of motions for new trials, the matter is one of practice. They may be filed without leave of court. The court, in its discretion, may grant a continuance, even at the hearing, to enable them to be prepared, and the affidavit of one of defendants sued jointly may be sufficient. *Howland v. Reeves*, 25 Mo. App. 458.

An affidavit of merits is required to support a motion for a new trial. *Burnham v. Smith*, 11 Wis. 258; *Elliott v. Leak*, 4 Mo. 540; *O'Keefe v. Tempest*, 35 Minn. 237.

But the court will not set aside a regular verdict on a mere affidavit of merits. *Gilliland v. Morrell*, 1 Cal. (N. Y.) 154.

2. *State v. Stanley*, 4 Nev. 71; *Ewing v. Price*, 3 J. J. Marsh. (Ky.) 520.

In *New York*, when the motion is made upon the ground of irregularity or surprise, it is not necessary to make a case, but the party making the motion is at liberty to make one if he sees fit to do so. *Paulitsch v. New York etc. R. Co.*, 50 N. Y. Super. Ct. 241. But if the motion is made before a judge, who did not preside on the trial of the case, it is better to make a case so that whatever occurred upon the trial may be presented in that way. *Nesmith v. Clinton F. Ins. Co.*, 8 Abb. Pr. (N. Y.) 141.

In *Nevada*, when the trial has been had in the absence of the defendant, if the indictment be for felony, or when the jury has received evidence out of

court other than that resulting from a view, or when the jury had separated without leave of the court, after retiring to deliberate on their verdict, or have been guilty of any misconduct tending to prevent a fair and due consideration of the case, or when the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors, or where the court has misdirected the jury in a matter of law, or where a verdict is contrary to law or evidence, a motion for a new trial may be made upon affidavits without either a bill of exceptions or a statement of evidence. *State v. Stanley*, 4 Nev. 71.

In *Wisconsin* the practice of moving for a new trial for causes stated in affidavits accompanying the motion, and a term subsequent to the one at which the verdict was rendered, without first settling a case, is irregular; and if proper objection is taken an order granting such motion will be reversed. But the requirements of the rule in this respect may be waived, and the irregularity cured, by the failure of the opposite party to object in the circuit court to proceeding upon the motion, and by procuring a case to be afterwards settled. *Jones v. Evans*, 28 Wis. 168.

3. *Berger v. Dubernet*, 7 Robt. (N. Y.) 1; *McLean v. Cole*, 13 Hun (N. Y.) 300; *Brown v. Grupp*, 10 N. Y. Wk. Dig. 357; *Schwarz v. Weber*, 103 N. Y. 658; *Laferty v. Brownlee*, 11 Cal. 132; *Danley v. Robbins*, 3 Ark. 147.

Testimony not minuted by the judge on a trial cannot be used on a motion for a new trial, nor to take off a nonsuit. *Bee v. Fisher*, 6 S. & R. (Pa.) 339.

When an attorney fails to promptly present a statement for a new trial to the judge before whom the case was tried, and it is not signed and filed in time by reason of a delay in the mail to which he has entrusted it, he cannot

(a) **BILLS OF EXCEPTIONS.**<sup>1</sup>—See, *ante*, **BILL OF EXCEPTIONS**, 2 Am. & Eng. Encyc. of Law 223.

(b) **STATEMENT OR BRIEF OF EVIDENCE.**—The statement or brief of evidence is usually required to contain all the evidence necessary to explain the particular points specified as error, and to which objection is made;<sup>2</sup> and, ordinarily, only such as is

obtain a new trial by original suit for that purpose, as ordinary prudence demanded, in such a case, that he should have presented the statement in person, or by attorney or messenger, and not trust to the uncertainties of the mail. *Proctor v. Wilcox*, 68 Tex. 219.

But a new trial may be granted when the exceptions, though disallowed by the judge, show sufficient cause. *Fisk v. Steel, Brayt.* (Vt.) 168. And where the judge of the superior court took a bill of exceptions, which had been agreed upon between the parties, for the purpose of examining it and making corrections, if necessary, and retained it, without returning it to the files for more than a year, and until after his resignation from office, the superior court had authority in its discretion to grant a new trial, notwithstanding the excepting party omitted to prove his exceptions. *Borrowscale v. Bosworth*, 98 Mass. 34.

1. A new trial may be properly refused, although the stenographer's notes of the evidence introduced on the first trial were burned before the preparation of the bill of exceptions, if, notwithstanding the loss, it is practicable, although with much labor, to prepare the bill from the judge's minutes, recollection of the testimony, and from other sources accessible. *Golden Terra Min. Co. v. Smith*, 2 Dak. 377.

Where there is a motion for a new trial, such previous exceptions as are not incorporated in the motion must be regarded as having been waived. *Collier v. State*, 20 Ark. 36.

2. *Cereghino v. Cereghino*, 4 Utah 100; *Crowther v. Rowlandson*, 27 Cal. 376; *Burnett v. Pacheco*, 27 Cal. 408; *Partridge v. San Francisco*, 27 Cal. 415; *Wing v. Owen*, 9 Cal. 247; *McGarvey v. Little*, 15 Cal. 27; *Walls v. Preston*, 25 Cal. 59; *Zenith Gold etc. Min. Co., v. Irvine*, 32 Cal. 302; *Reamer v. Nesmith*, 34 Cal. 624; *Beans v. Emanuelli*, 36 Cal. 117; *McCole v. Wynne*, 12 Ind. 317; *Gillespie v. State*, 9 Ind. 380; *Jolly v. Terre Haute etc. Co.*, 9 Ind. 417; *Cones v. Ryman*, 9 Ind. 277; *O'Brian v. State*, 14 Ind. 469;

*Walpole v. Atkinson*, 18 Ind. 434; *Crawford v. Martin*, 19 Ind. 370; *Cleveland v. State*, 20 Ind. 444; *Kienne v. Anderson*, 13 Iowa 565; *Nutter v. Ricketts*, 6 Iowa 92; *Eastman v. Wight*, 4 Ohio St. 156; *Pease v. Pease*, 66 Ga. 277; *Jackson v. Andrews*, 59 N. Y. 244; *Hardin v. Inferior Court*, 10 Ga. 93; *Brown v. Newcastle etc. R. Co.*, 9 Ind. 181; *Marshall v. Golden Fleece etc. Min. Co.*, 16 Nev. 156; *State v. Clark*, 12 Ired. L. (N. Car.) 151; *Caldwell v. Greely*, 5 Nev. 258.

A statement, upon a motion for a new trial, which sets forth none of the evidence, but simply refers to the reporter's notes, and directs that they shall be inserted in full, is not a proper statement, and will be disregarded by the court upon application for *mandamus* to compel its settlement. *Frazer v. San Francisco Superior Court*, 62 Cal. 49.

**Presumption from Omission of Facts.**—The facts, upon which a court exercised its discretion in discharging a jury, should be spread on the record on a motion for a new trial; if they are not, the supreme court will presume that the inferior court exercised its discretion in a proper manner. *State v. Waterhouse*, Mart. & Y. (Tenn.) 278; *Patent Brick Co. v. Moore*, 75 Cal. 205; *Jackson v. Andrews*, 59 N. Y. 244.

In *Georgia*, in an application for a new trial in the superior court, a brief of the testimony which refers to executions, judgments and interrogatories as being attached, when in fact no such papers are appended, is fatally defective; and the omission cannot be supplied by the certificate of the judge presiding, that he recognizes such documents as in court before him, on the final hearing of the motion. *Tomlinson v. Cox*, 8 Ga. 111.

In *California*, in a statement for a new trial, the evidence may simply be referred to, and need not be contained in the statement itself. *Dickinson v. Van Horn*, 9 Cal. 207.

In *Massachusetts*, it is a matter of discretion with the judge to report the evidence, so as to lay a foundation for

material to the motion;<sup>1</sup> but where the ground that the verdict is contrary to, or against the weight of evidence, or that the damages are excessive, is relied upon, the case should contain all the testimony taken or offered on the trial.<sup>2</sup> This statement or brief of evidence must be served upon the opposite party within a time usually prescribed by statute.<sup>3</sup> Amendments may be

a motion for a new trial, or not. *Miller v. Baker*, 20 Pick. (Mass.) 285.

1. *Hamilton v. Conyers*, 25 Ga. 158; *Marckwald v. Oceanic Steam Nav. Co.*, 8 Hun (N. Y.) 547; *Cereghino v. Cereghino*, 4 Utah 100. See *Snell v. Loucks*, 12 Barb. (N. Y.) 385.

In *Nebraska*, instructions of the court to the jury on a motion for a new trial, and all matters required by the Nebraska statutes to be filed with the clerk and entered upon the journal of the court, should not be embodied in the bill. *Eaton v. Carruth*, 11 Neb. 231.

2. *Converse v. Washington etc. R. Co.*, 2 McArthur (D. C.) 504; *Freeman v. Morey*, 41 Me. 588; *Bradbury v. Saco W. P. Co.*, 41 Me. 155; *Blake v. Russ*, 33 Me. 579; *Vinalhaven v. Washington*, 33 Me. 584. And see *Simpson v. Norton*, 45 Me. 281; *Lamance v. Byrnes*, 17 Nev. 197; *Mandlebaum v. Liebes*, 17 Nev. 131; *Hidden v. Jordan*, 28 Cal. 301; *Simpson v. Norton*, 45 Me. 281; *People v. Perdue*, 49 Cal. 425.

In *Connecticut*, the court will not entertain a motion for a new trial, for a verdict against evidence, unless it contain a statement of the evidence reported by the judge. *Hopson v. Doolittle*, 13 Conn. 236.

To authorize a trial *de novo* by the supreme court, all the evidence offered, as well as that admitted on the trial below, must be before the court. *Argall v. Pugh*, 56 Iowa 308.

A judge's certificate that the record contained "all the evidence used on the trial," but failing to show that no other evidence was offered, is insufficient for a new trial. *Hart v. Jackson*, 57 Iowa 75. And see *Roby v. Hall*, 57 Iowa 213.

**Presumed to Contain All.**—In the absence of any showing to the contrary, the statement on the motion for a new trial will be presumed to contain all the testimony offered. *Clark v. Gridley*, 35 Cal. 398. And see *Patent Brick Co. v. Moore*, 75 Cal. 205; *Jackson v. Andrews*, 59 N. Y. 244; *State v. Waterhouse, Mart. & Y. (Tenn.)* 278.

**The admission by the respondent's**

attorney, that a statement on motion for new trial is correct, does not admit such statement to contain all the evidence offered in the case, where the statement itself does not purport to contain it all. It can only be held to be an admission that, so far as the evidence is stated, it is stated correctly. *Howard v. Winters*, 3 Nev. 539.

**The Only Question Submitted.**—Where an allowed statement of evidence on a motion for a new trial, based on the ground that the verdict is against the evidence, sets out evidence which relates to but one question of fact in the case, the moving party may show that this was the only question submitted to the jury, and that on all other questions the court ruled as a matter of law in his favor. *Chaffee v. Sprague*, 15 R. I. 135.

3. See *Honay v. Chesterman*, 5 Cow. (N. Y.) 22; *French v. Powers*, 80 N. Y. 146; *Schwarz v. Weber*, 103 N. Y. 658; *Wulff v. Manuel* (Mont. 1890), 23 Pac. Rep. 723.

Where a statement on motion for a new trial has been duly filed, and the moving party has given notice of the time and place of settlement of the statement, no further notice is necessary. The court, at the time and place appointed, may settle the statement in the absence of the other side. *Barbaires v. Gregory*, 64 Cal. 230.

**Extension of Time.**—When a motion for a new trial is made in term, and an order is taken, by consent of parties, to perfect the brief of evidence by a specified day in vacation, and to hear the motion on that day at chambers, the judge, sitting at chambers on and by successive adjournments after the appointed day, has full possession of the matter, and may, without consent, give further time to complete the brief and prepare for the hearing. *Stone v. Taylor*, 63 Ga. 309.

In *California*, the time for the preparation of the statement on motion for a new trial may be further extended by stipulation if the original time of extension has not expired. *Curtis v. Superior Court*, 70 Cal. 390.

proposed and served by the opponent to the motion,<sup>1</sup> and the statement, together with the amendments, settled, either by agreement of the parties or by the judge before whom the cause was tried, upon due notice.<sup>2</sup> Whereupon, it is usually required to be certified by the trial judge<sup>3</sup> and filed with the clerk of the

1. See *Chaffee v. Sprague*, 15 R. I. 135; *Perkins v. Hill*, 56 N. Y. 87; *Stuart v. Binsse*, 4 Bosw. (N. Y.) 616; *Wulff v. Manuel* (Mont. 1890), 23 Pac. Rep. 723; *Mellor v. Crouch*, 76 Cal. 591.

2. *Twin v. Twist*, 3 Cal. 89; *Hamilton v. Conyers*, 25 Ga. 158; *Levey v. Fargo*, 1 Nev. 415; *Dunn v. Crozier*, 17 Ga. 70; *Frielden v. Lahens*, 14 Abb. Pr. (N. Y.) 48; *People v. Baker*, 35 Barb. (N. Y.) 105; *Wills v. Rhen Kong*, 70 Cal. 548; *Marshall v. Golden Fleece etc. Min. Co.*, 16 Nev. 156.

Where no amendments are proposed to the statement on motion for a new trial, within the time designated, it may be presented for settlement without notice to the adverse party, he cannot object that settlement was made without notice to him where he had offered no amendments. *Wulff v. Manuel* (Mont. 1890), 23 Pac. Rep. 723.

Where a statute provides that a statement on motion for a new trial shall be settled by the judge upon notice, if it is not agreed to by the adverse party, the adverse party need not be present at such settlement, if he had notice. *Vilhac v. Biven*, 28 Cal. 409. And see *Wulff v. Manuel* (Mont. 1890), 23 Pac. Rep. 723.

The rule of the superior court that an applicant for a new trial shall make out a brief of the oral and a copy of the written evidence may not be dispensed with by agreement of parties and an order of court that a part of the evidence may be omitted from the brief. *Georgia R. Co. v. Mitchell*, 75 Ga. 144.

The granting of a rule nisi, on a motion for a new trial, is an approval of the brief of evidence. *Vanover v. Turner*, 41 Ga. 577.

If the judge or referee before whom the case was tried is dead, the proper course is to apply to the court at special term on motion to have the case settled. *Morse v. Evans*, 6 How. Pr. (N. Y.) 445; *People v. Hodgdon*, 55 Cal. 72.

The California Code, § 659, does not limit the time within which the state-

ment on motion for a new trial may be presented for settlement after amendment. *Pendergrass v. Cross*, 73 Cal. 475. See *Mellor v. Crouch*, 76 Cal. 549; *Smith v. Stockton*, 73 Cal. 204.

A motion to vacate the report of a referee, and for a new trial for errors of law committed during the trial, and for insufficiency of evidence, may be made on a case settled after the entry of judgment when the report has been made and filed, and judgment has been entered without notice, and when the party making the motion has been guilty of no laches or unreasonable delay in settling the case and making the motion. When, in such a case, a report is vacated, and a new trial is granted, the court may also set aside the judgment to give effectiveness to its decision. *Cochrane v. Halsey*, 25 Minn. 52.

3. See *Adams v. Dohrmann*, 63 Cal. 417; *Simpson v. Norton*, 45 Me. 281; *Hyde v. Harkness*, 1 Idaho, N. S. 623; *Bliss v. Stevens*, 13 Ga. 403; *Snelling v. Darrell*, 15 Ga. 507; *Raymond v. Thexton*, 7 Mont. 299. See *Taliaferro v. Franklin*, 1 Gratt. (Va.) 332.

A motion for a new trial submitted upon a statement certified by the attorneys of both parties to be correct, but not signed and certified by the judge as required by the code, must be disregarded. *Schreiber v. Whitney*, 60 Cal. 431.

A certificate of the clerk, to the effect that no amendments to the statement on motion for a new trial have been filed, is such an authentication as is required by Nev. Pr. Act, § 197. *Borden v. Bender*, 16 Nev. 49.

An endorsement by the judge on a brief of evidence that, six months having elapsed, he was unable to certify whether it was correct or not, though he recognized the correctness of portions of it, is not an "approval" within Georgia Super. Ct., rule 49, and a motion for a new trial is properly refused for laches in not sooner presenting the brief for approval. *Brown v. Groover*, 65 Ga. 238.

A certificate of a trial judge that the record in a case contained all the evidence "adduced" on the trial below, is

court in which the trial was had.<sup>1</sup> A case properly settled and filed cannot be disregarded, though the court may be of the opinion that it does not correctly set forth the facts.<sup>2</sup> The rules with reference to the preparation and filing of a statement, or brief of evidence are statutory and usually analogous to those applicable to the preparation of a bill of exceptions.<sup>3</sup>

(c) **AFFIDAVITS.**—When the motion is made upon grounds which must be set forth by affidavits, they must clearly show the irregularity complained of.<sup>4</sup> The facts must be stated; the bare assertion that the party has a good defence is insufficient.<sup>5</sup>

Insufficient to authorize a trial *de novo* on appeal. *Tuttle v. Story Co.*, 56 Iowa 316.

**Denial Before Settlement.**—Where a motion for a new trial is to be made on a statement of the case, an order denying the motion before the statement has been settled and certified by the court is erroneous. *Stewart v. Taylor*, 68 Cal. 5. And see *Hart v. Burnett*, 10 Cal. 64.

1. *White v. Newton etc. Co.*, 38 Ga. 587; *Bliss v. Stevens*, 13 Ga. 403; *Mills v. Dearborn*, 82 Cal. 51.

**The time of filing** is prescribed by statute in some of the States. See *Stevens v. North Western Stage Co.*, 1 Idaho, N. S. 604; *Pease v. Pease*, 66 Ga. 677; *Turner v. Rawson*, 5 Ga. 399; *Petty v. Mahafy*, 3 Ga. 217; *Coughlin v. District of Columbia*, 106 U. S. 7; *Elder v. Feret*, 18 Nev. 278; *Collins v. Kay*, 69 Tex. 365.

**Extension of Time.**—Good reasons appearing why the brief of the evidence had not been filed and approved by the court, a motion to dismiss the motion for a new trial on this ground is properly overruled. *Williams v. Central R. Co.*, 77 Ga. 612. And see *Hardin v. Inferior Court*, 10 Ga. 93; *Candler v. Hammond*, 23 Ga. 493.

A motion to dismiss a pending motion for a new trial, on the ground that an approved brief of the evidence had not been seasonably filed, is properly refused where the delay was due to the illness of the judge and the inability of counsel to agree upon the brief. *Crockett v. Roebuck*, 77 Ga. 16.

**Waiver.**—The filing of a brief of evidence on a motion for a new trial is waived by the opposite party's appearance and argument of the motion. *Goodwyn v. Hightower*, 30 Ga. 249. And see *Watts v. Kilburn*, 7 Ga. 356; *Moxley v. Kinlock*, 80 Ga. 46.

2. *Steinkraus v. Minneapolis R. etc. Co.*, 39 Minn. 135; *Reichenberger v.*

*Minneapolis etc. R. Co.* (Minn. 1888), 39 N. W. Rep. 71.

3. See, *ante*, tit. **BILL OF EXCEPTIONS**, 2 Am. & Eng. Encyc. of Law 218.

4. *Townsend v. State*, 13 Ind. 357; *Quinlan v. Stratton*, 7 N. Y. Supp. 786; *Brown v. Speyers*, 20 Gratt. (Va.) 196.

Defendant's motion for a new trial, on the ground of surprise and newly discovered evidence, is properly overruled when the affidavit therefor fails to state that the verdict was unjust, and that defendant had a meritorious defence. *Campbell v. Buller*, 32 Mo. App. 646.

**Statement that Defect Can be Supplied.**—A new trial may be granted for the rejection of evidence, on affidavit that it was offered *bona fide*, and that its place can be supplied on a new trial. *Holmes v. M'Kinney*, 4 Mon. (Ky.) 4; *Hunt v. Owings*, 4 Mon. (Ky.) 20.

5. *Hammond v. Keiner*, 3 Hayw. (Tenn.) 145; *Ligon v. Taylor*, 2 B. Mon. (Ky.) 498.

**Form.**—It is not error to exclude affidavits written in a foreign language, on a motion for a new trial. *Spencer v. Doane*, 23 Cal. 418.

A "statement" on a motion for a new trial which is not signed as required by statute, and which is served only by copy while thus unsigned, will be disregarded on the hearing of the motion. *Snow v. Crowe*, 3 Utah 172.

Where a cause is transferred from the county to the district court because the county judge was counsel in another suit growing out of the same cause of action, an unsworn statement by the county judge, offered in support of a motion for a new trial in the district court on the ground that the county judge was not in fact disqualified, but forming no part of the proceedings or of the record, need not be considered. *Kahanek v. Galveston etc. R. Co.*, 72 Tex. 476.

Generally, affidavits made by the mover are all that is required,<sup>1</sup> but the court is not bound to receive an affidavit as true; it is open to the scrutiny of its judgment and reason, and corroborative affidavits may be required;<sup>2</sup> and in criminal cases the affidavit of the accused is received with caution, and when standing alone, is usually held to be insufficient.<sup>3</sup> Affidavits of jurors will not be admitted to impeach their verdict,<sup>4</sup> nor to show their reasons for their verdict, or the manner in which it was arrived at.<sup>5</sup> But as a general rule, such affidavits are received to explain

1. Thomp. on Trials, § 2761; Dailey v. Gaines, 1 Dana (Ky.) 529; South v. Thomas, 7 Mon. (Ky.) 60.

Where a *cestui que trust* is better informed of the facts of a cause than the trustee, having had the management of it, he should make the moving affidavits. Finley v. Tyler, 3 Mon. (Ky.) 402.

When there are several parties joining in a motion for a new trial, one of whom has had exclusive management of the cause, affidavits by the others are insufficient. Dailey v. Gaines, 1 Dana (Ky.) 529.

*Ex parte* affidavits will be rejected where a rule of courts requires the motion to be made upon depositions taken on notice. Pemberton v. Johnson, 113 Ind. 538; Fowler v. Colton, 1 Pinn. (Wis.) 331.

**Information and Belief.**—An affidavit that alleges, upon information, without disclosing the sources of the information, that a judge had improperly received a communication from a jury, after charge and retirement, and had made answer to the same, and that said answer and communication were unlawful, and prejudicial to the interests of the defendants, etc., is not sufficient to authorize setting aside the verdict. Gillotte v. Jackson, 41 N. Y. Super. Ct. 308.

2. Bruce v. Truett, 5 Ill. 454; Arnold v. Skaggs, 35 Cal. 684; Baker v. Joseph, 16 Cal. 180; Ewing v. Price, 3 J. J. Marsh. (Ky.) 521.

The court will not order a new trial on the unsupported affidavit of the defendant, when the plaintiff's claim was established on the trial by the testimony of a disinterested witness. Silkman v. Boiger, 4 E. D. Smith (N. Y.) 236. Nor upon the unsupported affidavit of defendant, that plaintiff swore falsely, and thereby surprised him. Iser v. Cohen, 1 Baxt. (Tenn.) 421.

The affidavit of plaintiff alone, that he had been informed since the trial, and believed that a juror was related

to defendant, both by blood and by affinity, within the fourth degree, and failed to disclose the same on *voir dire*, but without stating what the relationship was, is insufficient. Shinn v. Tucker, 37 Ark. 580.

3. See Kunnells v. State, 28 Ark. 121; Campbell v. State, 38 Ark. 498; Robinson v. State, 33 Ark. 180; Jackson v. State, 29 Ark. 62.

In *Tennessee*, the court may require the attendance of one who has made an affidavit in support of a motion for a new trial, for personal examination. Gildewell v. State, 15 Lea (Tenn.) 133.

In *Illinois*, the affidavit of a prisoner upon a motion for a new trial is *prima facie* evidence of the truth of the statements contained therein. Guykouski v. People, 2 Ill. 476.

4. Lechleiter v. Broehl, 17 Ill. App. 490; United States v. Clements, 3 Hugh. (U. S.) 509; Reed v. Thompson, 88 Ill. 245; Cummins v. Crawford, 88 Ill. 312; Perry v. Bailey, 12 Kan. 539; Tucker v. South Kingston, 5 R. I. 558. And see generally, tit. JURY AND JURY TRIALS, 12 Am. & Eng. Encyc. of Law 318.

5. Warren v. Spencer Water Co., 143 Mass. 155; Rumsford Chemical Works v. Finnie, 2 Flip. (U. S.) 459; Woodward v. Leavitt, 107 Mass. 453.

A juror's affidavit that a juror stated that he had long known a witness whose credibility was under consideration, and that he would not swear to what was not true, are inadmissible on a motion for a new trial. Taylor v. Garnett, 110 Ind. 287. And see *McMurdock v. Kimberlin*, 23 Mo. App. 523.

**Affidavits by Outside Parties.**—An affidavit by an attorney, to support a motion for a new trial, as to what one of the jurors told him, is hearsay evidence and not to be considered. State v. Quinton, 59 Iowa 362.

In *Kansas*, it may be shown by the affidavit of a juror that the verdict was



and uphold a verdict;<sup>1</sup> and any matter occurring during the trial, or in the jury room, not essentially inhering in the verdict itself may be shown.<sup>2</sup> Where misconduct of the jury is relied upon, the time, place and nature of the misconduct must be stated and the participants identified,<sup>3</sup> and the mover must establish his ignorance of it at the time of the trial.<sup>4</sup> When the motion is made for accident, mistake or surprise, the facts constituting such ground must be detailed,<sup>5</sup> and the party must show that he was thereby deprived of an opportunity to properly defend the action.<sup>6</sup> Where the absence of witnesses is relied upon, the facts which

determined by lot. *Perry v. Bailey*, 12 Kan. 539.

1. *Perry v. Bailey*, 12 Kan. 539; *Dana v. Tucker*, 4 Johns. (N. Y.) 487; *Nesmith v. Clinton F. Ins. Co.*, 8 Abb. Pr. (N. Y.) 141. And see *Eastwood v. People*, 3 Park. Cr. (N. Y.) 25.

An affidavit that, upon information and belief, the verdict of the jury was the result of chance, and not the deliberate judgment of the jury, by each putting down a certain sum and dividing the amount by 12, and which does not show any preliminary understanding that the result should be adopted as the verdict, is insufficient to impeach the verdict; and, in such case, the polling of the jury, and their separate answers, relieves it of all objection. *Pekin v. Winkel*, 77 Ill. 56.

2. *Perry v. Bailey*, 12 Kan. 539; *Hix v. Drury*, 5 Pick. (Mass.) 296; *Whitney v. Whitman*, 5 Mass. 405; *State v. Hascall*, 6 N. H. 352; *Page v. Wheeler*, 5 N. H. 91; *Wright v. Illinois etc. Tel. Co.*, 20 Iowa 195.

That a juror was improperly approached by a party, his agent or attorney, may be shown. *Perry v. Bailey*, 12 Kan. 539.

The affidavit of a juror to prove discussions and votes in the jury room, is not received; not even to support the verdict. But such affidavit may be received to disprove allegations against a juror that he has made declarations outside the jury room, showing an improper bias. *Woodward v. Leavitt*, 107 Mass. 453.

**Affidavit of Party.**—An affidavit of a party to an action, stating what took place in a jury room while the jury were considering their verdict, without any statement therein, or proof that such party was present in the jury room, will not be received to impeach the verdict of a jury, for it cannot be presumed that such party was present in the jury room. *Hoare v. Hindley*, 49 Cal. 275.

**Misconduct or Mistake of Officers of Court.**—The affidavits of jurors are admissible to show the misconduct of a party, or of the officer having the jury in charge. *Thomas v. Chapman*, 45 Barb. (N. Y.) 98; *Reynolds v. Champlain Transp. Co.*, 9 How. Pr. (N. Y.) 7; *Wright v. Illinois etc. Tel. Co.*, 20 Iowa 195. Or to show that a wrong verdict was delivered by mistake. *Cogan v. Ebdon*, 1 Burr. (Eng.) 383. Or that a wrong verdict was entered. *Jackson v. Dickenson*, 15 Johns. (N. Y.) 309.

3. *Lennox v. Knox etc. R. Co.*, 62 Me. 322; *Harper v. State*, 101 Ind., 109; *Mehnert v. Thieme*, 15 Kan. 368. See also tit. JURY AND JURY TRIAL, 12 Am. & Eng. Encyc. of Law 318.

Affidavits alleging irregularities and misconduct upon information and belief are insufficient; they must be positively and specifically stated. *Stone v. State*, 4 Humph. (Tenn.) 27.

In *New York*, the motion must be heard either upon a case or upon affidavits, or both. *Paulitsch v. New York etc. R. Co.*, 19 N. Y. Wk. Dig. 73; s. c., 50 N. Y. Super. Ct. 241; *Nesmith v. Clinton F. Ins. Co.*, 8 Abb. Pr. (N. Y.) 141.

4. *Flesher v. Hale*, 22 W. Va. 45.

5. See *Theobald v. Hare*, 8 B. Mon. (Ky.) 43; *Smith v. Morrison*, 3 A. K. Marsh. (Ky.) 81; *Heath v. Conway*, 1 Bibb (N. Y.) 399.

Where the ground is that the cause was unexpectedly called for trial, the affidavits must disclose an available defence. *Embry v. Devinney*, 8 Dana (Ky.) 203. And where the ground is a variance between pleading and proof the mover must show in what respect he was misled. *Shelton v. Durham*, 76 Mo. 434; s. c., 7 Mo. App. 585.

6. *Richards v. Nuckolls*, 19 Iowa 555. And see *Hunt v. Owings*, 4 Mon. (Ky.) 20.

Upon a motion for a new trial on the ground of the absence of witnesses who

they would prove must be stated,<sup>1</sup> together with the reason for their nonappearance.<sup>2</sup> Where the motion is made upon the grounds of newly discovered evidence, it should be supported both by affidavits and a brief or statement of evidence,<sup>3</sup> it being necessary that the evidence should be set out in full, in order to enable the court to determine that the newly discovered evidence is material, and not merely cumulative.<sup>4</sup> The affidavits must affirmatively show that reasonable diligence has been exerted to procure such evidence at the time of the trial,<sup>5</sup> and to do this the

had been subpoenaed, the failure of the affidavits of the moving party to state whether or not the witnesses absented themselves by his consent is good ground for denying the motion. *North Chicago City R. Co. v. Gastka*, 27 Ill. App. 518.

1. *South v. Thomas*, 7 Mon. (Ky.) 59; *Reed v. Miller*, 1 Bibb (Ky.) 142.

An affidavit of counsel, stating their belief that injustice has been done, and that it can be shown by witnesses, without specifying facts, or designating the witnesses, is not sufficient to authorize the appellate court to interfere. *Ligon v. Taylor*, 2 B. Mon. (Ky.) 498.

2. *Picket v. Picket*, 2 Bibb (Ky.) 179; *Bright v. Wilson*, 7 B. Mon. (Ky.) 123; *Jones v. Gaither*, 3 A. K. Marsh. (Ky.) 166; *South v. Thomas*, 7 Mon. (Ky.) 61.

3. *Anonymous*, 7 Wend. (N. Y.) 331; *Sproul v. Resolute F. Ins. Co.*, 1 Lans. (N. Y.) 71; *Hoseley v. Colerick*, 3 How. Pr. N. S. (N. Y.) 169; s. c., 9 Civ. Proc. Rep. (N. Y.) 43; *Slone v. Slone*, 2 Metc. (Ky.) 339; *McDaniel v. Graves*, 12 Ind. 465; *Moore v. Wills*, 69 Tex. 109; *Weeks v. State*, 79 Ga. 36; *Hughes v. People*, 116 Ill. 330.

When newly discovered evidence is relied upon as a cause for a new trial, the affidavit supporting it must appear in the record in order to present any question in relation thereto in the supreme court. *Harper v. State*, 101 Ind. 109. See also *State v. Adams*, 39 La. An. 238.

4. *Dennett v. Dow*, 17 Me. 20; *Swisher v. Malone*, 31 W. Va. 442; *Harris v. Cheshire R. Co.* (R. I. 1889), 16 Atl. Rep. 512; *Omaha etc. R. Co. v. O'Donnell*, 24 Neb. 753; *Glidewell v. Daggy*, 21 Ind. 95; *McKiliver v. Manchester*, 1 Wash. Ter. 255; *Russell v. Randall*, 9 N. Y. Supp. 327; *Runnells v. State*, 28 Ark. 121; *Moss v. Vroman*, 5 Wis. 147; *Larrimore v. Williams*, 30 Ind. 18; *Anderson v. Sutherland*, 59 Tex. 409; *Combs v. Chandler*, 5 Harr.

(Del.) 423; *Perry v. Cochran*, 1 Cal. 180; *Re Collins*, 6 Dem. (N. Y.) 286; *State v. Hebert*, 39 La. An. 319. And see *Freeman v. Bowman*, 25 Ind. 236; *Turnley v. Evans*, 3 Humph. (Tenn.) 222; *Cowden v. Wade*, 23 Ind. 471; *Huntington v. Drake*, 24 Ind. 347; *Bartholomew v. Loy*, 44 Ind. 393; *Omaha etc. R. Co. v. O'Donnell*, 24 Neb. 753.

On motion for a new trial, on the ground of newly discovered evidence, the evidence must be disclosed, and the motion granted or refused, according as the court may judge such evidence to affect the justice of the case. *Ewing v. McConnell*, 1 A. K. Marsh. (Ky.) 188; *Ludlow v. Park*, 4 Ohio 5; *Sheppard v. Sheppard*, 10 N. J. L. 250; *Halsey v. Watson*, 1 Cal. (N. Y.) 24; *Gilbert v. Woodbury*, 22 Me. 246.

5. *Stineman v. Beath*, 36 Iowa 73; *Halliburton v. Johnson*, 30 Ark. 723; *Peterson v. Gresham*, 25 Ark. 380; *Reno v. Robertson*, 48 Ind. 106; *Stuckslager v. McKee*, 40 Iowa 212; *First Nat. Bank v. Murdough*, 40 Iowa 26; *Miller v. Albaugh*, 24 Iowa 128; *Carson v. Henderson*, 34 Kan. 406; *Ewing v. McConnell*, 1 A. K. Marsh. (Ky.) 188; *Adams v. Ashby*, 2 Bibb (Ky.) 287; *Evans v. Christopherson*, 24 Minn. 330; *Laurel v. State Nat. Bank*, 25 Minn. 48; *Roemmich v. Wamsganz*, 8 Mo. App. 576; *Howland v. Reeves*, 25 Mo. App. 458; *Williams v. State*, 4 Tex. App. 255; *Collins v. State*, 6 Tex. App. 72; *Snider v. Myers*, 3 W. Va. 195; *Moss v. Vroman*, 5 Wis. 147, 149; *People v. Howard*, 74 Cal. 547; *Cleveland v. Sims*, 69 Tex. 153.

It must appear not only that the evidence was discovered too late to have been used on the trial, but that it was of such a nature or so concealed that it could not, by the use of reasonable diligence, have been obtained and used at the trial. *Denny v. Wickliffe*, 1 Metc. (Ky.) 224; *Bronson v. Green*, 2 Duv. (Ky.) 234.

use of the words "due diligence," or "reasonable diligence," or their equivalent, is not sufficient—they must set forth the particular efforts which have been made to discover and produce such evidence, the diligence being a question for the court, to be decided upon the facts submitted to it in support of the motion.<sup>1</sup> The affidavit of the moving party only, if nothing appears to discredit it, is sufficient to establish the discovery

1. *Moody v. Priest*, 69 Iowa 23; *Smith v. Wagaman*, 58 Iowa 11; *Skaggs v. State*, 108 Ind. 53; *Hines v. Driver*, 100 Ind. 315; *Merrick v. Britton*, 26 Ark. 496; *Johnson v. Herr*, 88 Ind. 280; *Ward v. Voris*, 117 Ind. 368; *Toney v. Toney*, 73 Ind. 34; *Martin v. Garver*, 40 Ind. 351; *Kitch v. Oatis*, 79 Ind. 96; *Allen v. Bond*, 112 Ind. 523; *Sikes v. Parker*, 95 N. Car. 232; *Pinschowers v. Hanks*, 18 Nev. 99; *Simmons v. Mann*, 92 N. Car. 12; *Shehan v. Malone*, 72 N. Car. 59; *Snider v. Myers*, 3 W. Va. 195; *Jones v. Gaither*, 3 A. K. Marsh. (Ky.) 166; *Henry v. Smith*, 78 N. Car. 27; *Goracke v. Hintz*, 13 Neb. 391; *Anderson v. Sutherland*, 59 Tex. 409; *Pemberton v. Johnson*, 113 Ind. 538; *Baitholomew v. Loy*, 44 Ind. 393; *Waples v. Overaker*, 77 Tex. 7; *Reno v. Robertson*, 48 Ind. 106; *Bailey v. Landingham*, 52 Iowa 415; *Harnett v. Harnett*, 59 Iowa 401; *Boot v. Brewster* (Iowa, 1888), 36 N.W. Rep. 649; *Greenwalt v. Tucker*, 10 Fed. Rep. 884; *Varner v. Coel*, 20 W. Va. 472; *Poullain v. Poullain* (Ga.), 4 S. E. Rep. 81; *Suggs v. Anderson*, 12 Ga. 461; *Pleasant v. State*, 13 Ark. 360; *Smith v. Williams*, 11 Kan. 104; *Murphy v. State*, 38 Ark. 514; *Butler v. Vassault*, 40 Cal. 74; *Carson v. Cross*, 14 Iowa 463; *Friar v. State*, 3 How. (Miss.) 422; *Madden v. Shappard*, 3 Tex. 49; *Moores v. Wills*, 69 Tex. 109; *Bumley v. Rice*, 21 Tex. 171; *Edmister v. Garrison*, 18 Wis. 594; *Heady v. Fishburn*, 3 Neb. 263; *Bord v. Sanford*, 14 Kan. 280; *Tomer v. Densmore*, 8 Neb. 384.

In *Champion v. Ulmer*, 70 Ill. 322, it was held, that to show sufficient diligence, upon a motion for a new trial, upon the ground of newly discovered evidence, the affidavit must expressly negative every circumstance from which negligence may be inferred.

A general statement in a motion for new trial, that all possible diligence was used to obtain newly discovered evidence, may need reduction to particular acts; and affirming that enquiry was made of numerous persons, every per-

son, etc., may not suffice, where no names of any persons are mentioned, and no reason assigned for the omission. *Patterson v. Collier*, 77 Ga. 292.

An affidavit that the party had made every effort to ascertain certain facts prior to the trial by enquiries of several persons, but which does not give the names of the persons of whom such enquiries were made, does not show sufficient diligence. *Smith v. Wagaman*, 58 Iowa 11.

Motions of this kind ought to be received with great caution, because there are few cases tried in which something new may not be hunted up, and because it tends very much to the introduction of perjury to admit new evidence after the party who has lost the verdict has had an opportunity of discovering points both of his adversary's strength and his own weakness. *Moore v. Philadelphia Bank*, 5 S. & R. (Pa.) 42. See also *Baker v. Joseph*, 16 Cal. 173.

The law favors the diligent and punishes the sluggard; its policy is to compel parties to be ready for trial and to try their causes at the time appointed, and to so try them as that all the evidence they can procure shall be introduced, and the litigation finally terminated. A party who seeks to reopen litigation on the ground that he has discovered new evidence must have the reasons stated and be prepared to establish every essential element of such a case strongly, clearly and satisfactorily. *Hines v. Driver*, 100 Ind. 315.

In *Nebraska* and *Nevada*, it is held, sufficient to allege the grounds in the language of the statutes, and the facts constituting diligence need not be set out in the motion. *Walrath v. State*, 8 Neb. 88; *Pinschower v. Hanks*, 18 Nev. 99.

In *Iowa*, it is held, that what was done to produce the testimony at the trial is a matter of evidence, and may be stated in the accompanying affidavit. *Woodman v. Dutton*, 49 Iowa 398. But see *Cohol v. Allen*, 37 Iowa 449.

of the evidence in question since the trial of the cause,<sup>1</sup> but the *ex parte* affidavit of the applicant setting forth the newly discovered evidence, or stating what the new witnesses will testify to, is not sufficient.<sup>2</sup> The affidavits of the witnesses themselves, setting forth the evidence they will give, must be produced,<sup>3</sup> or the absence of such proofs must be satisfactorily

1. 4 Minor's Inst. 758; Thompson's Case, 8 Gratt. (Va.) 637; Read's Case, 22 Gratt. (Va.) 946; Sarah v. State, 28 Ga. 576; Merrick v. Britton, 26 Ark. 496; Runnels v. State, 28 Ark. 121; Morgan v. Taylor, 55 Ga. 224; Gaines v. White (S. Dak. 1891), 47 N. W. Rep. 524; Shields v. State, 45 Conn. 266; State v. Kellerman, 14 Kan. 135; Glascock v. Manor, 4 Tex. 7; State v. McLaughlin, 27 Mo. 111; White v. Wallen, 17 Ga. 106. And see Thompson v. State, 54 Ga. 577.

A new trial will not be granted on the ground of newly discovered evidence where there is no affidavit from the prisoner or his counsel that this evidence was unknown at the trial and when the new evidence is from a witness who was examined for the defence at the trial. Milner v. State, 30 Ga. 137. On a motion for a new trial on the ground of newly discovered evidence, if there is a doubt as to its being newly discovered, the court should allow the rule nisi, so as to give time for an additional affidavit. Sharman v. Morton, 13 Ga. 34.

It has been held that the affidavit of counsel alone to want of knowledge before trial is not sufficient unless it also appears that the party had no knowledge. Russell v. Oliver (Tex. 1890), 14 S. W. Rep. 264; Roziene v. Wolf, 43 Iowa 393; State v. McLaughlin, 27 Mo. 111.

See, however, Sterling v. Arnold, 54 Ga. 600, where it was held that, where the clients resided out of the county where the case was tried, and took no part in the preparation or trial of the cause, but left it all to their counsel, that the affidavit of the counsel that the evidence was newly discovered was sufficient.

In *Kentucky*, a party seeking a new trial on the ground of newly discovered evidence must not only produce the affidavit of the witness that he had not communicated the facts to him till after the trial, but must state in his own affidavit that the facts were unknown to him until after the jury retired. Bronson v. Green, 2 Duv. (Ky.) 234.

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2. Scranton v. Tilley, 16 Tex. 183; State v. Kellerman, 14 Kan. 135; Cozart v. Lisle, 1 Meigs (Tenn.) 65; Shumway v. Fowler, 4 Johns. (N. Y.) 425. See also Ritchey v. West, 23 Ill. 385.

The ground of a motion for a new trial, on account of newly discovered evidence, is not sufficiently verified by an affidavit of defendant that he has been told by A, that A had been told by B, that B had heard a saying of C, which saying constitutes the newly discovered evidence. White v. Wallen, 17 Ga. 106.

An affidavit of the proposed new witness contradicting the alleged newly discovered evidence will defeat the motion for a new trial. Schultz v. Third Ave. R. Co., 47 N. Y. Super. Ct. 285. See also cases cited in the following note.

3. Mann v. Clifton, 3 Blackf. (Ind.) 304; Blood v. Whitman, 3 Pinn. (Wis.) 54; Hare v. Sproul, 2 How. (Miss.) 772; Giles v. State, 6 Ga. 276; Sheppard v. Sheppard, 10 N. J. L. 250; Strader v. Goff, 6 W. Va. 257; State v. Kellerman, 14 Kan. 135; *In re Collins*, 6 Dem. Sur. (N. Y.) 286; Wilson v. Johnson, 74 Wis. 337; Moores v. Willa, 69 Tex. 109; Adams v. Bush (No. 1), 2 Abb. Pr., N. S. (N. Y.) 104; Jenny Lind Co. v. Bower, 11 Cal. 194; Caldwell v. Dickson, 29 Mo. 227; Arnold v. Skaags, 35 Cal. 684; Cummins v. Walden, 4 Blackf. (Ind.) 307; Cozart v. Lisle, 1 Meigs (Tenn.) 65; Priddy v. Dodd, 4 Ind. 84; Gibson v. State, 9 Ind. 264; Warren v. State, 1 Greene (Iowa) 106; Manix v. Malony, 7 Iowa 81; Bright v. Wilson, 7 B. Mon. (Ky.) 122; Keough v. McNitt, 6 Minn. 513; Chambers v. Brown, Cooke (Tenn.) 292; Scott v. Wilson, Cooke (Tenn.) 315; Webber v. Ives, 1 Tyler (Vt.) 441; McQueen v. Stewart, 7 Ind. 535; Cowan v. Smith, 35 Ill. 416; Rulon v. Lintol, 2 How. (Miss.) 891; Dean v. Morrell, 1 Hall (N. Y.) 382; Glascock v. Manor, 4 Tex. 7; Edrington v. Kiger, 4 Tex. 89; Welsh v. State, 11 Tex. 368; Burnley v. Rice, 21 Tex. 171; Blood v. Whitman, 3 Chand. (Wis.) 54; Smith v.

accounted for.<sup>1</sup> Where it is impossible or impracticable to obtain such affidavits, the affidavit of some one who has heard the statements of such witnesses,<sup>2</sup> together with a statement of their names,<sup>3</sup> may be received in their stead. In States in which the time for filing affidavits is limited either by statute or by rule of court, they are properly disregarded, if not filed within the prescribed time,<sup>4</sup> but where good reasons are given, the court may grant an extension of the time, and a consequent continuance of the hearing of the motion.<sup>5</sup>

(d) COUNTER AFFIDAVITS.—Counter affidavits are admissible, and may be presented on a motion for a new trial by the party

*Cushing*, 18 Wis. 295; *Kane v. Burrus*, 2 Smed. & M. (Miss.) 313; *Pleasant v. State*, 13 Ark. 360; *Suggs v. Anderson*, 12 Ga. 461; *Keough v. McNitt*, 6 Minn. 513.

The affidavit of the witness himself is the best evidence of which the case is susceptible, and must, therefore, be produced, or its absence accounted for. *Eddy v. Caldwell*, 7 Minn. 225.

In *Dunbar v. Hollingshead*, 18 Wis. 505, the court said, "Affidavits are required as well, that the statement made may be with proper deliberation as that they may come supported by the solemn sanction of a judicial oath."

1. *Fisher v. People*, 103 Ill. 101; *Smith v. Cushing*, 18 Wis. 295. See also *Rulon v. Lintol*, 2 How. (Miss.) 891; *Dean v. Morrell*, 1 Hall (N. Y.) 382; *McQueen v. Stuart*, 1 Ind. 538; *In re Collins*, 6 Dem. Sur. (N. Y.) 286; *State v. Kellerman*, 14 Kan. 135.

Where the affidavit of the mover states that the witness is out of the State, and that his affidavit cannot, therefore, be procured, it is a sufficient excuse. *Smith v. Cushing*, 18 Wis. 295. And see *Helms v. Chadbourne*, 48 Wis. 690. But lack of time to procure the necessary affidavits is no excuse for the want of them, when no motion was made to postpone the rule. *Johnson v. Lovett*, 31 Ga. 187.

2. 4 Min. Ins. 759; *Eddy v. Caldwell*, 7 Minn. 225.

An affidavit of a party, laying, as a ground for a new trial, that new evidence has been discovered, should be accompanied by some indifferent testimony, showing that the proof relied on can be had. *Read v. Staton*, 3 Hayw. (Tenn.) 164.

3. See *Ewing v. McConnell*, 1 A. K. Marsh. (Ky.) 188; *Adams v. Ashby*, 2 Bibb (Ky.) 287; *McCombs v. Chandler*, 5 Harr. (Del.) 423; *Sarah v. State*,

28 Ga. 576; *Ewing v. Price*, 3 J. J. Marsh. (Ky.) 522; *Holmes v. McKinney*, 4 Mon. (Ky.) 7; *Richardson v. Backus*, 1 Johns. (N. Y.) 59; *Burlingame v. Cowee* (R. I. 1887), 12 Atl. Rep. 234; *Fuller v. Harris*, 29 Fed. Rep. 814.

But in *Mann v. State*, 34 Ga. 1, upon a motion for a new trial, on the ground of newly discovered evidence, that the applicant did not state the residence of the witness on whom he relied and whose affidavit he produced, and did not allege that he expected, or had reason to expect, the benefit of the witness's testimony at a future trial, or that the witness was within reach of process of the court, was held to be no ground for refusing to allow the motion.

4. *Howe v. Briggs*, 17 Cal. 385; *Harper v. Minor*, 27 Cal. 108; *Carter v. Prior*, 8 Mo. App. 577; *Roemmich v. Wamsanz*, 8 Mo. App. 576. And see *Howland v. Reeves*, 25 Mo. App. 458.

But at the hearing of a motion for a new trial, it is error to refuse to allow the reading of an affidavit because it was not filed with the motion, but subsequent thereto. *Werner v. Edmiston*, 24 Kan. 147.

And where an affidavit was used at a hearing upon a motion for a new trial, without objection, and not filed until after the argument, *held*, that an objection that it should have been filed before being read to the court, was waived. *Longfellow v. State*, 10 Neb. 105.

The general practice probably is to file the affidavits at the time of the hearing of the motion. *Thomp. on Trials*, § 2760.

5. *Shipman v. State*, 38 Ind. 549; *Howe v. Briggs*, 17 Cal. 385; *Gibson v. State*, 9 Ind. 264; *Howland v. Reeves*, 25 Mo. App. 458.

opposing the motion;<sup>1</sup> but, like affidavits in support of the motion, they are designed to enlighten but not to control the discretion of the court.<sup>2</sup>

**10. Application by Petition or Complaint.**—Where the application for a new trial is not made until after the expiration of the statutory period, it is a new and independent proceeding, and must be instituted by petition or complaint, and the service of summons or notice, as in ordinary actions.<sup>3</sup> The rules applicable to pleadings generally apply to the petition or complaint.<sup>4</sup> It should be entitled as in the original case,<sup>5</sup> and all persons should be made parties who were parties to the original action;<sup>6</sup> and, besides the facts required to be stated in an application upon affidavits, it must show some good reason why the application was not made

1. *Newcastle etc. R. Co. v. Chambers*, 6 Ind. 346; *Bratton v. Bryan*, 1 A. K. Marsh. (Ky.) 212; *Parker v. Hardy*, 24 Pick. (Mass.) 246; *Finch v. Green*, 16 Minn. 355; *Pomroy v. Columbian Ins. Co.*, 2 Cal. (N. Y.) 260; *Burlingame v. Cowee* (R. I. 1887), 12 Atl. Rep. 234; *McGavock v. Brown*, 4 Humph. (Tenn.) 251; *Burr v. Palmer*, 23 Vt. 244.

Upon motion for new trial, alleging the violation by opposing counsel of a verbal agreement not to try the case in the absence of the other, the motion being supported by affidavit, counter-affidavits are admissible. *Davis v. Ransom*, 57 Tex. 333.

Iowa Code, § 3268, does not contemplate a trial upon an application for a new trial made under its provisions, and it is not error to refuse to permit a party to answer and controvert such application. *Buena Vista Co. v. Iowa Falls etc. R. Co.*, 55 Iowa 157.

2. *Burlingame v. Cowee* (R. I. 1887), 12 Atl. Rep. 234. And see *Burr v. Palmer*, 23 Vt. 244.

In *McGavock v. Brown*, 4 Humph. (Tenn.) 251, the court said that there is no rule of law which will exclude cross-affidavits either in civil or criminal cases, though the practice of introducing them in civil cases ought not to be encouraged.

**Extension of Time to File.**—Where it appears, on a motion for a new trial, that a party has prepared counter-affidavits and served copies of them within the prescribed time, but inadvertently omitted to file them, he may file them after the expiration of the time prescribed. *Spottiswood v. Weir*, 80 Cal. 448.

3. *Sanders v. Loy*, 45 Ind. 229; *Hines v. Driver*, 100 Ind. 315; *Blackburn v. Crowder*, 110 Ind. 127; *Thomp. on*

*Trials*, § 2764; *Hiatt v. Ballinger*, 59 Ind. 303. And see *McKee v. McDonald*, 17 Ind. 518.

Where a petition was filed in due time in a case contesting the validity of a will, and stated to be a petition for rehearing, but containing substantially the averments and prayer prescribed for a petition for a new trial, it should be received as a petition for a new trial, and defects of form may be amended. *Myres v. Myres*, 6 Ohio St. 221.

The fact that a cause is pending in the supreme court upon exceptions does not give that court jurisdiction to grant a new trial in the county court for causes not appearing upon the record, upon a motion for a new trial. The only proper proceeding to secure a new trial in such a case is an original one by the way of a petition under the statute. *South Royalton Bank v. Colt*, 31 Vt. 415.

In *Vermont*, if the recognizance taken for the prosecution of a petition for a new trial be defective, the petition will not, for that reason, be dismissed, but further security will be ordered. *Houghton v. Slack*, 10 Vt. 520.

4. *Gottlieb v. Jasper*, 27 Kan. 770; *Blackburn v. Crowder*, 110 Ind. 127. But a petition for a new trial, setting forth several grounds therefor, does not thereby state several causes of action. *Gottlieb v. Jasper*, 27 Kan. 770.

On a proceeding to set aside a default judgment, and for a new trial, the petition for new trial is not objectionable because it refers to the motion to set aside the default, and the affidavit supporting it, and makes them a part thereof. *Wishard v. McNeil*, 78 Iowa 40.

5. *Hintragur v. Sumbargo*, 54 Iowa 604.

6. *Carver v. Compton*, 51 Ind. 451.

in season.<sup>1</sup> The testimony or its purport should be stated with such fulness as to call the attention of the court to such alleged errors as require correction,<sup>2</sup> and where the application is made upon the ground of newly discovered evidence, the issues and all the evidence in the former trial should be stated, together with the new evidence.<sup>3</sup>

1. See *Burlington etc. R. Co. v. Dobson*, 17 Neb. 450; *Nordan v. Stough*, 50 Ind. 280; *Sutherland v. Hankins*, 56 Ind. 343; *Woodman v. Dutton*, 49 Iowa 308; *Axtell v. Warden*, 7 Neb. 286; *Miller v. Hall*, 12 Tex. 556; *Cook v. Garza*, 13 Tex. 431; *Shigley v. Snyder*, 45 Ind. 543; *Trustees of Indiana etc. Assoc. v. Reynolds*, 61 Ind. 104; *Spencer v. Kinnard*, 12 Tex. 180.

Courts of equity will not decree a new trial at law upon a mere showing that the complainant had in reality a good cause and failed to make it out, and that on another trial he will be able to repair his injury; but it must appear that he was active and diligent, and that the judgment against him was the result of accident or fraud, and without *laches* or neglect on his part. *Hiller v. Cotton*, 48 Miss. 593.

That a motion has been made and denied is not enough, if the time for moving has not expired; for a second motion might be made on the new grounds. *Bryorly v. Clark*, 48 Tex. 345.

On a petition for a new trial, on the ground of misconduct of the jury, not filed for more than ten months after verdict and four months after judgment, it is not sufficient for petitioner to allege that he "could not, with reasonable diligence, have discovered or ascertained the misconduct sooner," without stating facts showing why. *Burlington etc. R. Co. v. Dobson*, 17 Neb. 450.

An averment in a petition to vacate a judgment, that certain glaring errors occurred at the trial, that the trial closed on the 3rd and the term of court on the 5th of the same month, and that owing to their press of business these errors were accidentally omitted by counsel from the motion for a new trial, does not disclose any "unavoidable casualty or misfortune," within the meaning of the statute. *Reed v. Wilson*, 13 Kan. 153.

Section 356 of Indiana Code authorizes a new trial only for such causes as would have justified the granting of a new trial during the term, had those causes, which must then have existed, been then known. *Nelson v. Johnson*,

18 Ind. 329; *Stanley v. Peeples*, 13 Ind. 232; *Glidewell v. Daggy*, 21 Ind. 95.

The sufficiency of the evidence to support the judgment and verdict cannot be questioned on a complaint for a new trial filed after the close of the term. *Suman v. Cornelius*, 78 Ind. 506.

2. *Miller v. Hall*, 12 Tex. 556; *Barrows v. Keene*, 15 R. I. 484; *Stineman v. Beath*, 36 Iowa 73. And see *Mehnert v. Thienne*, 15 Kan. 368; *Hines v. Driver*, 100 Ind. 315.

The evidence given on the trial of the cause may be made an exhibit to the complaint for a new trial, but such an exhibit performs no other office than that of setting forth the evidence, and it cannot supply any averment essential to the validity of the complaint, for all such averments must be contained in the body of the pleading. *Blackburn v. Crowder*, 110 Ind. 127.

A petition for a new trial under Iowa Code, § 3154, on the ground of fraud practiced by the successful party, need not allege the fraud in terms, but is sufficient if it sets out facts which amount in law to a fraud. *Lafever v. Stone*, 55 Iowa 49.

3. *Carver v. Compton*, 51 Ind. 451; *Roush v. Layton*, 51 Ind. 106; *Blackburn v. Crowder*, 110 Ind. 127; *Skaggs v. State*, 108 Ind. 53; *Hines v. Driver*, 100 Ind. 315; *McCauley v. Murdock*, 97 Ind. 229; *Wall v. State*, 80 Ind. 146; *Toney v. Toney*, 73 Ind. 34; *Trustees of Indianapolis etc. Assoc. v. Reynolds*, 61 Ind. 104; *Saunders v. Loy*, 45 Ind. 229; *Allen v. Gillum*, 16 Ind. 234; *McKee v. McDonald*, 17 Ind. 518; *Freeman v. Bowinan*, 25 Ind. 236; *Huntington v. Drake*, 24 Ind. 347; *House v. Wright*, 22 Ind. 383; *Pattison v. Wilson*, 22 Ind. 358; *Cox v. Hutchings*, 21 Ind. 219; *Glidewell v. Daggy*, 21 Ind. 95; *Crawford v. Martin*, 19 Ind. 370.

The particular language of the witnesses themselves is required. *Trustees of the Indiana etc. Assoc. v. Reynolds*, 61 Ind. 104; *Yates v. George*, 51 Ind. 324; *Anderson v. Lane*, 32 Ind. 102.

A petition for a new trial in respect to the specific sum decreed to the petitioner instead of alimony, on the ground

It should be verified,<sup>1</sup> and if defective, may be taken advantage of by demurrer.<sup>2</sup> The facts stated in it are deemed to be denied without answer,<sup>3</sup> and process is served in the same manner as in ordinary cases.<sup>4</sup>

**11. Incidental Matters of Procedure—(a) AMENDMENTS.**—When reasonable cause is shown, a motion for a new trial may be amended by the addition of new parties and of new counts or grounds;<sup>5</sup> and this, even though the time for filing the statement has passed;<sup>6</sup> but additional causes should not be added in such a manner as to surprise the opposite party.<sup>7</sup> So, pending the motion, the court may allow the affidavits to be amended;<sup>8</sup> and a brief or statement of evidence is amendable at, or at any time before, the hearing of the motion.<sup>9</sup>

of the discovery of new evidence, must state under oath the names of the witnesses and what each is expected to testify, and allege that the parties have not cohabited since the trial, and that neither of them has contracted a new marriage. *Merrill v. Shattuck*, 55 Me. 374.

1. *Cox v. Hutchings*, 21 Ind. 219; *McDaniel v. Graves*, 12 Ind. 465. But this was doubted in *Allen v. Gillum*, 16 Ind. 234.

2. *Hines v. Driver*, 100 Ind. 315; *Sanders v. Loy*, 45 Ind. 229; *Axtell v. Warden*, 7 Neb. 186.

3. See *Eckel v. Walker*, 48 Iowa 225; *Bond v. Epley*, 48 Iowa 600; *Gray v. Coan*, 48 Iowa 424; *First Nat. Bank v. Murdough*, 40 Iowa 26; *Alger v. Merritt*, 16 Iowa 121.

4. See *Darrance v. Preston*, 18 Iowa 396; *Bradish v. State*, 35 Vt. 452.

5. *Martin v. Lake*, 3 Hill (N. Y.) 475; *Moore v. Ulm*, 34 Ga. 565; *Sowden v. Craig*, 20 Iowa 477; *Valentine v. Stewart*, 15 Cal. 387; *Loucks v. Edmondston*, 18 Cal. 203; *Houston v. Kidwell*, 83 Ky. 301; *Toppliff v. Fruman*, 5 N. Y. Supp. 304. *Reed v. Miller*, 1 Bibb (Ky.) 142. But see *Riggins v. Brown*, 12 Ga. 271.

An error in the date of the entry of the decision of a motion for a new trial is a matter for correction, not for reversal. *Girardey v. Bessman*, 62 Ga. 654.

In *Nevada*, however, the provision of Civil Prac. act, to the effect that the statement on a motion for a new trial must contain the specifications of error relied upon, is imperative; and, after the time allowed by statute for amendments has passed, it is not competent for the trial court to allow the paper filed as a statement to be amended by adding thereto specifications of error which had, as claimed in the affidavit in

support of the motion, been inadvertently omitted. *Earles v. Gilham* (Nev. 1887), 14 Pac. Rep. 586.

6. *Valentine v. Stewart*, 15 Cal. 387; *Loucks v. Edmondston*, 18 Cal. 203; *Houston v. Kidwell*, 83 Ky. 301.

Wherever a new trial is granted by the supreme court, leave may be given to file pleas. *Bates v. Slocum*, 3 R. I. 129.

But an amended petition for a new trial, filed after the original petition has been dismissed, has no standing in court, either as an amendment or as a petition, since the relief it seeks is *res adjudicata* by the judgment on the original petition. *Houston v. Kidwell*, 83 Ky. 301.

7. *Bell v. Howard*, 4 Litt. (Ky.) 117.

8. *Goings v. Chapman*, 18 Ind. 194.

When a motion for a new trial is filed within the two days after verdict, as required by a rule of court, and before decision another motion is filed on the ground of evidence discovered after the expiration of the two days, the latter will be construed as an amendment or addition to the former motion, and both grounds will be considered. *Preble v. Bates*, 37 Fed. Rep. 772.

Leave to amend a motion for new trial on the ground of newly discovered evidence, by inserting the affidavits of other witnesses, should be refused, when the evidence set forth in such affidavits is immaterial. *Andis v. Ritchie*, 120 Ind. 138.

9. *Howard v. Munford*, 80 Ga. 166; *Lucas v. Marysville*, 44 Cal. 210; and see *Pendergrass v. Cross*, 73 Cal. 475.

The statement on motion for a new trial may be amended within a reasonable time before its settlement by the insertion of a specification of essential particulars. *Smith v. Stockton*, 73 Cal. 204.



(b) **WITHDRAWAL OR ABANDONMENT OF MOTION.**—The mover has a right, by motion, to withdraw his application, or to abandon it by failure to prosecute at any time,<sup>1</sup> and if the application is not diligently prosecuted, it will be dismissed on motion,<sup>2</sup> but the question of lack of diligence in the prosecution of the motion is one resting wholly within the discretion of the trial court.<sup>3</sup>

(c) **CONTINUANCE OR POSTPONEMENT.**—Where a motion for a new trial is made within the time prescribed by statute, it may be continued and disposed of, as a general rule, at a succeeding term,<sup>4</sup> either by agreement of counsel,<sup>5</sup> or by order of the court

But in *Georgia* it is held that after a brief of the testimony has been filed, on a motion for a new trial, and approved by the presiding judge, a motion to amend the same, on the affidavit of a witness whose testimony has been incorporated therein, should not be allowed. *Baker v. Wright*, 37 Ga. 327.

1. *Stoyell v. Cole*, 19 Cal. 602; *McReynolds v. Baltimore etc. R. Co.*, 106 Ill. 152.

He may do this either before or after the motion for a new trial is actually made. *Stoyell v. Cole*, 19 Cal. 602. And the fact that the opposite party has consented to the motion will not affect his right. *McReynolds v. Baltimore etc. R. Co.*, 106 Ill. 152.

2. *Eckstein v. Calderwood*, 27 Cal. 413; and see *Warden v. Mendocino Co.*, 32 Cal. 655; *Boggs v. Clark*, 37 Cal. 236.

A refusal to argue a motion for a new trial does not act as an abandonment of it, when the statement sets forth specifically the grounds of the motion, and it has been duly made and submitted. *Carder v. Baxter*, 28 Cal. 99.

A motion for a new trial is not necessarily abandoned by the failure of the moving party to appear, present his statement and argue his motion. *State v. Central Pac. R. Co.*, 17 Nev. 259.

3. *Burlock v. Shupe* (Utah, 1888), 17, Pac. Rep. 19; *Boggs v. Clark*, 37 Cal. 236.

4. *Walker v. Hale*, 16 Ala. 26; *Higinbotham v. Campbell* (Ga. 1890), 11 S. E. Rep. 1027; *Milner v. Burrus* (Ga., 1890), 11 S. E. Rep. 1029; *Spalding v. Meier*, 40 Mo. 176. And see *Turpin v. Turpin*, 3 J. J. Marsh. (Ky.) 327; *Hinton v. Coleman*, 76 Wis. 221.

Motions for a new trial must be disposed of at the term when made, or at the next ensuing term. They cannot be kept under advisement by the cir-

cuit judge, beyond the term succeeding that at which they were made. *Scarborough v. Smith*, 52 Miss. 517.

But they are embraced within the terms of the Code of 1871, § 668, by which it "stands continued, of course," if not decided before the adjournment of the court. *Vicksburg v. Hennessey*, 52 Miss. 178.

Where a movant for a new trial is allowed until the next term to complete a brief of evidence, but he does not present it for the approval of the judge until the second term thereafter, the motion is properly dismissed, although the hearing of the motion is regularly continued until such second term. *Milner v. Burrus* (Ga. 1890), 11 S. E. Rep. 1029.

5. See *Dozier v. Owen*, 63 Ga. 539; *Pace v. Mealing*, 21 Ga. 464; *Johnston v. Simmons*, 77 Ga. 298.

It is doubtful whether such an agreement would be binding unless in writing, or entered upon the minutes of the court. *American White Bronze Co. v. Clark*, 123 Ind. 230.

Where a motion for a new trial stood continued to the next term by agreement of counsel, and it was so stated to the court, which did not dissent, but no record of the continuance was made by the clerk, and the motion afterwards came up for a rehearing at the same term, and, in the absence of the plaintiff's counsel, was overruled, though the plaintiff's attorney was in fault, in that he did not see that the proper entry was made upon the record, yet it would be a fraud in the defendant to insist upon an advantage gained in this way; and a continuance was therefore entered *nunc pro tunc*, and the motion for a new trial allowed to come regularly to a hearing. *Spalding v. Meier*, 40 Mo. 176.

After verdict, motion was made for a new trial, and the action continued for advisement. Subsequently, at a

on cause shown.<sup>1</sup> In some of the States, however, the rule is that the motion must be determined at the term in which it was made,<sup>2</sup> but in such States a party cannot be prejudiced by a continuance on motion of the court without his application.<sup>3</sup> Where a continuance is granted, an order should be simultaneously made vacating or suspending the judgment.<sup>4</sup>

time when the court was not in session, an entry was made that the motion was overruled, and judgment entered upon the verdict. At a subsequent term, the court properly regarded this entry as a nullity, decided the motion and entered judgment on the verdict. *Sheppard v. Wilson*, 6 How. (U. S.) 260.

1. See *Milner v. Burrus* (Ga.), 11 S. E. Rep. 1029; *Spalding v. Meier*, 40 Mo. 176; *Walker v. Banks*, 65 Ga. 20; *Walker v. Hale*, 16 Ala. 26; *Bruner v. Marcum*, 50 Mo. 405.

A motion for a new trial having been made during the term at which the case was tried, and an order passed that the motion be heard in vacation, the hearing may, by order of the presiding judge, be postponed from time to time, and the brief of evidence be approved at final hearing. *Williams v. Central R.*, 77 Ga. 612.

Where a motion for a new trial is ordered in term to be heard at chambers on a certain day, and on such day the hearing is continued to the first day of an adjourned term of the court, the motion may be heard at any time during such adjourned term, without any further continuance. *Higginbotham v. Campbell* (Ga. 1890), 11 S. E. Rep. 1027.

If a motion for a new trial is made at the trial term, and the court adjourn without disposing of the motion, the refusal of the judge, at the next term, to hear the motion, is not ground of reversal. The remedy is by *mandamus*. *Bridges v. Miller*, 3 Ala. 746.

A motion for a new trial made in term cannot be heard in vacation over the objection of either party, unless an order is taken for that purpose, or it is so directed in the rule  *nisi*. *Rust v. McLaren*, 54 Ga. 111; *Ferrill v. Marks*, 76 Ga. 21.

**Sufficient Cause.**—It is no error to refuse to postpone a motion for a new trial for the purpose of procuring a witness, respecting the purport of whose testimony there was a misunderstanding between the attorneys of the parties. *Miller v. Koger*, 9 Humph. (Tenn.) 231.

But that some instructions have been lost is ground for suspending a motion for a new trial, until they can be found, or for granting it. *Visher v. Webster*, 13 Cal. 58.

Where a defendant's motion for a continuance has failed to show diligence, he cannot supply the defect in his affidavit in support of a motion for a new trial. *May v. State*, 6 Tex. App. 191.

2. *Doddridge v. Gaines*, 1 McArthur (D. C.) 335; *England v. Duckworth*, 75 N. Car. 309; *Valentine v. Holland*, 40 Ark. 338; *McKean v. Tiller*, 9 Tex. 58; *Walker v. Jefferson*, 5 Ark. 23; *Kain v. Burrus*, 2 Smed. & M. (Miss.) 313.

If not so disposed of it will be regarded as denied or refused to be entertained. *Doddridge v. Gaines*, 1 McArthur (D. C.) 335; *Rupp v. Hand* (Ariz. 1890), 24 Pac. Rep. 257.

3. *Valentine v. Holland*, 40 Ark. 338; *Pace v. Mealing*, 21 Ga. 464; and see *King v. Carey*, 5 Ga. 270; *Johnston v. Simmons*, 77 Ga. 298.

In *Mississippi*, a circuit judge is authorized to take under advisement motions for new trials in vacation; and where one does so in a case, and returns his opinion in the manner and time prescribed by the statute, it is error for the judge sitting at the next term to strike the case from the docket. *McClure v. Houston*, 10 Smed. & M. (Miss.) 392.

Where, after verdict for plaintiff, defendant filed motions for a new trial and for judgment *non obstante veredicto*. The motions, together with a motion by plaintiff for judgment on the verdict, were afterwards argued, and a judgment *non obstante* rendered, without disposing of the other motions, but upon appeal such judgment was reversed, the motion for a new trial should be considered as still pending after remand, and could then be granted. *Fisk v. Henarie*, 14 Oreg. 29.

4. *Doggett v. Jordan*, 4 Fla. 121.

At common law the judgment was not entered or signed until after the motion for a new trial had been heard and determined. Under California

**12. The Hearing.**—On the hearing of the motion the counsel for the moving party opens the argument, the opposite counsel answers, and the counsel for the mover has the reply: one counsel only to be heard on each side,<sup>1</sup> and the court should be furnished with copies of the motion papers.<sup>2</sup> The parties are entitled to have the motion determined upon its merits,<sup>3</sup> and the court may, in its discretion, hear affidavits for and against the truth of matters with respect to which the new trial is asked,<sup>4</sup> but where the counsel for the moving party fails to appear when the motion is called in its regular order, the court may, nevertheless, proceed to dispose of the motion.<sup>5</sup> Objections must be made at the hearing of the motion to any omission or irregularity in the proceedings prelim-

practice the motion proceeds independent of the judgment, mainly upon a record of its own, and may be made before or after the entry of judgment or making up of the roll, and need not be made at the term at which the judgment was entered, and may likewise be made out of term. *Spanagel v. Dellinger*, 34 Cal. 476.

In *Connecticut*, a motion was made in court for a new trial at the same term the first trial was had, and was continued until the next term, that notice might be given, but the court refused to stay execution meanwhile. *Sholes v. Stoddard*, Kirby (Conn.) 163.

1. *Burr. Pr.* 331; *New York etc. R. Co. v. Mayor etc. of N. Y.*, 1 Hilt. (N. Y.) 562; *Thompson v. Erie R. Co.*, 9 Abb. Pr. N. S. (N. Y.) 233.

Notice of argument on a rule to show cause why a verdict should not be set aside, must be filed with the clerk in *New Jersey*. *Earl v. Burr*, 12 N. J. L. 321.

Although in strict practice a rule *nisi* for a new trial seems requisite, yet it need not be separate from the motion, nor be signed by the judge, if the judge on hearing the motion can and will recognize that rule which has been signed by counsel. More especially is this so where opposing counsel has also recognized it in his acknowledgment of service. If such irregular rule has not been entered on the minutes, it may, by order of the judge, be entered *nunc pro tunc*. *Georgia R. & Banking Co. v. Usry*, 82 Ga. 54.

2. *Gardner v. Gardner*, 2 Gray (Mass.) 434.

On the motion for a new trial, the granting of a rule *nisi* is presumptive of approval of the brief of the evidence, and a direct approval may be made at the hearing, though a different

judge is presiding. *Worsham v. Murchison*, 66 Ga. 715.

3. *Emery v. Emery*, 54 Iowa 106; *Cook v. Allen*, 5 Hun (N. Y.) 561.

A rule of court, which requires that a party applying for a new trial shall make and argue the motion on the Saturday after the trial, is unconstitutional. *Pawley v. McGimpsey*, 7 Yerg. (Tenn.) 502.

4. *Meeks v. State*, 57 Ga. 329.

5. *Ford v. Holmes*, 61 Ga. 419; *Bosworth v. Hightower*, 73 Ga. 46. See *Bolles v. Duff*, 55 Barb. (N. Y.) 313; *Bolles v. Duff*, 7 Abb. Pr. N. S. (N. Y.) 385.

The court may dispose of the motion, although informed of an agreement between counsel to postpone the hearing until some time in vacation. *Ford v. Holmes*, 61 Ga. 419.

An order denying a motion for a new trial is not void because made in the absence of one attorney of record, where another was present, and the record shows no lack of authority to appeal on his part. *Romine v. Cralle*, 80 Cal. 626.

In criminal cases, however, a motion by the accused for a new trial should not be acted upon in his absence, but, if then overruled, may be reconsidered in his presence. *Berkley v. State*, 4 Tex. App. 122. And see *Krautz v. State*, 4 Tex. App. 534; *Sweat v. State*, 4 Tex. App. 617.

Where the defendant was convicted of murder in the second degree, and his attorneys, appointed by the court, filed a motion for a new trial, but on the next day were arrested by order of the court for an alleged contempt, and on a subsequent day were brought into court by the sheriff, and required by the court to argue the motion, it was held to be such a wanton trifling with

inary to it.<sup>1</sup> (See also tit. MOTIONS, 15 Am. & Eng. Encyc. of Law 887.)

(a) REARGUMENT.—It is within the discretion of the court whether to receive and consider additional affidavits after the hearing is closed and the decision announced;<sup>2</sup> but where a long time has elapsed, and the position of the parties has changed, and new rights have accrued, a reargument must be refused.<sup>3</sup> (See also tit. MOTIONS; subtit. RENEWAL OF MOTIONS, and REHEARING OR REARGUING MOTIONS, 15 Am. & Eng. Encyc. of Law 919, 924.)

(b) ORAL TESTIMONY ON HEARING.—While motions for a new trial are usually heard on affidavits, or on the record of the trial, or both, it is within the sound judicial discretion of the court to admit oral evidence on the questions at issue;<sup>4</sup> and on an application, made after the expiration of the statutory time to

the rights of the defendant as to require a new trial, irrespective of the merits of the case. *Robertson v. State*, 38 Tex. 187.

1. *Quivey v. Gambert*, 32 Cal. 304.

2. *Scott v. Moore*, 41 Vt. 205; *Slocum v. Fairchild*, 7 Hill (N. Y.) 292; *Grace v. Martin*, 83 Ga. 245.

Where a motion for the reargument of a rule for a new trial is made on the same day on which the rule is discharged, it continues the rule, and the judgment cannot be entered on the verdict. *Van Vliet v. Conrad*, 95 Pa. St. 494.

When a motion was denied, on the ground that the question was *res adjudicata*, and afterwards the court of appeals reversed so much of the judgment as determined any question involved in the motion, the order denying the new trial, and the judgment entered thereon, should be set aside, and a reargument allowed. *Gilchrist v. Comfort*, 26 How. Pr. (N. Y.) 394.

3. See *Rebhum v. Swartwout*, 3 N. Y. Supp. 419.

But the entry of a final order granting a motion for a new trial on the minutes does not prevent the judge from listening upon the same papers to a rehearing on application of the defeated party, and making an order vacating the former final order, and deciding the motion the other way by denying it. *Herzig v. Metzger*, 62 How. Pr. (N. Y.) 355.

4. *Gano v. Wells*, 36 Kan. 688. And see *Gottlieb v. Jasper*, 27 Kan. 770; *State v. Lloyd*, 4 Cranch (C. C.) 472.

On a motion for a new trial on a case made, the court will receive docu-

mentary evidence which could not have been controverted at the trial to defeat the motion. Otherwise, where the motion is founded on a bill of exceptions. *Hart v. Coltram*, 24 Wend. (N. Y.) 14.

Under rule twenty-one of the Massachusetts superior court, that "the court will not hear any motion grounded on facts, unless the facts are verified by affidavit, or are apparent from the record and from the papers on file in the case, or are agreed and stated in writing, signed by the parties or their attorneys," it is within the discretion of a single justice, on a motion for a new trial on the ground of newly discovered evidence, to admit oral evidence. *Spaulding v. Knight*, 118 Mass. 528.

In *Texas* there is no authority under which, after trial and judgment, the party moving for a new trial may propound, in support of his motion, interrogatories to the adverse party. A failure to answer such interrogatories cannot, therefore, be construed as an admission. *Cleveland v. Sims*, 69 Tex. 153. And it is irregular for the judge, in disposing of a motion for new trial, to examine a bailiff, on oath or otherwise, out of the presence of the parties or their counsel, with a view to aiding the judicial mind on a question of fact embraced in the motion. *City Bank v. Kent*, 57 Ga. 283.

When the judge who tried a cause has died, or is out of office, and a motion is made for a new trial, the judge to whom the application is made is required by the rules of court to ascertain the facts by the best means at his command. But this does not require

move, it being an independent proceeding, both the mover and the contestant should introduce their evidence orally before the court;<sup>1</sup> but as it is not a trial of the issues of the action, neither party has a right to a trial by jury.<sup>2</sup>

**13. Decision of the Motion.**—A new trial cannot be granted on questions not raised by the pleadings,<sup>3</sup> and the sufficiency of the pleadings and the jurisdiction of the court cannot be considered;<sup>4</sup> the general rule being that such rulings as were made upon the trial, and then duly excepted to only, can be again considered by court.<sup>5</sup> But if the question is one which could not have been

him to re-examine the witnesses, or to hear oral testimony as to what transpired at the trial. The party moving should present, in writing, a brief of the testimony and the history of the trial properly verified. *McKendree v. Sikes*, 40 Ga. 189.

1. *Sanders v. Loy*, 45 Ind. 229; *Allen v. Gillum*, 16 Ind. 234; *Pattison v. Wilson*, 22 Ind. 358; *Glidewell v. Daggy*, 21 Ind. 95; *McKee v. McDonald*, 17 Ind. 518.

On petition for a new trial filed under Iowa Code, § 3155, the court may, without jury, "first try and decide upon the grounds to vacate or modify the judgment." *Carpenter v. Brown*, 50 Iowa 451.

Testimony, by way of *ex parte* affidavits, to meet the testimony taken in support of a petition for a new trial, has always been regarded in *Vermont* as loose and unsatisfactory, and as not coming within any known rule of practice. Yet previous to the promulgation of the rule of court adopted in 1851, such testimony has been always received—giving to the other party an election to have his case continued, to rebut the evidence. *Burr v. Palmer*, 23 Vt. 244.

2. *Houston v. Bruner*, 59 Ind. 25.

3. *Bullis v. Cheadle*, 36 Minn. 164; *Patent Brick Co. v. Moore*, 75 Cal. 205.

Where there is not sufficient ground to set aside a verdict and grant a new trial, generally, it is error to set it aside to enable the defendant to withdraw his pleas and confess judgment for the purpose of proceeding in equity for relief against the judgment. *Harnsbarger v. Kinney*, 6 Gratt. (Va.) 287.

It may be shown that a certain question only was submitted to the jury. *Chaffee v. Sprague*, 15 R. I. 135.

4. *State v. Cady*, 47 Conn. 44.

The question whether an action is properly brought cannot be made on a

motion for a new trial. *Crowley v. Pendleton*, 46 Conn. 62.

In *New York*, a judge has no authority to entertain a motion for a new trial on his minutes, when the complaint is dismissed upon the plaintiff's own showing. *Dusenbury v. Dusenbury*, 61 How. Pr. (N. Y.) 432. And see *Healey v. Twenty-third Street R. Co.*, 11 Daly (N. Y.) 281.

5. *Da Lee v. Blackburn*, 11 Kan. 190; *New York etc. R. Co. v. Cook*, 2 Sandf. (N. Y.) 732.

Thus, error of law, occurring at the trial, is no ground for a new trial, unless excepted to by the party making the application. *Darrance v. Preston*, 18 Iowa 396; *Patent Brick Co. v. Moore*, 75 Cal. 205; *Evans v. State*, 33 Ga. 4; *Harman v. Moses*, 39 Ga. 708; *Poullain v. Poullain*, 79 Ga. 11; *Fitzgerald v. Garvin*, Charl. (Ga.) 281; *McVean v. Scott*, 46 Barb. (N. Y.) 379; *Griffin v. Pate*, 63 Ind. 273; *Ashbey v. Ashbey*, 38 La. An. 902; *Garland v. Holmes*, 1 La. An. 405; *Hays v. Pennsylvania R. Co.*, 42 N. J. L. 446; *Toms v. Greenwood*, 9 N. Y. Supp. 666; *Bank of Attica v. Pottier etc. Mfg. Co.*, 1 N. Y. Supp. 483; *Stoddard v. Long Island R. Co.*, 5 Sandf. (N. Y.) 180; *Remington v. Harrington*, 8 Ohio 508; *Klatt v. Mallon*, 61 Wis. 542. And see *Williams v. Vandeverr*, 10 Johns. (N. Y.) 200; *Citizens' Bank v. Bellboeq*, 19 La. An. 376; *Bland v. Gaither* (Ky. 1889), 11 S. W. Rep. 423; *Volker v. First Nat. Bank*, 26 Neb. 602; *Gates v. Kinney*, 20 Neb. 120; *Smith v. Hicks*, 1 Wend. (N. Y.) 202.

A defendant, raising a question upon the legal character of evidence for the first time on motion for a new trial, presents no point of law for adjudication, but only appeals to the discretion of the court for a favor; its refusal is not an error of law. *Cheatham v. Roberts*, 23 Ark. 651.

obviated, had it been raised at the trial<sup>1</sup>, or if justice requires it,<sup>2</sup> it may be considered. In some of the States the rule has been adopted that an error, apparent on the record, cannot be considered on a motion for a new trial;<sup>3</sup> and in some, making the motion is regarded as a waiver of such errors.<sup>4</sup> The court will not re-examine a ruling made against the contestant of the motion, unless it is such that, when correctly determined, it would render a new trial useless.<sup>5</sup> Where the motion is to set aside the verdict of a

Upon a motion for a new trial on the evidence, the fact that the party did not call the attention of the court to his claim that the weight of the evidence as a matter of law called for a verdict in his favor is sufficient cause for denying the motion. *Pollock v. Brennan*, 39 N. Y. Super. Ct. 477.

Where it appears from the statement of the case that there were no exceptions taken during the trial to any act of the court, the court is justified in refusing a new trial on the ground that the decision is against the law. *Patent Brick Co. v. Moore*, 75 Cal. 205.

Where, in case of a joint judgment against two defendants for breach of warranty of title in a deed, the evidence was insufficient as to one who, however, made no motion for a new trial, the judgment will not be disturbed. *Real v. Hollister*, 17 Neb. 661.

Under the New York Code, where the justice who tried a cause grants an order, sending the motion for a new trial, in the first instance, to be heard at the general term, the court here has power to decide questions of law as well as of fact. *Fellows v. Emperor*, 13 Barb. (N. Y.) 92.

1. *New York etc. R. Co. v. Cook*, 2 Sandf. (N. Y.) 732; *Brookman v. Hamill*, 54 Barb. (N. Y.) 209; s. c., 43 N. Y. 554.

To support a motion for a new trial on account of an alleged erroneous dismissal of an action, the order of dismissal need not be excepted to, if granted after the trial was concluded and the case taken under advisement. *Volmer v. Stagerman*, 25 Minn. 234.

2. See *Garland v. Holmes*, 1 La. An. 405; *Hatfield v. Central R. Co.*, 33 N. J. L. 251; *Farr v. Fuller*, 8 Iowa 347; *Low v. McCallan*, 64 Cal. 2; *Hopkins v. Grinnell*, 28 Barb. (N. Y.) 533; *McConihe v. New York etc. R. Co.*, 20 N. Y. 495; *Devendorf v. Wert*, 42 Barb. (N. Y.) 227.

A ruling depriving the prisoner of a statutory privilege, like the right to de-

mand that the charges should be in writing, may be objected to for the first time on a motion for a new trial. *People v. Ah Fong*, 12 Cal. 345.

Where there has been a trial by jury without disposing of a general demurrer, which was overlooked, and a new trial granted, the court may then pass upon and decide the demurrer. *Portis v. Cole*, 11 Tex. 157.

Where a verdict, in an action on a contract, is in accordance with justice and the law of the State, a new trial will not be granted to give the party the benefit of the law of another State, not insisted on at the trial, though the contract was made and the parties resided in that State. *Brush v. Scribner*, 11 Conn. 388.

In a *Connecticut* case it has been held that a new trial will be granted in order to prevent inconsistency in the decision of the law on the same point. *Edwards v. Lambert*, 2 Root (Conn.) 430.

3. *Beers v. Broom*, 4 Conn. 247; *Minor v. Mead*, 3 Conn. 289.

In *Vermont*, questions of law raised and decided on exceptions, by the supreme court, cannot be again presented on a motion for a new trial. *McConnell v. Strong*, 11 Vt. 280; *Beardsley v. Gordon*, 3 Vt. 324.

The court trying the cause ought not to grant a new trial for the causes embraced by a bill of exceptions, unless the party submitting a motion distinctly waives the exception. *West v. Cunningham*, 9 Port. (Ala.) 104.

4. *Minor v. Mead*, 3 Conn. 289.

A motion was made to dismiss a suit, and denied, and a bill of exceptions taken *pendente lite*, the trial resulted in a mistrial, and at a second trial, before another judge, the motion was renewed. As the exception to the first decision was then pending and undetermined, the second judge was estopped from examining the matter. *Runnals v. Aycock*, 78 Ga. 553.

5. *Elsev v. Metcalf*, 1 Den. (N. Y.) 323.

jury, all the testimony and all inferences from it, which might be drawn by a jury without error, that tend to sustain the verdict, must be accepted,<sup>1</sup> and where the error, or irregularity complained of is one which might have been prevented or obviated by the use of reasonable diligence, the motion will be denied.<sup>2</sup> Where the motion is made before a judge other than the trial judge, due allowance should be made for the superior advantages of the presiding judge,<sup>3</sup> and the court should examine all grounds upon

**Consequence of Verdict.**—The court, on motion for a new trial, do not enquire into the consequence of the verdict as relating to costs. *Hagar v. Weston*, 7 Mass. 110.

**Veracity of Witnesses.**—In case of a conflict in the affidavits on motion for a new trial, on the ground of misconduct of jurors, it is the duty of the court below to determine the question of veracity, and that its action in this respect would not, on the showing made, be disturbed. *State v. St. Clair*, 6 Nev. 207.

1. *Kimmins v. Wilson*, 8 W. Va. 584; *Sullivan v. Meyers*, 28 W. Va. 375. And see *Wadsworth v. Harrison*, 14 Iowa 272; *Barksdale v. Smith*, 31 Ga. 671; *Alston v. Grantham*, 26 Ga. 374; *Jones v. Rixey*, 79 Va. 656; *Keeler v. Barret's etc. Dyeing Estab.*, 54 N. Y. Super. Ct. 369.

In passing upon the motion for a new trial, on the ground of a verdict against evidence, the court must consider all the evidence submitted to the jury, although part of it was improperly admitted. *McCloud v. O'Neill*, 16 Cal. 392.

On a motion for a new trial, on the ground of misdirection, the court will not admit evidence tending to prove particular facts to be different from what they appeared at the trial. *Mott v. Pettit*, 1 N. J. L. 298. But record evidence of a fact improperly proved at a trial may be given in opposition to a motion for a new trial. *Ritchie v. Putnam*, 13 Wend. (N. Y.) 524.

**Amendment on Motion.**—A verdict for plaintiffs, in a case in which one of them had no interest, there being no allegation or proof of an assignment to him by the others, cannot be sustained without an amendment, and this can only be had on motion at the trial or afterward. The court will not order the amendment on the argument for a new trial. *Travis v. Tobias*, 8 How. Pr. (N. Y.) 333.

**Competent Evidence Excluded.**—In considering a ruling of the court below, setting aside a verdict, as against the

evidence, the supreme court will look only at the evidence before the jury, and not at competent evidence offered and erroneously excluded. *Tegarden v. Carpenter*, 36 Miss. 404. And see *Pierce v. Jackson*, 21 Cal. 636; *McCloud v. O'Neill*, 16 Cal. 392.

**Motion at General Term.**—Where, after verdict, a motion for a new trial on exceptions is ordered to be heard at the general term in the first instance, the case cannot be reviewed on the ground that the verdict is against the weight of evidence. *Hoxie v. Greene*, 37 How. Pr. (N. Y.) 97.

2. See *Sacia v. O'Connor*, 79 N. Y. 260; *Clark v. Blount*, 3 Hawks (N. Car.) 208.

Where the grounds of a motion for a new trial are misconduct of the prevailing party, or accident or surprise which ordinary prudence could not have guarded against, and the facts, as claimed, are that the prevailing party testified incorrectly as to the contents of a letter, it is not error to overrule the motion when it does not appear that the prevailing party was guilty of wilful false swearing, nor that the losing party had used due diligence to have and produce the letter at the trial. *Boyd v. Sanford*, 14 Kan. 280.

Where it appears that the accused had sufficient time to have filed a motion containing all his grounds for a new trial, the refusal of the court below to permit additional grounds to be added on the trial of the motion, and to receive evidence in support of them, is not a sufficient ground for reversing the judgment. *State v. Nolan*, 13 La. An. 276.

3. *Reynolds v. Reynolds*, 44 Minn. 132.

Where, by a change in the lines of a district, a cause was transferred from one court to another pending a motion for a new trial, it is error in the new judge to refuse the motion, on the ground that he had not heard the cause. If in doubt as to the propriety of a new trial,

which the motion is made,<sup>1</sup> and if they are not borne out by the facts of the case, the new trial should be denied.<sup>2</sup> A new trial should not be granted where the cause of action is trifling, and the suit is merely for the recovery of costs and for the purpose of vexation.<sup>3</sup> And, as a general rule, where the defence set up is unconscionable, and the verdict has been found according to the justice, conscience and equity of the case, a verdict for the plaintiff will not be disturbed.<sup>4</sup> (See also, *ante*, subtit. III, DISCRETION OF TRIAL COURT IN GRANTING OR REFUSING NEW TRIAL.)

(a) INCIDENTAL RELIEF.—On granting a motion for a new trial, the court may also, in its discretion, give leave to amend the pleadings by adding new counts or otherwise, or grant such other incidental relief as the parties may appear to be entitled to, or as will best promote justice between the parties.<sup>5</sup>

he should have granted it. *Woodfolk v. Tate*, 25 Mo. 597.

1. *Haynes on New Trials*, 167 a.

2. *Maynard v. Lawrence*, 26 Ga. 411; *Cannon v. Bullock*, 26 Ga. 431.

But a motion for a new trial is not always necessarily to be decided on the grounds made by the party bringing up the case. See *Ingraham v. South Carolina Ins. Co.*, 1 Treadw. Const. (S. Car.) 707; *Cowan v. Green*, 3 Murph. (N. Car.) 569.

Upon a motion for a new trial, the court may look into the evidence embodied in the statement, to ascertain whether the findings cover the material matters presented for consideration. *Riley v. Heisch*, 18 Cal. 108.

**Uncertainty as to Facts.**—Where the facts of a case are so meagre and uncertain that the supreme court cannot in justice to the parties pass upon the question raised in the pleadings, a new trial will be granted. *Jones v. Shaw*, 84 N. Car. 218.

Where the case below was not tried on its merits, by reason of uncertainty as to the proper mode of procedure, a new trial was granted, although the general decision below was approved, and the only error might have been remedied by a modification of the judgment. *Speyer v. Ihmels*, 21 Cal. 280. And see *Woodfolk v. Tate*, 25 Mo. 597.

3. *Flemming v. Gilbert*, 3 Johns. (N. Y.) 528; *Hunt v. Burrel*, 5 Johns. (N. Y.) 137; *Cady v. Fairchild*, 18 Johns. (N. Y.) 129; *Van Slyck v. Hogeboom*, 6 Johns. (N. Y.) 270; *Stephens v. Wilder*, 32 N. Y. 351. And see *Seymour v. Deyo*, 5 Cow. (N. Y.) 289; *Maybee v. Fisk*, 42 Barb. (N. Y.) 326; *Union Pacific R. Co. v. Springsteen*, 41 Kan. 724.

An erroneous judgment in favor of the plaintiff carrying costs will not be set aside and a new trial ordered if the plaintiff will elect to discontinue without costs. *Flemming v. Gilbert*, 3 Johns. (N. Y.) 528.

4. *Wilkinson v. Payne*, 4 T. Rep. (Eng.) 168; *Macrow v. Hull*, 1 Burr. (Eng.) 11; *Farewell v. Chaffey*, 1 Burr. (Eng.) 54. And see *Fletcher v. Webb*, 11 Price (Eng.) 381; *Edmonston v. Matchell*, 2 T. Rep. (Eng.) 4.

In action for penalties a new trial will not be granted on the ground that the verdict is against the weight of evidence when such verdict is in favor of the defendant. *East River Bank v. Hoyt*, 22 How. Pr. (N. Y.) 478.

Where the statement specifies many alleged errors, to the most of which no objection had been made or exception taken at the trial, and there is no merit in the rest, but does not contain any specifications of insufficiency of the evidence, or the bill of particulars, or the charge of the court, the motion is properly overruled. *Paris v. Raynor*, 76 Cal. 647.

**Disposed of Before Appeal.**—A motion for a new trial must be disposed of before the case can be settled for an appeal. *Sinclair v. Washington etc. R. Co.*, 4 MacArthur (D. C.) 13.

5. *Bradley v. Long*, 2 Strobb. (S. Car.) 160.

Where, on a motion for a new trial by one of the defendants, it appeared, as a matter of law that no recovery could be had against such defendant, the verdict should be set aside, and a nonsuit directed as to such defendant. *Fitzgerald v. Quann*, 62 How. Pr. (N. Y.) 331; s. c., 10 Abb. N. Cas. (N. Y.) 28.



(b) THE IMPOSITION OF TERMS.—A court to which an application for a new trial is made has power to impose terms upon the party applying for it as a condition of granting it, or upon the opposite party as a condition of refusing it.<sup>1</sup> Where it is sought upon the ground of surprise, newly discovered evidence or other ground, that impliedly concedes that the trial already had was without error, and the opposing party without fault, the payment of the costs of the former trial is usually required as a condition of granting a new one.<sup>2</sup> The same terms are usually imposed where the motion is made upon the ground that the verdict is against evidence, or against the weight of evidence.<sup>3</sup> But, as a

Neither erroneous rulings by a judge on a first trial of an indictment, nor unfavorable comments on the evidence, made in passing sentence, show prejudice in such sense as to require the supreme court, on granting a new trial, to direct a removal of the cause on the ground of prejudice. *State v. Bohan*, 19 Kan. 28.

1. *Stephenson v. Mansony*, 4 Ala. 317; *Walker v. Blassingame*, 17 Ala. 810; *Benedict v. Cozzens*, 4 Cal. 381; *Battelle v. Connor*, 6 Cal. 140; *Buntain v. Mosgrove*, 25 Ill. 152; *Haggin v. Christian*, 1 A. K. Marsh. (Ky.) 579; *Crew v. McCafferty*, 124 Pa. St. 200. See *Hoyt v. Murphy*, 23 Ala. 456; *Ely v. Horiuss*, 5 Dana (Ky.) 398; *Boswell v. Jones*, 1 Wash. (Va.) 322.

In *Iowa*, the question of costs, on granting new trial, is in the discretion of the court. *Wright v. Antrim*, 1 Morr. (Iowa) 258.

If the court, in granting new trials, subject the party applying to more than the costs for that term, the grounds for so doing ought to be stated. *Logan v. Gibbs*, Litt. Sel. Cas. (Ky.) 19.

Where a defendant obtained a new trial on payment of costs, and recovered judgment as in case of nonsuit, he was not entitled to costs on the application for a new trial. *Slocum v. Lansing*, 3 Den. (N. Y.) 259.

A case having been reversed and remanded, with an unconditional mandate for a new trial, it is clearly erroneous to give judgment against the party to whom it was granted, for the costs of the former trial. *Garrison v. Singleton*, 5 Dana (Ky.) 160.

2. See *Golden v. Snellen*, 54 Ind. 282; *Rountree v. Talbot*, 89 Ill. 246; *Sitzke*, 121 Ill. 30; *Bonyngie v. Waterbury*, 12 Hun (N. Y.) 534; *Tyler v. Hoornbeck*, 48 Barb. (N. Y.) 197; *Chamberlain v. Lindsay*, 1 Hun (N. Y.) 231; *Comstock*

*v. Dye*, 13 Hun (N. Y.) 113; *Siebrecht v. Webb*, 47 N. Y. Super. Ct. 557; *Bailey v. Park*, 5 Hun (N. Y.) 41; *Hoseley v. Colerick*, 3 How. Pr., N. S. (N. Y.) 169; s. c., 9 Civ. Pro. Rep. (N. Y.) 43; *People v. Genesee Circuit Judge*, 37 Mich. 281; *Haseltine v. Metcalf*, 66 Wis. 209.

New Trial as a Matter of Right.—The payment or tender of all the costs of the former trial is a peremptory and almost a universal condition of a motion for a new trial as a matter of right. *Cook Co. v. Calumet & C. Canal & Dock Co.* (Ill., 1888), 19 N. E. Rep. 46; *Rountree v. Talbot*, 89 Ill. 246; *Goulden v. Snellen*, 54 Ind. 282; *Montgomery v. Hays*, 44 Ind. 433; *Crews v. Ross*, 44 Ind. 481; *People v. Genesee Circuit Judge*, 37 Mich. 281; *Haseltine v. Metcalf*, 66 Wis. 209; *Setzke v. Setzke*, 121 Ill. 30. And an order granting a new trial may be vacated at a succeeding term if the costs are not paid. *Setzke v. Setzke*, 121 Ill. 30.

When a new trial has been granted as a matter of right, in a real action, and a second trial has been had, the supreme court will presume, where the record is silent on the subject, that the costs were paid before the granting of the new trial. *Vanduyne v. Hepner*, 45 Ind. 589.

A party in ejectment who petitions for vacation of a judgment and for a new trial, but who, for more than a year after the close of the term at which it was rendered, has failed to pay the costs, must show due diligence to sustain his excuse therefor, that the clerk had not computed the amount because of absence of the files in the hands of some unknown person. *Aholtz v. Durfee*, 21 Ill. App. 144.

3. *Buck v. Webb*, 11 N. Y. Supp. 617; *Ward v. Woodburn*, 27 Barb. (N. Y.) 346; *North v. Sargeant*, 14 Abb. Pr. (N. Y.) 223; *East River Bank v. Hoyt*,

general rule, a party injured by an erroneous ruling, or instruction of the court is entitled to a new trial, leaving the costs to abide the event.<sup>1</sup> The practice most prevalent is to regard the requirement to pay costs by a party applying for a new trial as a condition precedent,<sup>2</sup> but the validity of the order is not conditional upon such payment; the order is absolute, and the collection of the costs may be enforced by execution;<sup>3</sup> and nothing

22 How. Pr. (N. Y.) 478; *Bailey v. Park*, 5 Hun (N. Y.) 41; *Kelly v. Frazier*, 27 Hun (N. Y.) 314; *Overing v. Russell*, 28 How. (N. Y.) Pr. 151; *Bank of Utica v. Ives*, 17 Wend. (N. Y.) 501; *Brown v. Bradshaw*, 1 Duer (N. Y.) 199; *Jackson v. Thurston*, 3 Cow. (N. Y.) 342; *Peck v. Fonda etc. R. Co.*, 6 N. Y. Supp. 379; *Pound v. Roan*, 45 Wis. 129; *Schweickhart v. Stuewe*, 75 Wis. 157; *Smith v. Lander*, 48 Wis. 587; *Jones v. Chicago etc. R. Co.*, 49 Wis. 352. To the contrary, see *Johnson v. Scribner*, 6 Conn. 186.

On setting aside a report of a referee, on an appeal from a judgment entered thereon, or the verdict of a jury on an appeal from an order denying a new trial, in cases in which they are set aside as being clearly and palpably contrary to evidence, the party obtaining a new trial should not be required to pay more, in the first instance, than the costs of the former trial, and the costs of the appeal should be ordered to be costs in the cause and abide the event. *Kennedy v. Harlem R. Co.*, 3 Duer (N. Y.) 659.

1. *Fisher v. Bridges*, 4 Blackf. (Ind.) 513; *Brown v. Bradshaw*, 1 Duer (N. Y.) 199; *Goodyear v. Ogden*, 4 Hill (N. Y.) 104; *Pennell v. Wilson*, 2 Abb. Pr., N. S. (N. Y.) 466; *Wright v. Orient Mut. Ins. Co.*, 6 Bosw. (N. Y.) 269; *Delafield v. Union Ferry Co.*, 10 Bosw. (N. Y.) 216. But see *Boyden v. Moore*, 5 Mass. 365.

Where a new trial has been granted to plaintiff for misconduct of a referee, partly caused by defendant, on condition that plaintiff shall pay the costs of the reference if finally successful, the condition will be stricken out as unreasonable. *Clark v. Eldred*, 7 N. Y. Supp. 95.

2. *Chambers v. Bass*, 18 Ind. 3; *Adams v. Neeley*, 15 Ill. 380; *Ex parte Jones*, 35 Ala. 706; *Somers v. Sloan*, 18 N. J. L. 46; *Moberly v. Davar*, 5 Blackf. (Ind.) 409; *Blizzard v. Blizzard*, 40 Ind. 344; *Ex parte Dillard*, 68 Ala. 594; *Prunty v. Mitchell*, 30 Gratt. (Va.) 247.

If the judgment awarding a new trial directs the payment of costs of the first trial, without saying that the costs shall be paid before the new trial is had, it will nevertheless be considered a precedent condition. *Rixey v. Ward*, 3 Rand. (Va.) 52.

In an action to quiet title, a party may have one new trial without showing cause, upon the payment of all costs and of the damages, if the court so direct; but the payment of costs is a condition precedent to a new trial, and the court has no power to order that they shall abide the event of the suit. *Zimmerman v. Marchland*, 23 Ind. 474.

But, in *North Carolina*, in *Rogers v. Cherry*, 7 Jones L. (N. Car.) 539, it was held where a judge, in the court below, made the following order: "Verdict set aside and new trial granted on paying the costs of this court," that paying the costs was not a condition precedent to the new trial, but that the failure of the court to revoke the order during the term and to give judgment on the verdict, gave a new trial irrevocably.

Costs, generally, mean the costs of the former trial. *Carbon v. Stout*, 7 Bush (Ky.) 609.

3. *Heffner v. Scranton*, 27 Ohio St. 579; *Ex parte Beavers*, 34 Ala. 71; *Johnson v. Taylor*, 3 Smed. & M. (Miss.) 92; *Gaines v. Dailey*, 1 J. J. Marsh. (Ky.) 478.

The Texas statute provides that new trials may be granted "on such terms and conditions as the court shall direct." An order granting a new trial directed payment of witness fees "as a condition upon which" the new trial was granted. It was held, that the payment of the fees was the "terms" on which the order was made, and not a condition on performance of which it should take effect. *Fenn v. Gulf etc. R. Co.*, 76 Tex. 380.

Where a new trial was granted, on condition of the payment of all costs, on or before the first day of the next term, the order being conditional, it is null and void, and the first judgment remains in full force and effect. *Sacrest*

but absolute payment will suffice.<sup>1</sup> Taking an appeal or bringing a writ of error is a waiver of the order and a refusal to accept the terms.<sup>2</sup> In States in which the right to a new trial is considered as conditional, subject to the payment of the costs, they must be paid within the prescribed time, or, if no time is prescribed, within a reasonable time.<sup>3</sup> Other terms and conditions may be imposed besides those relative to costs—thus, the court may impose upon the successful party the alternative of accepting a reduced amount, or of submitting to a new trial;<sup>4</sup> or it may grant the new

*v. Best*, 6 Tex. 199. And see *Edwards v. Lewis*, 18 Ala. 494.

Defendant may enter rule granted to plaintiff for new trial, if plaintiff delays. *Gale v. Hoysradt*, 3 How. Pr. (N. Y.) 47.

1. *Screws v. Upshaw*, 34 Ala. 496.

The time of payment is usually fixed either by the order or by statute. See *Myers v. Lummins*, 80 Ky. 456; *Ex parte Dillard*, 68 Ala. 594; *Garman v. McFarland*, 13 Tex. 237. In case of the failure to pay within such time a subsequent payment will not revive the right to the new trial. *Ex parte Dillard*, 68 Ala. 594. But the time of payment may be enlarged or extended. *Smith v. Grover*, 74 Wis. 171.

But where the district court granted a plaintiff's motion for a new trial, upon the condition that he should pay the cost of the action within thirty days, which he failed to do, without any sufficient reason for his failure, it is error for the court to allow him further time in which to pay the costs. *Adams Express Co. v. Gregg*, 23 Kan. 376.

2. *Stephens v. Broadnax*, 5 Ala. 258; *Edwards v. Lewis*, 18 Ala. 494.

If the party in whose favor a new trial is granted upon the payment of costs is unwilling to accept the terms imposed, he should have an entry to that effect made on the minutes, or have the order annulled. Incorporating an exception to the grant of the new trial in the bill of exceptions is not a rejection of the terms imposed, but indicative rather of an intention to rely on the exception; and that failing, to comply with the order and claim the new trial under it. *Tannenbaum v. Tankersly*, 52 Ala. 489.

**Waiver of Payment.**—When the party who obtained the order paid a portion of the costs in time, but not all, but the other party, supposing that the costs had been fully paid, consented to a continuance, and also issued a subpoena for the second trial, these acts were

not a waiver of the right to object to the nonpayment. *Watts v. Green*, 30 Ind. 98. And see *Falls v. Hawthorn*, Ind. 444.

3. See *Ward v. Patterson*, 46 Pa. St. 372; *First Nat. Bank v. Brown* (Iowa, 1890), 46 N. W. Rep. 995.

But in *New Jersey* it is held that where a new trial has been granted to the plaintiff on the payment of costs, it is error for the court, at the next term, to *non pros.* the plaintiff because the costs have not been paid, and enter up judgment for the defendant on the verdict which has been set aside. *Gilliland v. Rappleyea*, 15 N. J. L. 139.

4. *Noel v. Dubuque etc. R. Co.*, 44 Iowa 293; *Sparks v. Aetna Ins. Co.*, 62 Ga. 198; *Francis v. Baker*, 11 R. I. 123; *Gregg v. San Francisco etc. R. Co.*, 59 Cal. 312; *Scott v. Gillenthal*, 9 Bosw. (N. Y.) 224; *Pendleton St. R. Co. v. Rahmann*, 22 Ohio St. 446; *Laney v. Bradford*, 4 Rich. L. (S. Car.) 1; *Holmes v. Misroon*, 1 Treadw. Const. (S. Car.) 21. But see, to the contrary, *Brown v. Morris*, 3 Bush (Ky.) 81. And in *Hallet v. Cotton*, 1 Cai. (N. Y.) 11. And in *Shutter v. Hallett*, Col. & C. Cas. (N. Y.) 330, it was held that the court would not compel the defendant to bring the amount of the verdict into court.

Where, pending defendant's motion for a new trial in an action of tort for personal injuries, plaintiff voluntarily writes off enough of the damages to bring them within the proofs, it is proper to refuse a new trial. *Central R. Co. v. Crosby*, 74 Ga. 737; *Williams v. Baltimore etc. R. Co.*, 9 W. Va. 33.

But where the court charged the jury that it could not find more than nominal damages, and the jury found substantial damages, it was held that the court could not order judgment for a nominal sum, unless plaintiff should elect to take a new trial, and then grant a new trial on his election. *Morgan v. Russell*, 71 Iowa 214.

trial on condition that it be confined to a single issue,<sup>1</sup> or refuse it on condition of the release of one of several defendants.<sup>2</sup> But it has no power to require the new trial to be had either wholly or in part on the evidence given on the previous trial,<sup>3</sup> the question apparently turning upon the reasonableness of the condition.<sup>4</sup> After conditions which are imposed are complied with, the court cannot revoke the order imposing them.<sup>5</sup>

**14. The Order.**—The order of the court on the hearing of a motion for a new trial is final, and cannot be set aside on motion unless it was inadvertently made,<sup>6</sup> and it should furnish a basis

1. *Hubbell v. Bissell*, 2 Allen (Mass.) 106.

2. *Irwin v. Riley*, 68 Ga. 605.

3. *Bissell v. Hamlin*, 3 Abb. Pr. (N. Y.) 22; *Bruce v. Davenport*, 1 App. Dec. (N. Y.) 233.

4. See *Parshall v. Conklin*, 81½ Pa. St. 487; *Hill v. Southwick*, 9 R. I. 299; *DeFord v. Urbain*, 48 Ind. 219.

On setting aside an inquest taken at the circuit, the Supreme Court of New York will not, in addition to the usual terms of relief, impose the condition that the defendant shall abandon the defence of usury, or the statute of limitations, if either of such defences has been interposed. *Allen v. Mapes*, 20 Wend. (N. Y.) 633.

The *Missouri* statute, providing that a circuit court may, after final judgment, grant a new trial "on such terms as may be just," does not authorize that court to annex to an order granting to the defendant a new trial, a condition that he give bond for the payment of any judgment afterwards rendered against him in the cause. *Dewey v. Leonhardt*, 37 Mo. App. 517.

**Time to Comply.**—Where a judge ordered a new trial, unless upon renunciation by respondent of all title to the property in controversy within a certain time, and during that time the counsel of respondent filed such renunciation on behalf of his client, upon an order holding the renunciation bad, counsel should be allowed additional time in which to secure the personal renunciation of his client. *Hill v. Printup*, 67 Ga. 731.

5. *Reiber v. Boos*, 110 Pa. St. 594. And see *Lang v. San Francisco Super. Ct.*, 71 Cal. 491; *Brooks v. Hanauer*, 22 Ark. 174; *Wells v. Melville*, 25 Tex. 337.

An order advisedly made upon an application for a new trial is conclusive, so far as the court making it is concerned. The court cannot afterwards

vacate it and decide again on the motion. *Coombs v. Hibberd*, 43 Cal. 452. And see *Metzger v. Wendler*, 35 Tex. 367.

6. *Odd Fellows' Sav. Bank v. Deuprey*, 66 Cal. 168; *Dorland v. Cunningham*, 66 Cal. 484; *Greehn v. Marker*, 67 Cal. 364; *Coombs v. Hibberd*, 43 Cal. 452; *Lang v. San Francisco Super. Ct.*, 71 Cal. 491; *State v. Templin*, 122 Ind. 235; *Brooks v. Hanauer*, 22 Ark. 174; *Wells v. Melville*, 25 Tex. 337.

In a case in the court of common pleas, in which, after verdict and before judgment, a motion was made for a new trial, the following minutes were made at different terms on the clerk's docket: "Verdict set aside and new trial granted," and "Judgment on the verdict." The court, at a subsequent term, on being satisfied by parol evidence that these minutes were erroneous and made by mistake, may cause them to be erased, and enter judgment on the verdict. *Fay v. Wenzell*, 8 Cush. (Mass.) 315.

Where a motion for a new trial has been made and refused, it is proper to refuse to entertain a similar motion afterwards made at the same term. *Wimpy v. Gaskill*, 76 Ga. 41.

**How Attacked.**—Where the jurisdiction over the subject matter and person is complete, an order erroneously granting a new trial is not void, but only voidable, and it cannot be attacked except by motion to set aside, or an appeal. *State v. Templin*, 122 Ind. 235.

**Notice of Decision.**—One does not waive his right to the statutory written notice of the decision by being in court when the decision is announced, and by requesting the adverse party to make the cost as light as possible in entering judgment. *State v. Murphy*, 19 Nev. 89. But an appearance will be considered a waiver of notice. *Barr v. White*, 2 Port. (Ala.) 342.

upon which to determine the rights of the parties in subsequent trials.<sup>1</sup>

(a) ITS EFFECT.—An order granting a new trial, as a general rule, vacates a former judgment without any special order to set it aside,<sup>2</sup> and sweeps away the verdict and leaves the case as though no trial had been had.<sup>3</sup> But where the new trial is granted conditionally, the judgment is not absolutely vacated until the conditions are performed;<sup>4</sup> and that the prevailing party has, with-

Failure to give notice during the term, as required by the Indiana revised statutes providing that the party obtaining a new trial shall give the opposite party ten days' notice thereof before the term next succeeding the granting of the application, does not authorize the court to set aside the previous order granting a new trial; that provision being intended only to prevent the bringing of the case on for trial at the same term at which the new trial is granted. *Stanley v. Holliday*, 113 Ind. 525.

1. See *Marietta v. Emerson*, 5 Ohio St. 288; *State v. Edwards*, 35 Mo. App. 680; *Borkheim v. Fireman's Fund Ins. Co.*, 38 Cal. 505.

But a judgment granting a new trial is not avoided by the failure of the judge allowing it "to enter on the minutes of the court his reasons for the same." *McDaniel v. Strohecker*, 19 Ga. 432; *State v. Edwards*, 35 Mo. App. 680.

The Colorado statute making it the duty of the court to state in writing the grounds upon which it refuses a motion for a new trial is directory merely. *Coleman v. Davis*, 13 Colo. 98.

2. *Maxwell v. Campbell*, 45 Ind. 361; *Fleming v. Lord*, 1 Root (Conn.) 214; *Edwards v. Edwards*, 22 Ill. 121; *Martin v. Matfield*, 49 Cal. 45; *Thompson v. Smith*, 28 Cal. 534; *Walden v. Murdock*, 23 Cal. 549; *State v. Twenty-second Dist. Judge*, 35 La. An. 1104; *Low v. Fox*, 56 Iowa 221; *Randolph v. McCain*, 34 Ark. 696; *Patterson v. Loughridge*, 46 N. J. L. 138; *Louisville Rock & Lime Co. v. Kerr*, 78 Ky. 12.

The rule is otherwise where the motion is to set aside an order overruling a motion for a new trial. *Louisville Rock & Lime Co. v. Kerr*, 78 Ky. 12.

An appeal cannot be taken from a judgment after a motion for a new trial has been granted. *Kower v. Gluck*, 33 Cal. 407.

Where the record of a judgment in the circuit court has been sent to the supreme court, and the defendant in error

has there entered his appearance, and the judgment has been reversed, and the cause remanded for a new trial, the defendant in error cannot object that the first judgment is in force and unreversed, because a writ of error was not sued out. *Evans v. Eaton*, 3 Wash. (Va.) 443.

A new trial was ordered, the new trial had and judgment rendered. Afterwards, the judgment ordering a new trial was reversed. *Held*, that the judgment on the new trial was thereby vacated, and that the successful party could have no fruit thereof. *Bigby v. Powell*, 15 Ga. 91.

3. *McCrum v. Corby*, 15 Kan. 112; *State v. McCord*, 8 Kan. 232; *Donahue v. Klassner*, 22 Mich. 252; *Ex parte Bradley*, 48 Ind. 548; *Gordon v. Downey*, 1 Gill (Md.) 41; *San Antonio v. Dickman*, 34 Tex. 647.

Where a case has been tried and a verdict returned for the plaintiff, which has not been set aside, and then there has been another trial and a verdict for the defendant, the court will not set aside the second verdict and render judgment on the first, if the motion for judgment is not made until after the second verdict is returned. *Knowles v. Dow*, 22 N. H. 387.

But where a new trial is improperly ordered, and the second verdict is set aside, judgment should be entered on the first verdict. *Brevard v. Graham*, 2 Bibb (Ky.) 177.

**Conditional Verdict.**—Where a conditional verdict is rendered in favor of the plaintiff, a rule for a new trial obtained by him will postpone the performance of the condition, the payment of money, for example, until the rule is disposed of. *Jones v. Backus*, 114 Pa. St. 120.

**In Criminal Cases.**—A *remittitur* ordering a new trial need not expressly set aside the verdict and judgment. *State v. Stephens*, 13 S. Car. 285.

4. *People v. Detroit Sup. Ct. Judge*, 41 Mich. 31.

out notice of the intention to apply for a new trial, disposed of the subject matter of the suit is no ground for vacating the order granting a new trial.<sup>1</sup>

(1) *Where Whole Case Is Opened*.—Where all the issues are essential and each touches the merits of the controversy, the order granting a new trial must be general, reopening all questions formerly controverted, or which can be controverted,<sup>2</sup> and in the absence of any showing to the contrary a new trial will be presumed to have been awarded on the merits reopening the whole case.<sup>3</sup>

(2) *When Part Only Is Opened*.—Where, upon the first trial, all the material issues were correctly found, and the error does not touch the merits, a partial new trial to correct that error may be

1. *Brown v. Cody*, 115 Ind. 484.

The title of a purchaser in good faith will not, however, be allowed to be disturbed by the motion. See *Union Bank v. Ames*, 37 Iowa 672.

2. *Merony v. McIntyre*, 82 N. Car. 103; *Holmes v. Godwin*, 71 N. Car. 306; *Isler v. Koonce*, 83 N. Car. 55; *Jones v. Swepson*, 94 N. Car. 700; *Gordon v. Downey*, 1 Gill (Md.) 41; *San Antonio v. Dickman*, 34 Tex. 647; *Foster v. Browning*, 4 R. I. 47; *Woods v. Jones*, 56 Ga. 520.

This applies equally to cases where the facts are to be passed on by the judge instead of a jury. *Jones v. Swepson*, 94 N. Car. 700. And a new trial in ejectment does not differ in this respect from any other, though under a judgment entered on a verdict on the first trial, the plaintiff has obtained restitution. *Donahue v. Klassnen*, 22 Mich. 252.

Plaintiff's petition contained two counts. He recovered on each, and damages were separately assessed by the verdict. Judgment, pursuant to statute, was rendered for the aggregate amount. On appeal the judgment was reversed for error on the trial of the issues made by the first count, and the cause was remanded for further proceedings. It was held that defendant was entitled to a new trial on both counts. *Needles v. Burke*, 27 Mo. App. 211.

**Criminal Cases**.—When a person indicted for murder in the first degree, on the trial was found guilty of murder in the second degree, the judgment was reversed on appeal by the defendant; the cause was again tried, resulting in a verdict of guilty of manslaughter, and the defendant again, at his request, was granted a new trial; he took the

new trial as to the whole cause, and might be tried again for the higher grades of the crime, of which he was not convicted, as well as for the lower grades, of which he was convicted. *Ex parte Bradley*, 48 Ind. 548; *State v. Behimer*, 20 Ohio St. 572. To the contrary *State v. Martin*, 30 Wis. 216.

**Steps Taken for Purpose of First Trial**.—Defendant, upon a trial, demurred to the evidence, judgment was rendered against him, and the judgment was reversed by the appellate court. *Held*, that upon a retrial, defendant was entitled to contest the evidence. The demurrer was tendered for the occasion of the first trial only. *Mitchell v. Bannon*, 10 Ill. App. 340.

Where the court refused a new trial upon plaintiff's stipulating to take judgment on one only of his two causes of action, and plaintiff so stipulated, judgment was entered, defendant appealed, and the appellate court reversed the judgment and ordered a new trial, plaintiff can try the issues raised on each cause of action. *Crim v. Starkweather*, 32 Hun (N. Y.) 350. And see *Hays v. Hynds*, 28 Ind. 531.

**Reversal on Appeal**.—The same rule applies to a case sent back for new trial upon reversal on appeal. *Ex parte Bradley*, 48 Ind. 548.

3. *Brenner v. Coerber*, 42 Ill. 497; *Hidden v. Jordan*, 28 Cal. 301; *Chapin v. Thompson*, 80 N. Y. 275.

An *ex officio* order for a new trial, not being restricted in its terms to the parties defendants who filed the motion for a new trial, will be held to have opened the case as to all the defendants, and the subsequent signing of the judgment as to one of the defendants who did not join in the motion was without effect, and no execution could issue

awarded,<sup>1</sup> and where an issue of fact has been awarded and tried, a new trial may be granted either as to the facts, or as to the conclusions of the court upon the facts.<sup>2</sup> In some States an action may be severed, and a new trial granted as to one or more of several parties and denied as to others.<sup>3</sup> If the new trial is granted for the purpose of retrying a portion of the issues only, the evidence must be confined to those issues.<sup>4</sup>

**XII. THE NEW TRIAL.**--There is, with a very few exceptions, no difference in the procedure on the second trial from that of the first.<sup>5</sup> There is no objection to the trial being had before the

thereon. *Converse v. Bloom*, 20 La. An. 555.

In an action on an administrator's bond, where several breaches have been assigned, issues joined thereon, and findings made, an order granting a new trial as to one issue has the legal effect of granting a new trial as to all. *State v. Templin*, 122 Ind. 235.

1. *Holmes v. Godwin*, 71 N. Car. 306; *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397; *Sprague v. Childs*, 16 Ohio St. 107; *San Diego etc. Co. v. Neale*, 78 Cal. 63; *Williams v. Henshaw*, 12 Pick. (Mass.) 378; *Winn v. Columbian Ins. Co.*, 12 Pick. (Mass.) 279; *Robbins v. Townsend*, 20 Pick. (Mass.) 345; *Bardwell v. Conway Mut. F. Ins. Co.*, 118 Mass. 465; *Dawson v. Wisner*, 11 Iowa 6; *Woodward v. Horst*, 10 Iowa 120; *Pratt v. Boston Heel etc. Co.*, 134 Mass. 300; *Lisbon v. Lyman*, 49 N. H. 553.

But see *Johnson v. McCulloch*, 89 Ind. 270; *Morris v. State*, 1 Blackf. (Ind.) 37, holding that a new trial cannot be granted as to part of a case.

In *Nevada*, the court may retry a part only of a case, as, for instance, that part relating to property rights in an action for a divorce, and for a separation of property. *Lake v. Bender*, 18 Nev. 361.

When exceptions are sustained on the sole ground of an error in the rejection of evidence, which affected the question of damages only, a new trial will be confined to the assessment of damages. *Kent v. Whitney*, 9 Allen (Mass.) 62; *Winn v. Columbian Ins. Co.*, 12 Pick. (Mass.) 279; *Haley v. Dorchester Mut. F. Ins. Co.*, 12 Gray (Mass.) 545.

This court, under the Iowa statute, on finding that an error occurred only in an allowance of the defendant's cross-action, will order a new trial to extend thereto, without disturbing the judg-

ment establishing the plaintiff's claim. *McAfferty v. Hale*, 24 Iowa 355.

**Waiver of Condition.**--If a motion for a new trial is granted for the purpose of submitting to another jury a single specified question of fact, the party who obtained the verdict may waive the condition in his favor; and if, at the new trial, he puts his case upon another ground, the whole case is thereby opened to the other party. *Seccomb v. Provincial Ins. Co.*, 4 Allen (Mass.) 152.

In *Alabama* it is held that after a trial of the question of right of property in two slaves, in one action, the court cannot grant a new trial as to the property in one slave, and refuse it as to the other. *Dale v. Mosely*, 4 Stew. & P. (Ala.) 371.

2. See *Zaleski v. Clark*, 45 Conn. 397. But see *Wilcox v. Hock*, 62 Barb. (N. Y.) 509.

3. *Seborn v. State*, 51 Ga. 164; *Gordon v. Pitt*, 3 Iowa 385.

If, in a civil action against two, a verdict is rendered in favor of one and against the other, a new trial may be granted as to the latter, without disturbing the verdict so far as it affects the former. *Bicknell v. Dorion*, 16 Pick. (Mass.) 478.

4. *Brenner v. Coerber*, 42 Ill. 497; *Kent v. Whitney*, 9 Allen (Mass.) 62; *Lake v. Bender*, 18 Nev. 361; *Bardwell v. Conway Mut. F. Ins. Co.*, 118 Mass. 465; *Amherst Bank v. Root*, 2 Metc. (Mass.) 542; *Pratt v. Boston Heel etc. Co.*, 134 Mass. 300.

Where the error was in the admission of improper evidence to prove one fact, the court may confine the evidence in the new trial to that point. *Wayland v. Ware*, 109 Mass. 248; *Warshauer v. Jones*, 117 Mass. 345; *Robbins v. Townsend*, 20 Pick. (Mass.) 345.

5. See 2 Whit. Pr. 451; *Brenner v.*

same judge,<sup>1</sup> but none of the jurors of the former panel are again eligible in the same cause,<sup>2</sup> and reference to rulings made or opinions expressed on the former trial is improper.<sup>3</sup> A ruling or waiver or other act is considered as having been made for the purpose of the former trial only,<sup>4</sup> though an absolute and unqualified admission can be retracted only by leave of the court;<sup>5</sup> and the defendant cannot for the first time on the second trial, interpose an objection to the parties plaintiff.<sup>6</sup>

**XIII. SUBSEQUENT NEW TRIALS.**—In the absence of statutory enactment it seems that there is practically no limit to the number of successive new trials that may be had upon the proper grounds.<sup>7</sup> But after two concurring verdicts upon the facts, the court will rarely set the second aside, unless satisfied that it is against right, or

Coerber, 42 Ill. 497; Walton v. Bostick, 1 Brev. (S. Car.) 162; Hudson v. Strickland, 49 Miss. 591; Dows v. Swett, 127 Mass. 364; Paul v. Luttrell, 1 Colo. 491; O'Neill v. Brown, 61 Tex. 34. And see, *ante* tit. JURY AND JURY TRIAL, 12 Am. & Eng. Encyc. of Law 318.

On the reversal of a judgment and a second trial, the parties may introduce new proofs in support of the complaint or the defence, as the case may be, where as to the legal effect of the facts thus sought to be established there was no adjudication on the appeal. Ryan v. Tomlinson, 39 Cal. 639.

**Time.**—Provisions have been adopted in some States requiring the new trial to be brought on within a specified time. See Stockton v. Coleman, 42 Ind. 281; Jackson v. Meyers, 3 Johns. (N. Y.) 541; Walsh v. Dart, 19 Wis. 433.

1. Fry v. Bennett, 3 Bosw. (N. Y.) 200. And see Pierce v. Delamater, 1 N. G. 17.

In case of the reversal of a judgment for error in a criminal case, a new trial must be had before the court where the original conviction was had, although no special order for that purpose is entered by the supreme court. Kazer's Case, 5 Ohio 544.

2. See Argent v. Darrell, 2 Salk. (Eng.) 648; Rex v. Mawbrey, 6 T. Rep. (Eng.) 619; 4 Chitty's Gen. Pr. 93.

3. Crawford v. Morris, 5 Gratt. (Va.) 90.

A "statement of a case" used upon motion for a new trial is not admissible upon the second trial to prove a variance between the testimony of the plaintiff on the first trial and his testimony on the second trial. Ferraris v. Kyle, 19 Nev. 435.

4. Gott v. Detroit Sup. Ct. Judge, 42 Mich. 625; Dows v. Sweet, 127 Mass.

364; Mitchell v. Bannon, 10 Ill. App. 340; Crim v. Starkweather, 32 Hun (N. Y.) 350; Hays v. Hynds, 28 Ind. 531.

**Waiver of Objections to New Trial.**—If, after a new trial is awarded, the plaintiff amends his declaration and changes the nature of his demand, he thereby waives all exceptions to the new trial. Carrico v. Lilly, 3 A. K. Marsh. (Ky.) 398.

Defendants who have claimed and been allowed the advantages of a second trial which had been formerly demanded by but one of them, are precluded from objecting to the regularity of the steps taken to obtain it. Cooke v. Altwater, 21 Ohio St. 628.

5. Owen v. Cawley, 36 N. Y. 600.

6. Jones v. Foster, 67 Wis. 296. See also Whittaker v. West Boylston, 97 Mass. 273; Ashbey v. Ashbey, 38 La. An. 902.

**May Proceed Notwithstanding Motion for Reargument.**—Where, after order for new trial, defendant has noticed the cause for trial, proceedings of plaintiff, on motion for reargument, do not stand in the way of defendant's right to proceed under the order. VanGelder v. Hellenbeck, 2 N. Y. Supp. 252.

7. See State v. Horner, 86 Mo. 71; State v. Edwards, 35 Mo. App. 680; Wilson v. Gordon, 20 Tex. 568; Monroe etc. University v. Brodfield, 30 Ga. 1; Chambers v. Collier, 4 Ga. 193; Wilkie v. Roosevelt, 3 Johns. Cas. (N. Y.) 206; Morgan v. Morgan, 15 Ga. 288; Pensacola etc. R. Co. v. Nash, 12 Fla. 497; State v. Edwards, 36 Mo. App. 425; State v. Adams, 12 Mo. App. 436; Wright v. Adams, 12 Mo. App. 376; Parker v. Ansell, 2 W. Bla. (Eng.) 963; Goodwin v. Gibbons, 4 Burr. (Eng.) 2108; Tindal v. Brown, 1 T. Rep. (Eng.) 167.



that a rule of law has been violated;<sup>1</sup> and after three concurring verdicts a new trial will be granted only upon a very strong case and where justice plainly demands it.<sup>2</sup> So, where the new trial was had upon the merits, and the second verdict is in favor of the party who was first unsuccessful, a new trial will not be granted except for the most controlling reasons.<sup>3</sup> Many of the States, however, have limited the number of successive new trials that may be had

In trespass to try title, where the court of appeals decides the question of location and sends the case back for a new trial, it will, upon the same evidence, continue to send it back until a verdict is rendered in conformity with the decision of the court. *South Carolina Bank v. Bobo*, 13 Rich. 4 (S. Car.) 47.

1. *VanBlarcom v. Kip*, 26 N. J. L. 351; *Dorsett v. Frith*, 25 Ga. 537. *Keble v. Arthurs*, 3 Binn. (Pa.) 26; *Commissioners of Berks v. Ross*, 3 Binn. (Pa.) 520; *Play v. Briggs*, 2 Nott & M. (S. Car.) 184; *Ga. Dec. 82*; *Ross v. Ross*, 5 B. Mon. (Ky.) 20; *Cumming v. Fryer*, *Dudley* (Ga.) 182; *Munn v. Perkins*, 1 Smed. & M. (Miss.) 412; *Talcot v. Commercial Ins. Co.*, 2 Johns. (N. Y.) 467; *Hill v. Deaver*, 7 Mo. 57; *Humbert v. Eckert*, 7 Mo. 259; *Hines v. Driver*, 100 Ind. 315; *Monroe etc. University v. Broadfield*, 30 Ga. 1; *Chambers v. Coller*, 4 Ga. 193; *Wilkie v. Roosevelt*, 3 Johns. Cas. (N. Y.) 206; *Morgan v. Morgan*, 15 Ga. 288. But see *Stamps v. Bush*, 7 How. (Miss.) 255; *The Commissioners v. James, Cam. & N.* (N. Car.) 566; *Frost v. Brown*, 2 Bay (S. Car.) 133.

Where a cause has been twice tried by the same judge with the same result, his refusal to grant a third new trial will not be questioned by the supreme court. *Hollenbeck v. Marshalltown*, 62 Iowa 21.

If on conflicting testimony there have been two concurring verdicts, the first of which was set aside as against the weight of evidence, a second new trial ought not to be granted on the same ground, unless there be an offer to produce new testimony. *Milliken v. Ross*, 4 Woods (N. Y.) 69.

Upon a bill of injunction against a judgment, a new trial was granted at law, which resulted in a verdict for the complainant, but the judge certified that it was against evidence. Another trial, directed, resulted as before, and the judge certified up all the evidence, from which it appeared that the

merits of the case were against the complainant, whereupon another trial was not ordered, but the injunction was dissolved and the bill dismissed. *Ruffners v. Barrett*, 6 Munf. (Va.) 207.

**Scope of the Inquiry.**—On granting a second trial the appellate court will not review the action of the court below in granting the first. *Pendleton St. R. Co. v. Rahmann*, 22 Ohio St. 1. And see *Earle v. Peterson*, 67 Ind. 503.

2. *Wilson v. Gordon*, 20 Tex. 568; *Wright v. Adams*, 12 Mo. App. 376; *Wolbrecht v. Baumgarten*, 26 Ill. 291; *Rains v. Hood*, 23 Tex. 555; *Keans v. Jones*, 77 Ga. 90. And see *Fowler v. Aetna F. Ins. Co.*, 7 Wend. (N. Y.) 270; *Haring v. New York etc. R. Co.*, 13 Barb. (N. Y.) 9; *Gilligan v. N. Y. etc. R. Co.*, 1 E. D. Smith (N. Y.) 453; *Ferguson v. Ferguson*, 7 How. Pr. (N. Y.) 217.

The court will not, in the exercise of its discretion, grant a third trial of an action to recover possession of lands to a party, who upon the two previous trials has lost his case by overlooking a point of law, or conceding a fact, or by omitting to seek a remedy by an appeal from an erroneous ruling on an unimportant question of evidence, unless he is shown to have been thrown off his guard. The fact that the defendant, in another cause tried subsequently, succeeded by raising the objections which were not raised in the present case, is not, necessarily, ground for granting the application. *Wright v. Millbank*, 9 Bosw. (N. Y.) 672.

Where three new trials were granted each resulting in a verdict for the plaintiff, in an action for personal injuries chargeable to negligence, to order another trial is reversible error. *Hazzard v. Savannah*, 77 Ga. 54.

3. *Mason v. Bascom*, 3 B. Mon. (Ky.) 269. See *Parker v. Ansell*, 2 W. Bla. (Eng.) 663; *Goodwin v. Gibbons*, 4 Burr. (Eng.) 2108.

**In Equity**, when one verdict goes one way and the other the other way, the court will usually order a third trial

by statute, two being the number generally adopted.<sup>1</sup> These statutes are not, as a general rule, allowed to operate as a restriction upon the power of an appellate court to reverse a judgment and send the case back for a new trial any number of times,<sup>2</sup> and

which will be regarded as conclusive. Danl. Ch. Pr. (5th ed.) 1125, *citing* Wyatt's Pr. 263.

1. See *Silsbe v. Lucas*, 53 Ill. 479; *Stanberry v. Moore*, 56 Ill. 472; *Charles v. Malott*, 65 Ind. 184; *Judah v. Vincennes University*, 23 Ind. 273; *Carmichael v. Geary*, 27 Ind. 362; *Shirts v. Irons*, 47 Ind. 445; *Roberts v. Robeson*, 22 Ind. 456; *Bowers v. Ross*, 55 Miss. 213; *Ray v. McCary*, 26 Miss. 404; *Thornton v. West Feliciana R. Co.*, 29 Miss. 143; *Wildy v. Bonney*, 35 Miss. 77; *Garnett v. Kirkman*, 33 Miss. 389; *Humbert v. Eckert*, 7 Mo. 259; *Boyce v. Smith*, 16 Mo. 317; *Harrison v. Cachelin*, 23 Mo. 117; *Wilson v. Greer*, 7 Humph. (Tenn.) 513; *Trott v. West*, 10 Yerg. (Tenn.) 500; 1 Meigs (Tenn.) 163; *Turner v. Ross*, 1 Humph. (Tenn.) 16; *Ferrell v. Alder*, 2 Swan. (Tenn.) 77; *East Tennessee etc. R. Co. v. Hackney*, 1 Head (Tenn.) 169; *Knoxville Iron Co. v. Dobson*, 15 Lea (Tenn.) 409; *Williams v. Ewart*, 29 W. Va. 659; *Watterson v. Moore*, 23 W. Va. 404; *Louisville etc. R. Co. v. Woodson*, 134 U. S. 614; *Equator Min. etc. Co. v. Hall*, 106 U. S. 86.

The provision of Indiana Code, which declares that not more than two new trials shall be granted to the same party in the same cause, means that when three juries have concurred in finding the matters actually in litigation against a party, the courts shall not disturb the verdict on his application. *Judah v. Vincennes University*, 23 Ind. 273.

**Restriction on Common-law Right.**—A statute which limits the number of new trials to be granted to the same party deprives the court of its common-law right to grant a new trial upon its own motion, where the verdict was in due form and responsive to the issues. *State v. Adams*, 12 Mo. App. 436.

Under the Missouri statute, providing that "only one new trial shall be allowed to either party: *First*, where the triers of the fact have erred in matter of law; *second*, where the jury shall be guilty of misbehavior," there is no limit to the number of new trials which may be granted for errors in giving or refusing instructions, or in admitting or excluding evidence. *State v. Edwards*, 35 Mo. App. 680.

The addition of new counts after two new trials have been granted (particularly when the cause of action remains the same), does not take the case out of Tennessee act that "not more than two new trials shall be granted to the same party, in the same cause at law, or upon the trial of an issue of fact in equity." *East Tennessee etc. R. Co. v. Hackney*, 1 Head (Tenn.) 169.

**Divorce and Real Action.**—Where, as in *Minnesota*, the statute gives the right to a second trial in an "action for the recovery of real property," a second trial may be claimed of that part of a divorce suit involving the title and right to the possession of land. *Schmitt v. Schmitt*, 32 Minn. 130.

In *Texas*, errors of law and misconduct of the jury are excepted, and that the jury have been misled by the charge of the court is held to be error of law. *Rains v. Hood*, 23 Tex. 555; *Austin v. Falk*, 26 Tex. 127. So, that the verdict is without evidence to support it. *Gibson v. Hill*, 23 Tex. 77; *Randall v. Collins*, 58 Tex. 231.

2. *Stanberry v. Moore*, 56 Ill. 472; *Dennison v. Genesee Circuit Judge*, 37 Mich. 285; *Louisville etc. R. Co. v. Woodson*, 134 U. S. 614; *Wildy v. Bonney*, 35 Miss. 77; *Garnett v. Kirkman*, 33 Miss. 389; *Boyce v. Smith*, 16 Mo. 317; *Harrison v. Cachelin*, 23 Mo. 117; *Caruthers v. Crockett*, 7 Lea (Tenn.) 91; *Wilson v. Greer*, 7 Humph. (Tenn.) 513; *Trott v. West*, 10 Yerg. (Tenn.) 500; 1 Meigs (Tenn.) 163; *Ferrell v. Alder*, 2 Swan. (Tenn.) 77; *Burton v. Gray*, 10 Lea (Tenn.) 580; *East Tennessee etc. Co. v. Hackney*, 1 Head (Tenn.) 169; *Turner v. Ross*, 1 Humph. (Tenn.) 16. But see, to the contrary, *Carmichael v. Geary*, 27 Ind. 362; *Knoxville Iron Co. v. Dobson*, 15 Lea (Tenn.) 409; *Watterson v. Moore*, 23 W. Va. 404.

In *Shirts v. Irons*, 47 Ind. 445, it was held that a statute which allows the granting of new trials for specified causes, and provides that not more than two new trials shall be granted to the same party in the same cause, should not be construed as restricting the power of the supreme court to grant new trials repeatedly for errors of law committed in the cause. The true meaning is, that

they apply only when a new trial is had, and not to a case of nonsuit.<sup>1</sup> Where a judgment is reversed on error and remanded for further proceedings, it is not to be counted as a new trial for the purpose of restricting the number which may be granted by the court below.<sup>2</sup>

#### XIV. APPEAL FROM ORDERS GRANTING OR DENYING NEW TRIALS—1.

**When Appealable.**—At common law and in some of the States, decisions of the trial court upon a motion for a new trial are not appealable;<sup>3</sup> and in others the order refusing to grant a new trial

where two new trials have been granted in the same cause to the same party, either by the court below or the supreme court, exclusively for any of the reasons specified in the act as causes for a new trial, another new trial cannot be granted to the same party in such cause for any of the reasons specified. And see also *Silsbe v. Lucas*, 53 Ill. 479.

In *West Virginia*, there are no exceptions to the provisions of code, that not more than two new trials shall be granted to the same party in the same case. But if, on the face of the record, it appears that a verdict is void, and that no judgment could at common law be properly entered upon it, as, for instance, because it was too uncertain, ambiguous or defective, the court may declare such a verdict void, and direct a new trial, without regard to the number of new trials which may have been granted to the same party in the same case. *Williams v. Ewart*, 29 W. Va. 659.

1. *People v. St. Clair Circuit Judge*, 37 Mich. 131.

2. *Burton v. Brashear*, 3 A. K. Marsh. (Ky.) 276. And see *Beckman v. Richardson*, 28 Kan. 648.

Under statutory restrictions not limiting the number of new trials to be granted for erroneous rulings on questions of law, a new trial granted because of the admission of improper evidence is not to be counted in determining the power of the court to grant a subsequent new trial. *State v. Edwards*, 36 Mo. App. 425.

**For Different Causes.**—Section 352 of the Practice act of Indiana, providing that "not more than two new trials shall be granted to the same party in the same cause," does not apply to a case where a party has twice had a new trial, once for an erroneous ruling upon a demurrer to a pleading, and again for other reasons. *Charles v. Malott*, 65 Ind. 184.

3. See *Kinney v. Beverly*, 2 Hen. & M. (Va.) 327; *Burd v. Dansdale*, 2 Binn.

(Pa.) 90; *Sidwell v. Ibbins*, 1 P. & W. (Pa.) 383; *Miller v. Baker*, 20 Pick. (Mass.) 285; *Final v. Backus*, 18 Mich. 218; *Kearney v. Snodgrass*, 12 Oreg. 311; *McBride v. Northern etc. Pac. R. Co. (Oreg.)*, 23 Pac. Rep. 814; *Brooklyn v. Patchen*, 8 Wend. (N. Y.) 47; *Chase v. Davis*, 7 Vt. 476; *Durant v. Atkinson*, 2 Bailey (S. Car.) 18; *M'Lanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 170; *Gray v. Bridge*, 11 Pick. (Mass.) 189; *Hudson v. Williamson*, Treadw. (S. Car.) Const. 360; *Lester v. State*, 11 Conn. 415; *White v. Trinity Church*, 5 Conn. 187; *Calhoun v. M'Means*, 1 Nott & M. (S. Car.) 422; *Fennell v. Patrick*, 3 Stew. & P. (Ala.) 244; *Barr v. White*, 2 Port. (Ala.) 342; *Sawyer v. Stephenson*, 1 Ill. 24; *Cornelius v. Boucher*, 1 Ill. 32; *Howser v. Commonwealth*, 51 Pa. St. 332; *Laber v. Cooper*, 7 Wall. (U. S.) 565; *Pomeroy v. Bank of Indiana*, 1 Wall. (U. S.) 592; *Blunt v. Smith*, 7 Wheat. (U. S.) 248; *Pennsylvania Min. Co. v. Brady*, 14 Mich. 260; *Lindsey v. Lee*, 1 Dev. L. (N. Car.) 464; *Burkholder v. Stahl*, 58 Pa. St. 371; *Final v. Backus*, 18 Mich. 218; *United States v. Wood*, 1 McArthur (D. C.) 241.

The supreme court will not revise the decision of a matter which rests in the legal discretion of the court below. *Sanford Mfg. Co. v. Wiggin*, 14 N. H. 441.

A petition for a new trial is an appeal to the discretion of the court, and, in the exercise of that discretion, they are supreme, so long as they keep within the limits of their authority. Their proceedings, when of this character, are not subject to be revised or controlled by writ of error, *certiorari* or appeal. If, indeed, they transcend those limits, and attempt to exercise a discretionary power, which they do not possess, their decision may be set aside for that reason. If, therefore, they grant a new trial, their decision upon the merits is not subject to a revision; yet, if they

is not appealable where the motion is addressed to the discretion of the trial judge, and his decision rests upon questions of fact.<sup>1</sup>

grant a new trial, in a case where they had no legal authority to do so, it is error. *Houghton v. Slack*, 10 Vt. 522.

In *United States courts* the granting or refusal of a motion for a new trial is always addressed to the discretion of the court, and cannot be reviewed by an appellate court. *Henderson v. Moore*, 5 Cranch (U. S.) 11; *Blunt v. Smith*, 7 Wheat. (U. S.) 248; *M'Lanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 170; *United States v. Buford*, 3 Pet. (U. S.) 12; *Life & Fire Ins. Co. v. Willson*, 8 Pet. (U. S.) 291; *Doswell v. De La Lanzo*, 20 How. (U. S.) 29; *Warner v. Norton*, 20 How. (U. S.) 448; *Pomeroy v. Bank of Indiana*, 1 Wall. (U. S.) 592; *Freeborn v. Smith*, 2 Wall. (U. S.) 160; *Laber v. Cooper*, 7 Wall. (U. S.) 565; *Ewing v. Howard*, 7 Wall. (U. S.) 499; *Home Ins. Co. v. Parton*, 13 Wall. (U. S.) 603; *Erskine v. Hohnbach*, 14 Wall. (U. S.) 613; *Republican R. Bridge Co. v. Kansas Bas. R. Co.*, 92 U. S. 315; *Cambuston v. United States*, 95 U. S. 285; *Young v. United States*, 95 U. S. 641; *Kerr v. Clampitt*, 95 U. S. 188; *San Antonio v. Mehaffy*, 96 U. S. 312; *Newcomb v. Wood*, 97 U. S. 581; *Kansas Pac. R. Co. v. Twombly*, 100 U. S. 78; *Boogher v. New York L. Ins. Co.*, 103 U. S. 90; *Jones v. Buckell*, 104 Ins. 554; *Embry v. Palmer*, 107 U. S. 3; *Terre Haute & Ind. R. Co. v. Struble*, 109 U. S. 381; *Missouri Pac. R. Co. v. Chicago etc. Co.*, 132 U. S. 191.

But the *United States Rev. Stats.*, § 804, relating to the District of Columbia, empowering a trial judge in his discretion to entertain motions for new trials, upon exceptions taken at the trial, do not limit the cases in which an appeal may be taken from his decision, on such motions, to the three cases enumerated. Construing that section in connection with section 772, giving an appeal from special to general term from any order, judgment, or decree, "if the same involved the merits of the action or proceeding," rulings on motions for new trials based upon other grounds, such as that the verdict is against the weight of evidence, are equally appealable as are those enumerated in section 804. *Inland etc. Coasting Co. v. Hall*, 124 U. S. 121.

1. *Merritt v. Morse*, 113 Mass. 271; *Lowell Gas Light Co. v. Bean*, 1 Allen

(Mass.) 274; *Doyle v. Dixon*, 97 Mass. 208; *Green v. Farlow*, 138 Mass. 146; *State v. Miller*, 1 Dev. & B. (N. Car.) 500; *Moore v. Edminston*, 70 N. Car. 471; *Rice v. Gashire*, 13 Cal. 54; *Hoensby v. South Carolina R. Co.*, 26 S. Car. 187; *Munden v. Casey*, 93 N. Car. 97; *Agnew v. Adams*, 26 S. Car. 101; *Long v. Gantley*, 4 Dev. & B., L. (N. Car.) 313; *Hilliard v. Carr*, 6 Ala. 557.

An appeal will not lie from an order granting or refusing a new trial, where no question of law is involved. *Thomas v. Myers*, 87 N. Car. 31; *Braid v. Lukins*, 95 N. Car. 123.

No exception lies to a decision of the court of common pleas, overruling a motion made for a new trial on the ground of the alleged incompetency of a juror by reason of interest. *Kennicutt v. Stockwell*, 8 Cush. (Mass.) 73.

There can be no appeal to the supreme court from an order denying a new trial. Nor can the notice of an appeal from such an order be amended so as to embrace an appeal from the final judgment. *Stevens v. Gale*, 2 Dak. 370.

Whether a verdict is against the weight of the evidence is a matter solely to be determined by the judge trying the cause, and the question of a new trial on that ground must be conclusively decided by him. *Boykin v. Perry*, 4 Jones L. (N. Car.) 325.

But in *Connecticut*, while a petition for a new trial is addressed to the discretion of the trial court, yet the exercise of that discretion is reviewable by the supreme court of errors. *Husted v. Mead*, 58 Conn. 55.

An order granting a new trial on the ground of newly discovered evidence, surprise, misconduct of juries, or the like, has always been considered as addressed to the discretion of the court, and no appeal lies from the decision. *Harris v. Burdett*, 73 (N. Y.) 136; *Selden v. Delaware etc. Canal Co.*, 29 N. Y. 634; *Wavel v. Wiles*, 24 N. Y. 635; *Lawrence v. Ely*, 38 N. Y. 42; *Smith v. Platt*, 96 N. Y. 635; *Williams v. Montgomery*, 60 N. Y. 648; *Dalrymple v. Hannum*, 54 N. Y. 654; *Meltzer v. Doll*, 91 N. Y. 365; *Hand v. Dorchester*, 43 Hun (N. Y.) 33. See also *Farley v. Lyddy*, 8 Daly (N. Y.) 514. Upon an appeal from an order grant-

While the foregoing proposition is equally true of an order granting a new trial,<sup>1</sup> yet the courts in many States go much farther, and refuse to review an order granting a new trial altogether:<sup>2</sup> assigning as reasons for this course: First, that the order is not final, and, therefore, not appealable;<sup>3</sup> and, secondly, that the order

ing a new trial the judgment cannot be reversed unless the case repels the inference that the court granting the new trial may not have differed from the original court upon the determination of any question of fact. To permit the reversal of such an order, it must appear, from a statement of the facts considered as established at general term, that an error of law was committed in granting the new trial. *Miller v. Schuyler*, 20 N. Y. 521. This decision and that of *Hoyt v. Thompson*, 19 N. Y. 207, were made before the amendment to the code of 1860, allowing a review in the court of appeals upon the facts in cases tried before the court or a referee, and are no longer applicable to that class of cases. But they are applicable to cases tried by jury, the law in respect to them being unchanged. *Wright v. Hunter*, 46 N. Y. 409.

An appeal from an order denying a motion made, under N. Y. Code, § 999, for a new trial on the ground that the verdict was contrary to law, brings the whole case before the appellate court, upon the law as well as the facts. *Tate v. McCormick*, 23 Hun (N. Y.) 218.

1. See cases in note next preceding.

2. *Fisk v. Henarie*, 15 Oreg. 90; *Artmon v. West Point Mfg. Co.*, 16 Neb. 572; *Kermeyer v. Kansas Pac. R. Co.*, 18 Kan. 215; *McCulloch v. Dodge*, 8 Kan. 476; *Staples v. Hartridge*, 8 Fla. 426; *Dawkins v. Carroll*, 5 Fla. 407; *Wampler v. Walker*, 28 Tex. 598; *Kinney v. South & North Ala. R. Co.*, 73 Ala. 536; *Philp v. Gardner*, 1 McArthur (D. C.) 165.

Without assuming to determine that a court of error will, in any case, employ the power apparently conferred by the letter of section 4 of the act of Ohio of April 12th, 1858, "to relieve the district courts," etc., to reverse a judgment for error of the court below, in granting a new trial, it will require a strong case to justify its exercise. *Beatty v. Hatcher*, 13 Ohio St. 115.

A notion for a new trial is addressed to the sound discretion of the court, and when granted the judgment rendered on the new trial will not be re-

versed for error in allowing such new trial. This may now be regarded to be the rule in this State, as indeed practically it always has been in like cases. *Smith v. Board of Education*, 27 Ohio St. 44. See also *Conord v. Runnels*, 23 Ohio St. 601; *Spafford v. Bradley*, 20 Ohio 74; *Beatty v. Hatcher*, 13 Ohio St. 15.

In Florida an order of the trial court granting a new trial is not appealable though the action of the court in granting or refusing a new trial may be reviewed upon an appeal from the final judgment. *Staples v. Hartridge*, 8 Fla. 426; *Dawkins v. Carroll*, 5 Fla. 407.

Where a court, after expiration of the term, vacates, without warrant of law, a judgment rendered by it, grants a new trial, restores the original case to the docket, and the plaintiff appears, objects to the proceeding, and moves to dismiss it, and, after his objection is overruled, enters on a second trial, in which judgment is rendered against him, he may appeal, and rest on the introduction of the cause in the court below, by the grant of the new trial, as an error fatal to the judgment. *McLendon v. Darden*, 53 Ala. 67.

A decree setting aside a judgment of forfeiture of an appearance bond is one granting a *new trial*, and is not appealable. *State v. Cole* (La. 1887), 3 So. Rep. 84.

While a judgment setting aside a verdict and granting a new trial is not a final judgment, and, therefore, is not one from which an appeal or writ of error will lie, yet, when the trial court improperly grants such new trial, the party objecting may avail himself of the error by tendering his bill of exceptions and abandoning the case at that point, and when final judgment is thereafter rendered against him, he may appeal therefrom and thus secure a review of the alleged errors of the trial court in granting the new trial. *Iron Mountain Bank v. Armstrong*, 92 Mo. 265.

3. *State v. Perry*, 4 Baxt. (Tenn.) 438; *King v. Miller*, 8 Baxt. (Tenn.) 382; *McWillie v. Perkins*, 20 La. An. 168; *Kernmeyer v. Kansas Pac. R. Co.*,

does not affect a substantial right.<sup>1</sup> And, where the order is held to be appealable, the courts always show greater hesitation and reluctance to disturb an order granting a new trial than one refusing it.<sup>2</sup> But an order denying a motion being in effect one which determines the action, is, as a general rule, appealable when not based upon a question resting in the discretion of the trial court.<sup>3</sup>

18 Kan. 215; *McCulloch v. Dodge*, 8 Kan. 476; *Staples v. Hartridge*, 8 Fla. 426; *Dawkins v. Carroll*, 5 Fla. 407. See also *Setzke v. Setzke*, 121 Ill. 30. *Wampler v. Walker*, 28 Tex. 598.

A judgment granting a new trial is not final, and therefore will be reviewed only in an extreme case. *McWhorter v. McMurrain*, 26 Ga. 164.

Although N. Y. Code provides that an appeal must be taken from the order denying a new trial, an appeal taken before the judgment of reversal is entered, is ineffectual to review the judgment. *Vernon v. Palmer*, 67 How. Pr. (N. Y.) 18. See, however, *Hines v. Driver*, 89 Ind. 339, where it was held that an order granting a new trial for cause, after the close of the term, is a final judgment, and therefore appealable. See also *Belt v. Davis*, 1 Cal. 134; *McCall v. Hitchcock*, 7 Bush (Ky.) 615; *Odd Fellows' Sav. Bank v. Deuprey*, 66 Cal. 168; *Dorland v. Cunningham*, 66 Cal. 484.

1. *Kearney v. Snodgrass*, 12 Oreg. 311; *Artmon v. West Point Mfg. Co.*, 16 Neb. 572.

2. *Ruble v. McDonald*, 7 Iowa 90; *Hines v. Driver*, 89 Ind. 344; *Moore v. Los Angeles Infirmary*, 49 Cal. 669; *Robbe v. Hewitt*, 54 Ga. 260; *Parrott v. Underwood*, 10 Tex. 48; *McGregor v. Christie*, 37 Ga. 557; *White v. Poorman*, 24 Iowa 108; *Robinson v. Bacon*, 24 Iowa 409; *Oliver v. Pace*, 6 Ga. 185; *Nagle v. Hornberger*, 6 Ind. 69; *Reynolds v. Tompkins*, 23 W. Va. 229; *Hill v. Goode*, 18 Ind. 207; *Roberts v. Jones*, 30 Iowa 525; *New York Piano Forte Co. v. Muller*, 38 Iowa 552.

The exercise of discretion by an inferior court, in granting a new trial, will not be interfered with on appeal, unless an abuse of discretion is shown, and the evidence thereof should be stronger to justify an interference where a new trial has been granted, than where it has been refused. *Shepherd v. Brenton*, 15 Iowa 84; *Whitney v. Blunt*, 15 Iowa 283; *McNair v. McComber*, 15 Iowa 368; *House v. Wright*, 22 Ind. 383.

The supreme court will very seldom

reverse an order for a new trial, and only for stronger reasons than need be shown for reversing an order refusing a new trial. *Sedan v. Church*, 29 Kan. 190.

To interfere with the decision of the court below in granting a new trial, the supreme court will require a clearer showing of abuse of judicial discretion, or legal error, than it would to reverse a refusal of a new trial. *Chapman v. Wilkinson*, 22 Iowa 541; *Newell v. Sanford*, 10 Iowa 396.

But where a new trial is erroneously granted on a ground not discretionary, the action of the court will be corrected on appeal as readily as though the new trial had been refused. *Manson v. Ware*, 63 Iowa 345.

3. *State v. Tomlinson*, 11 Iowa 401; *Matter of Coffman*, 12 Iowa 491; *Suydam v. Grand Street etc. R. Co.*, 41 Barb. (N. Y.) 375; s. c., 17 Abb. Pr. (N. Y.) 304; *Seneca Nation v. Knight*, 19 N. Y. 587; *Cook v. President of New York etc. Dock Co.*, 18 N. Y. 229; *Schultz v. Keeler* (Idaho), 13 Pac. Rep. 481; *Iron Mountain Bank v. Armstrong*, 92 Mo. 265; *Wahl v. Barnum*, 116 N. Y. 87. And see *Tucker v. Sandridge*, 82 Va. 532.

An order refusing a new trial, and dismissing the motion therefor, being appealable, an order refusing to set aside said order is not appealable. *Larkin v. Larkin*, 76 Cal. 323.

An order denying a motion to vacate an order sustaining a demurrer, and for a "new trial" on the demurrer, is not an order refusing a new trial, so as to be appealable, under Gen. Stat. Minn. 1878, ch. 86, § 8. *Dodge v. Bell*, 37 Minn. 382.

Where a motion for a new trial has been denied, and a subsequent motion for a new trial has been denied on the ground of the previous decision, the latter order is not appealable. *Romine v. Cralle*, 80 Cal. 626.

**Inferior Courts.**—No appeal lies from the order of an inferior court granting or refusing a new trial. *Kirk v. Grant*, 67 Md. 418.

court will not review the decision,<sup>1</sup> and, generally, the record must affirmatively show that all the evidence submitted to the court below, upon the questions relied upon on the motion, are incorporated into it.<sup>2</sup> If this rule is not complied with, the appellate court will take no cognizance of the case unless, after rejecting all parol evidence in favor of the applicant and giving full credence to that of the other, the decision of the court below still appears to be erroneous.<sup>3</sup> The party desiring to appeal from the order of the court upon a motion for a new trial, must except to such order, or he will be deemed to have acquiesced in the decision.<sup>4</sup> The affidavits, too, which were before the court below must be in-

(Va.) 287. See also *Nease v. Capehart*, 15 W. Va. 299; *Sanaker v. Cushwa*, 3 W. Va. 29.

1. *Beal v. Stone*, 22 Iowa 447; *Briggs v. Hartman*, 10 Iowa 63; *Caffrey v. Groome*, 10 Iowa 548; *Dyer v. Hatch*, 1 Ark. 339; *Grant v. Westfall*, 57 Ind. 121; and see *Shaw v. State*, 27 Tex. 750; *Bush v. Nichols*, 77 Iowa 171.

The correctness of instructions, in most if not in all cases, depends upon the facts developed upon the trial; and where their applicability or irrelevancy is not shown by a bill of exceptions, embodying sufficient of the testimony, the appellate court cannot determine upon their correctness, nor determine whether the court erred in granting a new trial, on the ground that they were erroneous. *Farr v. Fuller*, 8 Iowa 347.

Where a motion for a new trial raises no question as to the correctness of the instructions given by the court to the jury, no error arising from them can be considered on appeal, although they are made part of the record by bill of exceptions. *Bodamer v. Hutton*, 40 Ind. 244.

Assignments of error that "the court erred in refusing to give the instructions asked for by defendants and refused by the court," and that "the court erred in not granting a new trial, because the verdict and judgment were contrary to and against the law, and were not supported by the evidence," are too general. *Koepsel v. Allen* (Tex. 1887), 4 S. W. Rep. 856.

2. See *Cooper v. State*, 16 Ohio St. 329. And see, *ante*, subtit. BRIEF OR STATEMENT OF EVIDENCE, and tit. BILL OF EXCEPTIONS, 2 Am. & Eng. Encyc. of Law 218.

3. 4 Minor's Inst. 746, citing *Noyes v. Humphreys*, 11 Gratt. (Va.) 636; *Farish v. Reigle*, 11 Gratt. (Va.) 697; *Vaiden v. Com.*, 12 Gratt. (Va.) 717;

*Butts's Case*, 14 Gratt. (Va.) 613; *Carlington v. Goddin*, 13 Gratt. (Va.) 587; *Great Falls Mfg. Co. v. Henry*, 32 Gratt. (Va.) 467; *Daingerfield v. Thompson*, 33 Gratt. (Va.) 141; *Sanaker v. Cushwa*, 3 W. Va. 29; *Gimml v. Cullen*, 20 Gratt. (Va.) 452; *Dean v. Com.*, 32 Gratt. (Va.) 916; *Danville Bank v. Waddill*, 31 Gratt. (Va.) 474; *Scott v. Shelor*, 28 Gratt. (Va.) 891; *Wolverton v. Com.*, 75 Va. 912.

On appeal from a judgment, where it does not appear that a motion for new trial was made, or that any statement was filed pursuant to Rev. St. Idaho, § 4443, the judgment roll only can be considered. *Washington etc. R. Co. v. Osborne* (Idaho 1889), 21 Pac. Rep. 421.

The objection that the court below denied the defendant the right to open and close, cannot be taken by assignment of error on an appeal. It should be assigned as cause for a motion for a new trial below. *Abshire v. State*, 52 Ind. 99; *White v. Carlton*, 52 Ind. 373.

4. *Graham v. State*, 115 Ill. 566; *Hicks v. Wilson*, 24 Ark. 628; *Robinson v. State*, 5 Ark. 659; *State v. Brewer*, 70 Iowa 384; *Kirk v. Litterst*, 71 Iowa 71; *Jacobson v. Cornelius*, 5 N. Y. Supp. 306; s. c., 52 Hun (N. Y.) 377; *Fisher v. Purdue*, 48 Ind. 323.

Where failure to suppress certain parts of a deposition is assigned as a reason for a new trial, and there is no bill of exceptions showing the motion to suppress or the parts of the deposition proposed to be suppressed, the supreme court cannot review the action of the lower court. *Bargis v. Farrar*, 45 Ind. 41.

The reviewing court will not notice the action of the court below in overruling a motion for a new trial, unless the bill of exceptions shows that judgment of the court to have been ex-

corporated in the record or certified by the judge.<sup>1</sup> These matters are thus made a part of the record by means of the settlement and filing of a statement of the case and bill of exceptions, properly setting forth the errors relied upon,<sup>2</sup> and errors occur-

cepted to. *Fondren v. Durfee*, 39 Miss. 324; *Hicks v. Wilson*, 24 Ark. 628; *Hoover v. Wood*, 9 Ind. 286.

The supreme court will not review the refusal of a new trial, on a motion involving questions of law blended with fact, unless the grounds are incorporated in a bill of exceptions. *State v. Chatman*, 34 La. An. 881.

Where, in effect, it clearly appears of record that the appellant did object to the overruling of his motion for a new trial below, it is immaterial that the fact is not so stated in terms. *Van Winkle v. Blackford*, 28 W. Va. 670.

In the absence of a bill of exceptions the supreme court will not review the action of the trial court on a motion for a new trial. Nor is it enough that the order recites that an exception was taken. *People v. Smith*, 3 Utah 425.

It has always been held in *Missouri* that the motion for a new trial is not part of the record proper and must be preserved by a bill of exceptions. It is also settled by the decisions of this court, that the action of the trial court on the motion for a new trial is a matter of exception and not of error, and it is accordingly held that when the bill of exceptions fails to show that the action of the court in overruling the motion for a new trial was excepted to, this court will not review such action of the trial court. *Hart v. Walker*, 31 Mo. 26; *Bateson v. Clark*, 37 Mo. 34; *State v. Marshall*, 36 Mo. 403, 404; *State v. Gaither*, 77 Mo. 375.

If the bill of exceptions shows the filing of a motion for a new trial and the action of the court thereon, it is not necessary that this should be shown by the record proper. *State v. Gaither*, 77 Mo. 304.

An order dismissing a motion for a new trial cannot be reviewed on appeal in the absence of a statement containing the papers on which the order was made. The papers are not of themselves a part of the record. *Strathern v. Dakin*, 63 Cal. 478.

The notice of intention to move for a new trial constitutes no part of the record on appeal from an order granting or refusing it. *Hook v. Hall*, 68 Cal. 22.

That a finding was against the preponderance of evidence, or that there was any cause, however good, for a new trial in the court below, is not ground for a reversal by the supreme court, without an assignment of error upon the overruling of a motion for a new trial. *Scott v. State*, 29 Ind. 219; *Kline v. Sinnissippi Ins. Co.*, 29 Ind. 293; *Whiting v. Nelson*, 29 Ind. 441; *Caldwell v. Asbury*, 29 Ind. 451; *Herrick v. Bunting*, 29 Ind. 467; *Smith v. Crigler*, 29 Ind. 516; *Vandoren v. Kimes*, 29 Ind. 582.

But a motion for a new trial is a part of the record, without a bill of exceptions; and the action of the court upon such motion may be assigned as error. *Kirby v. Cannon*, 9 Ind. 371; *Cooper v. Howard Co.*, 64 Ind. 520. See also *State v. Central Pac. R. Co.*, 17 Nev. 259.

1. *Matlock v. Todd*, 19 Ind. 130; *Pleper v. Centinela L. Co.*, 56 Cal. 173; *Walsh v. Hutchings*, 60 Cal. 228; *People v. Honshell*, 10 Cal. 83; *Branger v. Chevallier*, 9 Cal. 353; *Faulkner v. Wilcox*, 2 Litt. (Ky.) 369; *Fish v. Benson*, 71 Cal. 428. And see *Sharon v. Sharon*, 79 Cal. 633; *Springer Transp. Co. v. Smith*, 16 Lea (Tenn.) 498.

On a motion for a new trial, which is overruled, and exceptions taken, the supreme court cannot act upon affidavits taken in the court below. *Rinehardt v. Potts*, 7 Ired. L. (N. Car.) 403; *Crippen v. People*, 8 Mich. 117.

The affidavit on motion for a new trial and the instructions complained of, form no part of the record, although copied therein by the clerk; they must be preserved in a bill of exceptions. *Gregory v. Spencer*, 3 Ill. App. 80; *Rockefeller v. Tobias*, 3 Ill. App. 461.

It appearing by the signed bill of exceptions that the motion for a new trial was heard on statements, etc., counter statements, and affidavits, it cannot be objected that no statement was settled. *Williams v. Gregory*, 9 Cal. 76.

2. See *Wickham v. State*, 7 Coldw. (Tenn.) 525; *Skillen v. Skillen*, 41 Ind. 122; *Hawkins v. Abbott*, 40 Cal. 639; *Sharon v. Sharon*, 79 Cal. 633; *Ward v. Ware*, 29 Ill. App. 22; *Obermark v.*



ring during the progress of the trial, and the facts of the case can only be considered by the appellate court when a motion for a new trial has been made in the court below, and thus preserved and incorporated in the record by a bill of exceptions,<sup>1</sup> unless

People, 24 Ill. App. 259; Puller v. Thomas, 36 Mo. App. 105; Klepfer v. State, 121 Ind. 491; Blohm v. Bamber, 10 N. Y. Supp. 98; Butt v. Lee, 27 Ill. App. 419; Collins v. Spence, 84 Ga. 503; Beets v. Chart, 79 Cal. 185. And see also, *ante*, tit. BILL OF EXCEPTIONS, 2 Am. & Eng. Encyc. of Law 218.

Where there is no bill of exceptions in the case, there is not proper *data*, either as to law or evidence, upon which the court will consider whether there was error in overruling a motion for new trial. Grady v. Jeffares (Fla. 1889), 6 So. Rep. 828.

Where leave to file a bill of exceptions is granted at the time a motion for a new trial is overruled, the bill may embrace all rulings made during the trial. Pitzer v. Indianapolis etc. R. Co., 80 Ind. 569.

The minute entry of the clerk reciting the fact of filing a motion for a new trial, the ruling upon it, and that the appellant excepted, does not bring the motion, the ruling, or the exception before the supreme court on appeal. That must be done by bill of exceptions. Sutherland v. Putnam (Ariz. 1890), 24 Pac. Rep. 320.

Where the transcript on appeal contains a motion for a new trial, based on alleged erroneous rulings of the court, but there is nothing in the record to show what the rulings were, or the facts on which they were based, the judgment of the lower court must be affirmed. State v. Harty (Iowa, 1890), 45 N. W. Rep. 903.

Notice of intention to move for a new trial need not be made part of the record on appeal. Pico v. Cohn, (Cal. 1889) 20 Pac. Rep. 706; Scott v. Wood, 81 Cal. 398.

A motion for a change of venue, with the affidavit supporting it, and a motion for a new trial, are not pleadings, and can only become part of the record by being incorporated into a bill of exceptions, and this is not sufficiently done when the bill simply recites the filing of the motion and affidavit, and then states that reference is made to them, and the same made part thereof. Perkins v. McDowell (Wyoming, 1890), 23 Pac. Rep. 71.

**Waiver of Bill.**—Where the record recited that a motion for a new trial, based upon affidavits, was by consent of parties brought to a hearing, and the affidavits were heard against it as well as in its favor the objection that there was no case or bill of exceptions was waived. Carroll v. More, 30 Wis. 574.

Where counsel stipulate that all depositions on file may be "read and referred to on the hearing of defendant's motion for a new trial herein as part of the foregoing statement," and that the same "shall be printed in the transcript on appeal," and "form a part of the statement," a strict compliance with the requirements of statute as to the manner of making them parts of such statement is waived. Sharon v. Sharon, 79 Cal. 633.

1. Crim v. Sellers, 37 Ga. 324; Lichtv v. Clark, 10 Neb. 472; Laird v. State, 15 Tex. 317; Klotz v. Pertee, 101 Mo. 213; Jacobson v. Cornelius, 5 N. Y. Supp. 306; s. c., 52 Hun (N. Y.) 377; Hallock v. Iglehart, 30 Ind. 327; Joiner v. Van Alstyne, 20 Neb. 578; Sheldon v. Perkins, 37 Vt. 550; Steck v. Mahar, 26 Ark. 536; Ward v. Carlton, 26 Ark. 662; Alpers v. Schammel, 75 Cal. 590; Dominguez v. Mascotti (Cal. 1887), 15 Pac. Rep. 773; Pico v. Cuyas, 47 Cal. 174; Bowden v. Bowden, 75 Ill. 111; Johns v. Hays, 52 Ind. 147; Schenck v. Butsch, 32 Ind. 338; Walpole v. Carlisle, 32 Ind. 415; Roberts v. Smith, 34 Ind. 550; Carr v. Eaton, 42 Ind. 385; McDill v. Gunn, 43 Ind. 315; Grant v. Westfall, 57 Ind. 121; Kelly v. Rogers, 21 Minn. 146; Shover v. Jones, 32 Ind. 141; Beatty v. Fernald, 47 Mo. 348; Collins v. Saunders, 46 Mo. 389; Stuefen v. Jefferis, 9 Mont. 66; Cheney v. Wagner (Neb. 1890), 46 N. W. Rep. 427; Hacker v. Ferrill, 66 Barb. (N. Y.) 559; Lancaster v. Washington Life Ins. Co. of N. Y., 62 Mo. 121; Tallman v. American Express Co., 6 Hun (N. Y.) 377; Dahash v. Flinders, 2 Thomp. & C. (N. Y.) 445; Fulton v. Earhart, 4 Oreg. 61; Bowen v. Malbon, 20 Wis. 491. And see Braly v. Henry (Cal. 1888), 18 Pac. Rep. 798; Randall v. Duff (Cal. 1888), 17 Pac. Rep. 532; Myers v. Jarboe, 56 Ind. 57; Rodman v. Harvey, 102 N. Car. 1;

the merits of the cause and the grounds for reversal appear upon the face of the record proper.<sup>1</sup>

*Woodall v. Greator*, 51 Ind. 539; *Wyoming Loan etc. Co. v. Holliday Co.* (Wyoming, 1890), 24 Pac. Rep. 193; *Sutherland v. Putnam* (Ariz. 1890), 24 Pac. Rep. 320; *Mahan v. School Dist. No. 1*, 29 Mo. App. 269; *Ogden v. Danz*, 22 Ill. App. 544; *Snead v. Tietjen* (Ariz.), 24 Pac. Rep. 324; *Story v. Ragsdale*, 30 Mo. App. 196.

A general term has no power to review a case upon the facts, on appeal from the judgment, where the trial was by jury; the only mode in which the facts can be brought before it for review is by appeal from the order of special term or circuit granting or refusing a new trial. *Boos v. World Mut. L. Ins. Co.*, 64 N. Y. 236. And an appeal from "all the orders and rulings occurring on the trial, and excepted to," is not an appeal from an order granting or refusing a new trial. *Day v. Callow*, 39 Cal. 593.

The giving or refusing to give instructions, and the overruling of a motion to strike out parts of a special verdict, cannot be assigned as error on appeal, but must be assigned as reasons for a new trial, and are then brought up for review under the assignment of error because of the overruling of the motion for a new trial. *Louisville etc. R. Co. v. Hart*, 119 Ind. 273.

In *White v. Prigmore*, 28 Ark. 450, and *Nisbett v. Brown*, 30 Ark. 585, it was held that the motion for a new trial does not become a part of the record merely by being filed, as do the pleadings. In the former case there was no bill of exceptions at all; in the latter there was a bill of exceptions, but it made no reference at all to the motion for a new trial.

In *Farquharson v. Johnson*, 35 Ark. 536, the court held that unless a motion for a new trial be incorporated in the bill of exceptions, or referred to in it as made part of the record, it is no part of the record, though filed and copied in the transcript.

The denial of a motion for a new trial on the judge's minutes, because the verdict is against the evidence, is not the subject of an exception; and an order of the general term affirming such a denial will not be reviewed by the court of appeals, though an appeal from the order and an intention to review it are contained in the notice of

appeal from the judgment. *Duryea v. Vosburgh*, 121 N. Y. 157.

**Trial by Court or Referee.**—The rule not to reverse a judgment for insufficiency of evidence, unless that question is first made in the court below on a motion for a new trial, applies when the cause is tried by the court without a jury. *Bills v. Stanton*, 69 Ill. 51.

On an appeal from a judgment confirming a referee's report, on exceptions to the referee's rulings on the admission of evidence, the record must show, not only that after the referee filed his report (stating the evidence taken, his findings of fact and conclusions of law), appellant moved to set the report aside, and for a new trial, and excepted to an order denying the motion, but also that he had filed exceptions to the referee's findings of fact. *Riley v. Mitchell*, 37 Wis. 612.

**Arbitration Proceedings.**—The Missouri revised statutes provide that the party aggrieved by the confirmation or vacation of an award of arbitrators may take his writ of error or an appeal "as upon any other judgment." Held that, in appealing from a judgment vacating an award of arbitrators, a motion for a new trial was necessary, pointing out the error alleged. *Wallace v. Underwood*, 32 Mo. App. 473.

**Waiver of Exceptions.**—In *New Jersey*, whether a rule to show cause why a new trial should not be granted is general or special, the mere granting of it on the application of the party who holds bills of exceptions operates as a waiver of all exceptions save those which are expressly reserved in the rule to show cause. *Finley v. Handley* (N. J. 1888), 14 Atl. Rep. 585.

**But the Supreme Court of Missouri** may review, though no motion for a new trial has been made. *Meek v. Hewitt*, 48 Mo. 337.

1. *Johnson v. State*, 43 Ark. 391; *Wells v. Mosely*, 4 Coldw. (Tenn.) 401; *Clark v. Hare*, 39 Ark. 258; *Burke v. Kansas*, 34 Mo. App. 570; *Steck v. Mahar*, 26 Ark. 536; *Ward v. Carlton*, 26 Ark. 662; *Pio Pico v. Cuyas*, 47 Cal. 174. And see *Gage v. Downey* (Cal. 1888) 19 Pac. Rep. 113; *Fisher v. Purdue*, 48 Ind. 323; *Derfahl v. Tuttle*, 42 Iowa 177; *Kilmer v. O'Brien*, 13 Hun (N. Y.) 224; *Reinke v. Morse* (Ky. 1889), 10 S. W. Rep. 468; *Cheney v.*

**3. What Will be Considered.**—Upon an appeal from an order granting or refusing a new trial, the appellate court will confine itself to the consideration of questions made below.<sup>1</sup> Thus, where it is assigned as error, that the court overruled the motion for a new trial, the only question for the appellate court is, whether the court erred in disallowing that motion on any of the grounds upon which it was made.<sup>2</sup> But a judgment in a criminal case may be reversed for an error not specified in the written grounds for a new

Wagner (Neb. 1890), 46 N. W. Rep. 427; Rogers v. King, 66 Barb. (N. Y.) 495.

Errors in a decree cannot be corrected by a motion for a new trial. Creech v. Richards, 76 Ga. 36.

A petition in error to review the charge to the jury and rulings on the admission of testimony will not be dismissed because no motion for a new trial was filed. Waldron v. Evans, 1 Dak. 11.

Where special finding is in accordance with the statute, the proper method of presenting to the supreme court the question of the sufficiency of the finding to justify the judgment is by exception to the decision of the court in its conclusion of law, and not by a motion for a new trial. But where there has been no motion for a new trial on account of the insufficiency of the evidence, the supreme court will not review the action of the court below upon the facts. Roberts v. Smith, 34 Ind. 550.

Where the issues of fact in a cause are tried by the court, and, by request, the conclusions of law are stated with the facts in writing, the questions of law involved are saved for review by the appellate court by exception to such conclusions and not by motion for a new trial. Luirance v. Luirance, 32 Ind. 108. And where the court, the record not showing it to have been requested by either party, finds the facts specially and states conclusions of law thereon, a motion for a new trial can raise no question for review as to the correctness of such conclusions. Rose v. Duncan, 43 Ind. 512.

A motion for a new trial below is not necessary to procure a review of a ruling by which the court excluded from the consideration of the jury the whole of the plaintiff's evidence as insufficient to prove his case, in consequence of which the jury necessarily found for the defendant. A simple exception to such ruling will bring it up for review. Smith v. Gillett, 50 Ill. 290.

1. Lyon v. Ely, 24 Conn. 507; Mills v. Jones, 27 Ark. 506; Bond v. Baldwin, 9 Ga. 9; Sullivan v. Dollins, 13 Ill. 85; Bowman v. Phillips, 47 Ind. 341; Richwald v. Gaylord, 73 Ill. 503; Harroli v. Mexico Cattle Co., 73 Tex. 612; Ohio etc. R. Co. v. Judy (Ind. 1889), 22 N. E. Rep. 252; Louisville etc. R. Co. v. Green (Ind. 1889), 22 N. E. Rep. 327; Fields v. Baum, 35 Mo. App. 511; State v. Spooner, 41 La. An. 780; Mazheivitz v. Pimentel, 83 Cal. 450; Durvea v. Vosburgh, 121 N. Y. 57; Dresser v. Boatman's F. & M. Ins. Co., 47 Hun (N. Y.) 153; Ward v. Ware, 29 Ill. App. 22; Puller v. Thomas, 36 Mo. App. 105; Smith v. Prior, 9 N. Y. Supp. 636; Kelly v. Rogers, 21 Minn. 146.

Where a motion for a new trial raises no question as to the correctness of the instructions given by the court to the jury, no error arising from them can be considered on appeal, although they are made part of the record by bill of exceptions. Bodamer v. Hutton, 40 Ind. 244.

The action of the court below in improperly sustaining or overruling a motion to suppress a deposition, or a part thereof, is cause for a new trial, and must be stated as a reason for a new trial in the court below, to entitle it to the consideration of the supreme court. Jeffersonville etc. R. Co. v. Riley, 39 Ind. 569.

**Proper Parties.**—On a motion to dismiss an appeal from an order refusing a new trial, the question whether others should have been made parties to the motion in the court below is not involved. Watson v. Sutro, 77 Cal. 609.

But the appellant, on an appeal from an order granting a new trial, cannot, for the first time, object that the notice of the motion did not specify any grounds for it. Chesley v. Mississippi etc. Boom Co. (Minn. 1888), 38 N. W. Rep. 769.

2. Vesey v. Reynolds, 14 Ind. 444; Stitson v. Lawrence Co., 45 Ind. 173; Barney v. Scherling, 40 Miss. 320; Gra-

trial in some States.<sup>1</sup> The action of the court in overruling the motion for a new trial must be specifically assigned as error.<sup>2</sup>

*ham v. Roark*, 23 Ark. 19; *McCarroll v. Stafford*, 24 Ark. 224; *Jonas v. Feist*, 52 N. Y. Super. Ct. 578; s. c., 5 N. Y. Supp. 436; *Stedman v. Batchelor*, 8 N. Y. Supp. 37; *Ersline v. Duffy*, 76 Ga. 602; *West v. Manhattan R. Co.*, 54 N. Y. Super. Ct. 522; *Guadalupe etc. Assoc. v. West*, 76 Tex. 461; *Schenck v. Butsch*, 32 Ind. 338; *Walpole v. Carlisle*, 32 Ind. 415; *Carr v. Eaton*, 42 Ind. 385.

Upon an appeal from an order refusing a new trial, the supreme court cannot review an order of the court below allowing an amendment of the pleadings made previous to the commencement of the trial, and not as a part of it. *Winona v. Minnesota Railway Construction Co.*, 27 Minn. 415.

Where an assignment of error in the supreme court alleges that "the court below erred in not granting a new trial for" a reason stated both in the assignment of error and in the motion for a new trial, it brings in review such ground only, though others be stated in such motion. *Harrison Co. v. Byrne*, 67 Ind. 21.

When error is assigned upon the overruling of a motion for a new trial, such assignment brings in review all the grounds properly made the basis of the motion, and they need not be assigned as error. Where the overruling of a motion for a new trial is not assigned as error, no question as to reasons properly assigned in such motion can be presented to the supreme court. *Reinhart v. State*, 45 Ind. 147.

Where, on motion for a new trial, objection is not made to the verdict, as contrary to evidence, or without evidence to sustain it, the appellate court will only consider the sufficiency of the evidence so far as may be necessary to pass upon the instructions based upon it. *Little Rock etc. R. Co. v. Barker*, 33 Ark. 350.

Error in assessing too small damages will not be considered in the supreme court, unless made the ground of a motion for a new trial. *Mackison v. Clegg*, 95 Ind. 373.

Excessive damages as a ground for revising a judgment must be submitted to the court below on the motion for a new trial, otherwise the question will be disregarded on appeal. *Seele v. Neumann* (Tex.), 1 S. W. Rep. 274.

If the statement and notice of a motion for a new trial are defective, in not specifying the grounds of the motion, the objection should be taken in the court below, and if it is overruled, this court can then review the matter. *Brady v. O'Brien*, 23 Cal. 244.

Upon appeal from an order granting a new trial, the court cannot review an order overruling a demurrer to the complaint. *Flanagan v. Chicago & Northwestern R. Co.*, 45 Wis. 98.

1. *Johnson v. Commonwealth*, 9 Bush (Ky.) 224; *Dunn v. State*, 2 Ark. 229; *State v. Pratt*, 20 Iowa 267. And see *Johnson v. State*, 43 Ark. 391; *People v. Maguire*, 26 Cal. 635; *State v. Fryber*, 29 Tex. 181; *Old v. Commonwealth*, 18 Gratt. (Va.) 915; *Matthews v. Commonwealth*, 18 Gratt. (Va.) 989.

2. See *Leach v. Wilson Co* (Tex. 1890), 13 S. W. Rep. 613; *Davis v. Montgomery* (Ind. 1890), 24 N. E. Rep. 367; *Lyons v. Van Gorder*, 77 Iowa 600; *Wilson v. Minnesota etc. Ins. Co.*, 36 Minn. 112; *Stevens v. Minneapolis*, 42 Minn. 136; *Bundy v. McClarnon*, 118 Ind. 165; *Bundy v. Williams*, 118 Ind. 600; *Mayor v. Duke*, 72 Tex. 445; *Landauer v. Hoagland*, 41 Kan. 520; *State v. Rollins*, 31 W. Va. 363; *State v. Broussard* (La. 1887), 2 S. W. Rep. 422; *Carr v. Eaton*, 42 Ind. 385; *Thompson v. Eagleton*, 33 Ind. 301.

Errors assigned for giving and refusing instructions to the jury are grounds for a new trial, and must be stated in a motion for a new trial; and where the action of the court in overruling the motion for a new trial is not specifically assigned for error, no question is properly raised in this court for the consideration of the instructions given or refused. *Carson v. Funk*, 27 Kan. 524; *Da Lee v. Blackburn*, 11 Kan. 191; *Norton v. Foster*, 12 Kan. 44; *Shepherd v. Pratt*, 16 Kan. 212; annotated edition; *Kansas Pac. R. Co. v. Muhlman*, 16 Kan. 224, annotated edition; *Brown Co. v. Roberts*, 22 Kan. 762; *Kerr v. Reece*, 27 Kan. 338; *State v. O'Laughlin*, 29 Kan. 24; *Jarrett v. Apple*, 31 Kan. 695.

An assignment of error that the "court erred in overruling the first, second and third grounds of defendant's motion for a new trial," *held*, sufficiently specific, when the grounds stated in different ways but a single proposition.

4. **The Decision.**—The trial court's decision will always be presumed to have been in accordance with the justice and merits of the case, unless the contrary plainly appears by the record.<sup>1</sup>

*Kitterman v. Chicago etc. R. Co.*, 69 Iowa 440.

But an assignment that "the court erred in overruling defendants' motion for new trial," is not sufficient to raise the question of the sufficiency of the evidence to sustain the verdict, where the motion for new trial is made on several grounds, only one of which raises that question. *State v. Harbach* (Iowa, 1889), 43 N. W. Rep. 272. And see *Cullen v. Drane* (Tex. 1888), 10 S. W. Rep. 720; *Ruby v. Von Valkenberg*, 72 Tex. 459.

"Irregularity in the proceedings of the court, error of law occurring at the trial and excepted to by the defendant," are too general an assignment of causes for a new trial to present any point for consideration on an appeal. *Phelps v. Tilton*, 17 Ind. 423. And see *State v. Wilson*, 51 Ind. 96.

Grounds alleged for a new trial on motion therefor, that proper evidence has been refused and improper evidence admitted, are too indefinite to present any question for review. *Queen Ins. Co. v. Studebaker Bros. Mfg. Co.*, 117 Ind. 416.

An assignment of error that "the court erred in overruling defendant's motion for new trial for all the reasons stated in the motion" is too general to be considered. *Harrell v. Mexico Cattle Co.*, 73 Tex. 612.

The appellate court will not consider assignments of error filed as a "supplemental statement," which the court below declined to make a part of the case settled for appeal under Code N. C., § 550, prescribing the manner in which the judge shall settle cases for appeal. *Rodman v. Harvey*, 102 N. Car. 1.

In *Wyoming* it is held that as errors occurring upon the trial, which are properly grounds for a new trial, can only be brought into the record by a motion for a new trial, and must be included in the motion to bring them to the attention of the supreme court, it is not necessary to separately assign them as error. They are sufficiently included in the assignment that there was error in overruling the motion for new trial. *Wolcott v. Bachman* (Wyo. 1890), 23 Pac. Rep. 72.

1. See *Wagner v. Condron* (Iowa, 1887), 33 N. W. Rep. 109; *Sukel v.*

*Worman*, 71 Iowa 264; *Hammel v. Stone* (Cal. 1887), 14 Pac. Rep. 675.

In *Slauter v. Whitelock*, 12 Ind. 338, it was assigned as error that a witness had not been sworn before he testified at the trial, but the record did not show when such mistake was discovered, if discovered at all, or whether any motion was made to correct it. It was held that the ruling of the trial court must be affirmed. See also *Mintrum v. Bliss*, 77 Cal. 90; *Schweickhart v. Stuerve*, 75 Wis. 157; *Edsall v. Ayers*, 15 Ind. 286; *Lloyd v. McClure*, 2 Greene (Iowa) 139; *Finley v. David*, 7 Iowa 3; *Ruble v. McDonald*, 7 Iowa 90; *Byington v. Woodward*, 9 Iowa 360; *Wetmore v. Mellinger*, 64 Iowa 741.

Where a motion is made for a new trial in the court below, on the ground that the charge of the court was disregarded by the jury, and the motion is refused, it will be presumed, on appeal, that the charge was not disregarded by the jury, unless there is evidence to the contrary. *Ashcroft v. Pouns*, 1 Tex. 594.

Where the trial court has granted a new trial on the ground of the submission of an improper issue to the jury, the supreme court will, in the absence of evidence, presume that such submission was prejudicial to the appellee. *Stutz v. Chicago etc. R. Co.*, 69 Wis. 312.

In reviewing the order granting a new trial, upon grounds other than the insufficiency of the evidence to support the verdict, its correctness will be presumed, unless the contrary affirmatively appears of record. *Nudd v. Home Ins. etc. Co.*, 25 Minn. 100.

The appellate court will not disturb an order granting a new trial, which is in the discretion of the trial court, though founded in part on an erroneous proposition of fact, where there is nothing in the record to show that the court based its conclusions solely on such proposition. *Reed v. Chicago etc. R. Co.*, 71 Wis. 399.

In *Kansas*, where a motion for a new trial is required to be reduced to writing, filed in the court, and made within three days after judgment is rendered, if the record of the court below shows that on the fifth day after the rendering of a judgment in a case, a motion for a

And where nothing is shown to the contrary by affidavit or otherwise in the record, the appellate court is bound to presume in favor of the ruling of the court on the motion for a new trial, that such a state of facts existed as authorized that ruling upon the point under consideration.

As has been said, the motion for a new trial is addressed to the sound discretion of the trial court, and the action of the lower court upon such motion will not be disturbed by the court of appeals, unless it appears affirmatively from the record that there has been an abuse of such discretion, or that some settled principle of law has been violated.<sup>1</sup> The question is not whether

new trial was overruled, it will be presumed by the supreme court for the purpose of upholding the judgment of the court below, that the party did not comply with the above requisites, and that therefore, the court below did not err in overruling his motion. *Lucas v. Sturr*, 21 Kan. 349. See also *Dyal v. Topeka*, 35 Kan. 62; *Douglass v. Insley*, 34 Kan. 604; *Odell v. Sargent*, 3 Kan. 80; *Mitchell v. Milhoan*, 11 Kan. 617; *Nesbit v. Hines*, 17 Kan. 316; *Fowler v. Young*, 19 Kan. 150; *State v. Benson*, 22 Kan. 473.

See, however, *Sam v. State*, 31 Miss. 480, where it was held that a new trial should have been granted, where the prisoner proved by the affidavits of two witnesses that one of the jurors stated, the day before the trial, "that if the evidence was the same as it was on the former trial, which he had heard, the prisoner was guilty of murder and should be hung"—as it did not appear from the record that the affidavits were disbelieved by the court below. *HANDY, J.*, dissented, holding that as the record did not show upon what ground the court acted, it should be presumed that the court disbelieved the testimony contained in the affidavits, as every presumption must be indulged in favor of the judgment of the court below, which is not removed by the record.

In *Byington v. Woodward*, 9 Iowa 360, the court said: "If the court below errs in granting or refusing a new trial upon a legal proposition, there is no especial presumption in favor of the correctness of such refusal.

1. *Lodge v. Reznor*, 13 Iowa 600; *Zweig v. Horricon etc. Mfg. Co.*, 14 Wis. 356; *Lewellen v. Williams*, 14 Wis. 687; *Evans v. Rugle*, 63 Wis. 31; *Mullen v. Rineg*, 68 Wis. 408; *Daggett v. Vanderslice* (Cal. 1887),

13 Pac. Rep. 402; *Mullen v. Haberkorn*, 68 Wis. 408; *Burnett v. Hobro*, 72 Cal. 178; *Burnett v. Whitesides*, 15 Cal. 35; *Peters v. Foss*, 16 Cal. 357; *Walton v. Maguire*, 17 Cal. 92; *Newell v. Sanford*, 10 Iowa 396; *Caffrey v. Groome*, 10 Iowa 548; *Schumaker v. Gelpcke*, 11 Iowa 84; *State v. Tomlinson*, 11 Iowa 401; *Jewett v. Miller*, 12 Iowa 85; *Drake v. Palmer*, 2 Cal. 177; *Speck v. Hoyt*, 3 Cal. 413; *Watson v. McClay*, 4 Cal. 288; *Duell v. Bear River etc. Min. Co.*, 5 Cal. 84; *Cappe v. Brizzolara*, 19 Cal. 607; *Quinn v. Kenyon*, 22 Cal. 82; *McKay v. Thornington*, 15 Iowa 25; *O'Brien v. Brady*, 23 Cal. 243; *Nooney v. Mahoney*, 30 Cal. 226; *Hall v. The Emily Banning*, 33 Cal. 522; *Nolan v. Chambers*, 19 Ga. 503; *Hopkins v. Tilman*, 25 Ga. 212; *Foster v. Thomas*, 26 Ga. 290; *Jacobs v. Pou*, 27 Ga. 33; *Hanson v. Barnhisel*, 11 Cal. 340; *Van Valkenburgh v. Hoskins*, 7 Wis. 496; *Hadly v. Ellis*, 31 Ga. 492; *Thornton v. Hollis*, 36 Ga. 595; *Leppar v. Enderton*, 9 Ind. 353; *Powers v. Bridges*, 1 Greene (Iowa) 235; *Sanders v. Clark*, 22 Iowa 275; *Devot v. Marx*, 19 La. An. 491; *Watterson v. Watterson*, 1 Head (Tenn.) 1; *Hooe v. Lockwood*, 3 Chand. (Wis.) 41; *Cook v. Helms*, 5 Wis. 107; *Coker v. State*, 20 Ark. 53; *Perry v. Cottingham*, 63 Iowa 41; *Lorenzana v. Camarillo*, 41 Cal. 467; *Savage v. Sweeney*, 63 Cal. 340; *Blum v. Sunol*, 63 Cal. 341; *Pierce v. Schaden*, 55 Cal. 406; *Bronner v. Wetzlar*, 55 Cal. 419; *Vanzant v. State*, 63 Ga. 158; *Freeman v. Rich*, 1 Iowa 504; *Hendricks v. Wallis*, 7 Iowa 224; *Barnes v. Merrick*, 6 Wis. 57; *Todd v. State*, 25 Ind. 212; *Bearrs v. Sherman*, 56 Wis. 55; *Rogers v. Winch*, 65 Iowa 168; *White v. Poorman*, 24 Iowa 108; *Sunberg v. Babcock*, 66 Iowa 515; *Ables v. Donley*, 8 Tex. 331; *Lavie v.*

the appellate court would have granted a new trial in the case, but it is rather whether the trial judge, who had many more and far more reliable facilities for exercising a reasonable discretion than the appellate court can claim, has abused that discretion, or has violated a clear legal right of the complainant.<sup>1</sup>

Acting upon this general rule, the courts have held that they will not reverse the order of the trial court refusing to grant a new trial, upon the ground that the verdict was contrary to the evidence, where there is any evidence to support the verdict.<sup>2</sup>

*Central R. Co.*, 71 Ga. 222; *Suddeth v. Kramer*, 78 Ga. 353.

Under the statutes of Arkansas, the circuit court has discretion whether to receive a motion for a new trial, although filed after the prescribed time, and the supreme court would be slow to interfere with the discretion exercised; but where the circuit court considered the statute imperative, the supreme court may direct the circuit court to use, but not how to use, its discretion. *Gould v. Tatum*, 21 Ark. 329.

Unless it is apparent that the trial judge has abused his discretion in granting a new trial on the ground of newly discovered evidence, the supreme court will not interfere. *Wingfield v. Rhea*, 77 Ga. 84.

In *Missouri*, if, upon a review of all the testimony, the supreme court are of opinion that the circuit court improperly exercised its discretion in refusing a new trial, the judgment will be reversed. *Bybee v. Kinote*, 6 Mo. 53.

1. *McLimans v. Lancaster*, 57 Wis. 299; *Lampsen v. Brander*, 28 Minn. 530; *Caldwell v. Wright*, 8 B. Mon. (Ky.) 525; *Dorr v. Watson*, 28 Miss. 383; *Ables v. Donley*, 8 Tex. 331; *Warren v. State*, 1 Greene (Iowa) 106; *Boulard v. Skimnee*, 11 Ark. 671; *Marsh v. Webber*, 13 Minn. 109; *Karsen v. Milwaukee etc. R. Co.*, 29 Minn. 12; *Doty v. Whittle* (Cal. 1886), 11 Pac. Rep. 761; *Hopkins v. Western Pac. R. Co.*, 44 Cal. 389; *Shuttleworth v. Winter*, 55 N. Y. 624. And see *Cam-buston v. United States*, 95 U. S. 285.

The discretion of the court below, in ruling upon a motion for a new trial, on the ground of a deposition having been improperly used by the jury in their room, is a legal discretion, subject to review in the supreme court. *Stewart v. Burlington etc. R. Co.*, 11 Iowa 62.

#### **Stipulation for Judgment Absolute.—**

Under a stipulation that, upon review of an order granting a new trial, the

determination of the appellate court shall be final as to the merits of the action, the rule that the decision of the trial court on a motion for a new trial will not be disturbed unless there is an abuse of discretion, does not apply. *Johnson v. Parrotte*, 23 Neb. 232.

2. *Van Huss v. Rainbolt*, 2 Coldw. (Tenn.) 139; *Nailing v. Nailing*, 2 Sneed (Tenn.) 630; *Kid v. Fleek*, 47 Wis. 443; *Janssen v. Lammers*, 29 Wis. 88; *Paine v. Roberts*, 29 Wis. 642; *Turner v. Scott*, 77 Ga. 270; *Stevens v. Middlebrooks*, 77 Ga. 81; *Georgia etc. Co. v. Mercier*, 77 Ga. 99; *Byne v. Smith*, 76 Ga. 101; *Stegall v. Baker*, 76 Ga. 107; *Georgia R. Co. v. Sigman*, 77 Ga. 71; *Anderson v. Barksdale*, 77 Ga. 86; *Hogan v. Sanders* (Cal. 1887), 14 Pac. Rep. 677; *Mazelbaum v. Limberger* (Ga. 1887), 3 S. E. Rep. 257; *Central R. etc. Co. v. Gamble*, 77 Ga. 584; *Grigsby v. Schwartz*, 82 Cal. 278; *Lovejoy v. Norcross*, 76 Ga. 100; *Donnelly v. Burkett* (Iowa 1887), 34 N. W. Rep. 330; *Declez v. Save*, 71 Cal. 552; *Agnew v. Adams*, 26 S. Car. 101. See also *Gerold v. Brunswick etc. Co.*, 67 Cal. 124; *Davis v. Smith*, 30 Ga. 263; *Ohlson v. Manderfeld*, 28 Minn. 390; *Hornsby v. South Carolina R. Co.*, 26 S. Car. 187; *Bennett v. Hobro*, 72 Cal. 178.

The Mississippi court, in *Drake v. Surget*, 36 Miss. 487, thus states the rule: "The doctrine is well established by a series of adjudications, that on a motion for a new trial, brought to this court by writ of error, the verdict of the jury will not be disturbed, unless where it is without evidence, or the evidence greatly preponderates against it, or where the verdict appears to be manifestly wrong, from the record before us." See also *Dickson v. Parker*, 3 How. (Miss.) 219; *Harris v. Halliday*, 4 How. (Miss.) 338; *Leflore v. Justice*, 1 Smed. & M. (Miss.) 381.

In a civil cause, where the court trying it approves the verdict by refusing

Where the trial court has granted a new trial upon the ground that the verdict was contrary to the evidence, the Minnesota court thus states the rule in regard to the reversal of such a decision: "We would not be warranted in reversing an order of this kind simply because if the judge below had refused to grant a new trial, we would have felt bound to sustain him, nor because there was evidence reasonably tending to support the verdict, nor because, if the motion for a new trial had been made before us in the first instance, we should have, upon a consideration of the evidence and its preponderance, denied the motion; but if, upon careful perusal of the testimony and mature reflection, we feel satisfied that the preponderance of the evidence is manifestly and palpably in favor of the verdict, we would then deem it our duty to reverse the order granting a new trial."<sup>1</sup> This rule, however, while seemingly reasonable enough, is perhaps at variance with that of a majority of the courts, who hold that they will not disturb an order granting a new trial if there is a substantial conflict in the evidence.<sup>2</sup> So where the motion for a new trial on the ground of surprise was overruled, the order will not be reversed if anything appeared upon the motion, either in the affidavits or counter-

to set it aside, and there is not an entire want of evidence in its justification, the supreme court will not interfere and reverse, although the verdict may seem to be greatly against the weight of evidence. *Gillespie v. Stone*, 43 Mo. 350.

A verdict may be against the weight of evidence, and yet not so strongly as to authorize a new trial, when it has been refused by the court below. *Doe v. Roe*, 28 Ga. 484. And the appellate court will not revise the discretion of the trial judge in refusing a new trial, because it is apparent that he was strongly of opinion that the verdict should have been different. *Atlanta v. Brown*, 73 Ga. 630.

In reviewing the decision of the court below, refusing to grant a new trial, the court above will consider as facts so much of the evidence as upholds the verdict, where there is any evidence to sustain it. *Turner v. Huggins*, 14 Ark. 21.

Where the general grant of a new trial, though from a third finding for the same party, is warranted on the ground that the verdict is contrary to evidence, other grounds not controlling as to the merits of the case may be left open for re-examination, should they arise again, when the new trial is had. *Jarrell v. King*, 84 Ga. 308.

But where, taking the whole testimony of the successful party alone, it is

not sufficient to sustain the verdict, the court will overrule the motion refusing to grant a new trial. *People v. Acosta*, 10 Cal. 196.

1. *Rheiner v. Stillwater etc. R. Co.*, 29 Minn. 147; *Cleland v. Minneapolis etc. R. Co.*, 29 Minn. 170; *Fox v. Burke*, 29 Minn. 171; *Hicks v. Stone*, 13 Minn. 434.

2. See *Downey v. Hellman*, 58 Cal. 62; *Sperry v. Spaulding*, 49 Cal. 252; *Atyeo v. Kelsey*, 13 Kan. 212; *Taylor v. Spalding*, 36 Minn. 550; *Goodwin v. Burney* (Cal. 1887), 14 Pac. Rep. 676; *McCrum v. Corby*, 15 Kan. 112; *Visher v. Webster*, 13 Cal. 58; *Taylor v. McKinley*, 4 Cal. 104; *Rice v. Cunningham*, 29 Cal. 492; *Beck v. Beck*, 6 Mont. 285; *Foute v. Massey*, 37 Ga. 258; *Henline v. Jacoby*, 62 Ind. 298; *Wicker v. Walter*, 77 Ga. 490; *Trinler v. Cornelius*, 24 Ind. 97; *Nave v. Hadley*, 24 Ind. 224; *Hollingsworth v. Pickering*, 24 Ind. 435; *Whisler v. Roberts*, 19 Ill. 274; *Harris v. Rupel*, 14 Ind. 209; *Preston v. Keys*, 23 Cal. 193; *Simpson v. Pac. Mut. Life Ins. Co.*, 44 Cal. 139; *Irwin v. McKnight*, 76 Ga. 669; *Ludden v. Morrow*, 65 Ga. 232; *O'Herrin v. State*, 14 Ind. 420; *Roberts v. Nodwift*, 8 Ind. 339; *Sibbitt v. Stryker*, 62 Ind. 41; *Bridgewater v. Bridgewater*, 62 Ind. 82.

In *Ackley v. Berkey*, 22 Iowa 226, the court said: "Now, although the evidence reported, taken as a whole,



affidavits, to justify it.<sup>1</sup> And when the ground is that of misconduct of a juror, the decision of the court will be upheld if there is anything in the proofs used upon the motion tending to sustain it,<sup>2</sup> while an order on a motion based upon excessive damages will be affirmed unless the damages assessed by the jury are so outrageous as to induce the belief that they acted from prejudice, partiality or corruption.<sup>3</sup> Where, however, the question in the lower court was not a discretionary one, and it appears from the record that some settled principle of law has been violated, the court will, upon appeal from the order, reverse it as in other cases where questions of law and not matters of discretion

would have equally, if not better, justified a different conclusion as we see it, looking simply at the written testimony, nevertheless we cannot conceal from ourselves the fact that there is so much to be inferred, especially in this class of cases, from surrounding circumstances, from the appearance of witnesses, their conduct upon the stand, etc., that it is possible we might have reached the same conclusion, had we been placed in like circumstances. Hence the propriety of not interfering unless the conflict in the testimony is slight, and the weight of evidence clearly against the verdict; or there are other circumstances strongly indicating that injustice has been done."

A motion for a new trial, upon the alleged ground that the evidence is insufficient to support the verdict, should be granted by the circuit court, unless it clearly appears that substantial justice has been done. But when the same question is presented to the supreme court, on appeal, that court should not grant a new trial, unless it clearly appears from the record that substantial justice has not been done. *Christy v. Holmes*, 57 Ind. 314.

When a verdict is wholly without evidence to support it, still more when it is directly against the entire evidence, and even when the preponderance of evidence is manifestly in opposition to it, and especially when in any of these cases the impression made upon the mind of the presiding judge concurs with the view of the court above, a new trial will be granted. *Plate v. Carolina Mut. Ins. Co.*, 15 Rich. (S. Car.) 213; *Davidson v. Manlove*, 2 Coldw. (Tenn.) 345.

It is in the discretion of a judge, so long as he does not invade the province of the jury, to grant a new trial, where the preponderance of the evidence is against the verdict, and his order will

not be disturbed on appeal. *Albion Consolidated Min. Co. v. Richmond Min. Co.*, 19 Nev. 225.

1. *Sultan v. Sherwood*, 18 Nev. 454.

A motion was made for the continuance of a motion for a new trial, on the ground of surprise in the testimony of the adverse party, and to enable the party to procure affidavits of witnesses to disprove the unexpected testimony in support of the motion for a new trial. The court overruled the motion for a continuance. *Held*, that the motion was addressed to the discretion of the court, and unless that discretion was abused the appellate court would not interfere with its exercise. *Toledo etc. R. Co. v. McLaughlin*, 63 Ill. 389.

But a verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through mistake, or some means not apparent in the record, will be set aside and a new trial awarded. *Sandwich Mfg. Co. v. Feary*, 22 Neb. 53.

2. *McCulley v. State*, 62 Ind. 428; *Myers v. Conway*, 62 Ind. 474.

A motion for a new trial, for the reason that one of the jurors before sat on a trial of the same case, is addressed to the sound discretion of the court below, and cannot be a ground of exception under our system of practice. *Bourke v. James*, 4 Mich. 336.

A motion for a new trial, based upon affidavits of some of the jurors that they did not concur in the verdict, and by others that they did not understand portions of the charge of the court, and where there is no error assigned in the record, is a matter purely within the discretion of the presiding judge, and will not be considered. *Jones v. Parker*, 97 N. Car. 33.

3. *Alexander v. Thomas*, 25 Ind. 268; *Guard v. Risk*, 11 Ind. 156.

A motion to set aside a verdict as against the evidence is addressed to the

merely are involved;<sup>1</sup> but the error must be affirmatively shown.<sup>2</sup> When a motion for a new trial is based upon several grounds, and the lower court grants such new trial, but without assigning upon which ground it is granted, the appellate court will presume that the lower court acted upon a good cause rather than upon a doubtful one.<sup>3</sup> And even where it appears from the bill of exceptions that the lower court assigned a bad cause for a new trial, it has been held that if the record shows a good cause the order will not be reversed.<sup>4</sup>

discretion of the trial court, and its action thereon is not revisable on exceptions. *Stearn v. Clifford* (Vt. 1890), 18 Atl. Rep. 1045.

**Newly Discovered Evidence.**—An order for a new trial, on the ground of newly discovered evidence, is largely discretionary, and the supreme court will not disturb the same, unless there is an abuse of such discretion. *Heilner v. Brown* (Idaho, 1887), 12 Pac. Rep. 903.

1. *Cochran v. O'Keefe*, 34 Cal. 554; *Shaw v. Sweeney*, 2 Greene (Iowa) 587; *Stewart v. Ewbank*, 3 Iowa 191; *Jones v. Coopridge*, 1 Blackf. (Ind.) 47; *State v. Bass*, 11 La. An. 478; *Boyd v. Munro* (S. Car. 1890), 10 S. E. Rep. 963; *Agnew v. Adams*, 26 S. Car. 101.

While the supreme court interferes reluctantly with an order granting a new trial, yet, when such order is made because of the misapplication of a legal proposition by the court, it will be reviewed the same as a ruling upon a demurrer or other legal question. *Mehan v. Chicago etc. R. Co.*, 55 Iowa 305.

When the statute notice to the adverse party of a motion for a new trial is not given, an order granting a new trial will be reversed. *Bear River etc. Co. v. Boles*, 24 Cal. 354.

Where there is no conflict in the evidence, and the correctness of the verdict can be demonstrated by a mathematical calculation, the trial court has no discretion, and an order granting a new trial will be reversed on appeal. *Anderson v. Cahill*, 65 Iowa 252.

A judge of the circuit court would have granted a new trial had he not fallen into the error of believing that the new constitution limited his power in the matter. *Held*, that the supreme court, upon appeal, would remand the case for a new trial. *Wood v. Atlanta etc. R. Co.*, 19 S. Car. 579.

In case of legal error in the decision of the court below, if it appear that, after correction of the error, the ver-

dict on the second trial must necessarily be as first rendered, an order for a new trial will be reversed. *Braddy v. Lumery*, 11 Iowa 29.

2. *Wright v. Ascheim*, 4 Utah 455; *Hammel v. Stone* (Cal. 1887), 14 Pac. Rep. 675; *Millen v. Haberkorn*, 68 Wis. 408.

On appeal from an order denying a motion for a new trial, there being no evidence before the appellate court, the judgment below will be presumed to be supported by the evidence. *Beck v. Beck*, 6 Mont. 318.

An appeal from an order of the trial court granting a new trial on the grounds of surprise and irregularity in the proceedings, cannot be reviewed where the record does not disclose the necessary affidavits, but it will be presumed that such affidavits were used in support of the motion, and the order will stand. *Leete v. Sutherland* (Nev. 1887), 15 Pac. Rep. 472.

3. *White v. Beck*, 64 Iowa 122; *Oullahan v. Starbuck*, 21 Cal. 413; *Iron Mountain Bank v. Armstrong*, 92 Mo. 265; *Barney v. Dudley*, 40 Kan. 247; *Taylor v. Central R. & Banking Co.*, 79 Ga. 330.

4. *McCreary v. Cockrill*, 3 Kan. 37; *Bolton v. Stewart*, 29 Cal. 615; *Grant v. Moore*, 29 Cal. 644; *Coghill v. Marks*, 29 Cal. 673.

Where error is alleged in sustaining a motion for a new trial, it must appear affirmatively that none of the grounds of the motion are sufficient before a reversal can be had. *Ryan v. Topeka etc. Co.*, 7 Kan. 207.

On appeal, where the order overruling a motion for a new trial is assigned as error, and it appears that it was assigned as cause for new trial, "that the court erred in giving to the jury instructions one to seventeen. inclusive," the order will be sustained, if any of the instructions so designated are correct. *Ohio etc. R. Co. v. McCartney*, 121 Ind. 385.

(a) **TRIAL DE NOVO IN THE APPELLATE COURT.**—The statutes of several of the States provide for a trial *de novo* in the appellate court, in certain prescribed cases.<sup>1</sup> The most usual application of the provision is to equity causes, in which a final decree, when appealed from, is required to be tried *de novo* upon the merits, and not upon alleged errors in the proceedings below;<sup>2</sup> and it is applicable also when the judgment or decree is based on evidence

1. See *Yocum v. Haskins* (Iowa 1890), 46 N. W. Rep. 1065; *Frank v. Hollands* (Iowa 1890), 46 N. W. Rep. 979; *Wetler v. Nokken*, 38 Minn. 376; *Hickman v. Baltimore etc. R. Co.*, 30 W. Va. 296; *Vandervoort v. Fouse*, 30 W. Va. 326; *Wilkes v. Cornelius* (Oreg. 1890), 23 Pac. Rep. 473; *Hilliard v. Hilliard*, 52 Ark. 283; *Boggs v. Brooks*, 45 Mo. 232; *Kirtland v. Davis*, 43 Ga. 318, *The Western Metropolis*, 12 Wall (U. S.) 389.

2. *State v. Orwig*, 27 Iowa 528. And see *Frank v. Hollands* (Iowa 1890), 46 N. W. Rep. 979; *Kennedy v. Gauli*, 44 Iowa 547; *Stoddard v. Hardwick*, 46 Iowa 160; *Clark v. Reynolds*, 46 Iowa 674.

Where it appeared by affidavits filed by the appellant, who was claimant below, in a collision case, that it was probable that two witnesses for the libellant received, before testifying, a promise from him for the payment of a sum of money in the event that the case should be decided in his favor, and that the appellant ascertained the fact after the appeal, the court ordered a commission to take the testimony of such witnesses relative to the alleged agreement. *The Western Metropolis*, 12 Wall (U. S.) 389.

A proceeding to establish a disputed corner and boundary line, under Laws Iowa 1874, ch. 8, which provides for the appointment of a commission of surveyors by the district court to hear the evidence and make a report, subject to the review of the district court, is a special proceeding, reviewable on appeal to the supreme court, only on the errors assigned, and is therefore not triable *de novo* on such appeal as an equity case. *Yocum v. Haskins* (Iowa 1890), 46 N. W. Rep. 1065.

Upon an appeal to the circuit court under Code Oreg., § 1134, from an order of the county court allowing a claim against an estate under the same section, which declares that such order shall have the force and effect of a judgment, the matters in issue between

the parties must be tried anew in the same manner as trials at law for the recovery of money are conducted. *Wilkes v. Cornelius* (Oreg. 1890), 23 Pac. Rep. 473.

**Setting Apart a Homestead.**—In *Georgia*, upon appeal from the judgment of the ordinary setting apart a homestead of realty and personalty exemption, it is error in the court to restrict the jury to find for or against the homestead, etc., as plotted. The whole case comes up by the appeal, and the court should administer the law with regard to its terms and provisions. *Kirtland v. Davis*, 43 Ga. 318.

**Assignment of Dower.**—In a proceeding for the allotment of dower in the probate court, an order confirming the report of the commissioners appointed to allot the same is final, and an appeal therefrom to the circuit court carries with it the whole case for trial *de novo*. *Hilliard v. Hilliard*, 52 Ark. 283.

**Contested Election Cases.**—The Missouri act of 1867, providing for appeals in contested election cases, was intended to give to the party aggrieved a trial *de novo* in the circuit court. *Boggs v. Brooks*, 45 Mo. 232.

**Appeals from Justices' Courts.**—See tit. JUSTICES OF THE PEACE; subtit. Trial De Novo in Appellate Court, 12 Am. & Eng. Encyc. of Law 488.

An appeal from a judgment of a justice on both law and fact brings the case up for a trial *de novo* upon the merits, irrespective of errors or irregularities occurring in the course of the trial in the court below, or in the judgment rendered therein, under Gen. Stat. Minn. 1878, ch. 65, § 117—*Wetler v. Nokken*, 38 Minn. 376. But a judgment rendered on the verdict of six jurors in an action for damages, in which no defence was made, cannot be tried *de novo* on appeal. *Hickman v. Baltimore etc. R. Co.*, 30 W. Va. 296; *Vandervoort v. Fouse*, 30 W. Va. 326.

Under the Kansas act, providing for an appeal from the judgment of a justice of the peace, in criminal cases,

submitted to the court as upon special findings of a jury.<sup>1</sup> But in order to entitle the appellant to such a trial, he must have moved, or the court must have ordered, at the hearing of the cause in the court below, that all of the evidence be reduced to writing and made a part of the record of the case.<sup>2</sup>

**5. May Appeal Separately or in Connection with Judgment.**—The losing party may, as a general rule, appeal from the judgment, or from the order granting or overruling the motion for a new trial, or from both;<sup>3</sup> the decision or disposition of the one being no bar to the further prosecution of the other.<sup>4</sup> But an order granting a new trial necessarily vacates the judgment, and thereby renders an appeal ineffective and inconsequential.<sup>5</sup> Such an appeal from an order refusing a new trial may be maintained, even though the reversal of the order will vacate the judgment and the time to appeal from the judgment has expired.<sup>6</sup>

and that on such appeal being taken, the cases shall be tried *de novo* in the appellate court, it is error for the appellate court to try such a case as upon a petition in error. *State v. Young*, 6 Kan. 37.

1. *Frank v. Hollands* (Iowa 1890), 46 N. W. Rep. 979; *Chambers v. Ingham*, 25 Iowa 225.

2. *Richards v. Hintrager*, 45 Iowa 253; *Kennedy v. Gauli*, 44 Iowa 547; *Clark v. Reynolds*, 46 Iowa 675; *Stoddard v. Hardwick*, 46 Iowa 160; *Walker v. Plummer*, 41 Iowa 697; *Hammer-sham v. Fairall*, 44 Iowa 462.

3. *Marziou v. Pioche*, 8 Cal. 537; *Carpentier v. Williamson*, 25 Cal. 167; *Spanagel v. Dellinger*, 38 Cal. 284.

In *Iowa*, an appeal may be taken from an order refusing a new trial, although no judgment has been entered on the verdict. *Baldwin v. Foss*, 71 Iowa 389.

Upon an appeal to the general term of the Supreme Court of New York from an interlocutory judgment of the special term, and upon motion for a new trial made, the judgment was affirmed and the motion for new trial denied, one order embracing both decisions. *Held*, that an appeal from that order was well taken, so far as related to the order denying a new trial. *Kelsey v. Sargent*, 104 N. Y. 663.

**Contra.**—Under the *Missouri* practice, when exception is taken to the granting of a new trial, the party complaining must wait until final judgment and then appeal from the judgment. *Smith etc. Implement Co. v. Wheeler*, 27 Mo. App. 16.

4. See *Towdy v. Ellis*, 22 Cal. 659; *Carpentier v. Williamson*, 25 Cal. 167;

*McDonald v. McConkey*, 57 Cal. 326; *Naglee v. Spencer*, 60 Cal. 10; *Donner v. Palmer*, 45 Cal. 183; *Fulton v. Cox*, 40 Cal. 105; *Fulton v. Hanna*, 40 Cal. 278.

The decision on a petition for a new trial is not an interlocutory order so as to deprive the appellate court of jurisdiction of an appeal from such decision. *Husted v. Mead*, 58 Conn. 55.

5. *Kower v. Gluck*, 33 Cal. 401; *Thompson v. Smith*, 28 Cal. 528; *Bronner v. Wetzlar*, 55 Cal. 419; *Gross v. Kelleher*, 80 Cal. 519.

6. *Walden v. Murdock*, 23 Cal. 540. And see *Hanscom v. Tower*, 17 Cal. 518.

By the New York Code Civil Proc., the court of appeals has jurisdiction to review every actual determination made at general term where a final judgment has been rendered, and to review an order granting or refusing a new trial. It is further provided that where a judgment has been reversed, and a new trial ordered, there can be no appeal from the judgment of reversal, but on appeal from the order the judgment must be reviewed; and an appeal to the general term from a final judgment on a verdict can only be taken on questions of law, the facts being reviewable only on appeal from an order on a motion for new trial. On appeal from a judgment and order denying a new trial, the general term refused to consider the facts, but heard the appeal from the judgment. *Held*, that the court of appeals had jurisdiction of an appeal from the order of the general term granting a new trial, and on such appeal was required to review the judgment of reversal. *Pharis v. Gere*, 112 N. Y. 408.

6. **Effect of Reversal.**—As a general rule, a judgment or order of the appellate court reversing an order denying a motion for a new trial, or affirming an order granting a motion for a new trial, expressed in general and unrestricted terms, like an order of the trial court granting a new trial, opens anew all the questions at issue in the case.<sup>1</sup> But the cause must be proceeded with in the court below, in accordance with the rulings of the appellate court as expressed in its decision of the motion and order remanding the case.<sup>2</sup> In States in which the appellate court is empowered either to affirm, reverse or modify the judgment or determination of the court below, it may affirm as to part and reverse as to part, and order a new trial as to the part reversed only.<sup>3</sup>

**NEXT**—(See NEAREST).—Next is only an abbreviation of the word nearest.<sup>4</sup>

1. *Hosford v. Wynn*, 26 S. Car. 130. See *Chase v. Weston*, 75 Iowa 159; *Moench v. Young*, 18 Civ. Proc. Rep. (N. Y.) 259; s. c., 9 N. Y. Supp. 637.

Where, upon reversal of a decree founded upon a verdict, the *remittitur*, upon notice to the parties, was made a part of the decree in the court below, and entered as a finality of the litigation by an order of the chancellor, and a motion made by parties in interest to set such order aside was overruled. The legal effect of the reversal by the appellate court of the judgment of the court below, based upon the verdict of a jury, was to have granted a new trial in the case, and it was error to have adjudged the rights of the parties to the litigation upon the motion. *Miller v. Jourdan*, 43 Ga. 316.

Where issue has been joined and trial had on evidence on the merits, defendant, having filed no exception, nor even prayed for a dismissal, a judgment maintaining an exception and dismissing the suit, is not responsive to the issues tendered, and cannot be reviewed on the merits by the appellate tribunal, but will be set aside and the cause remanded for a new trial on the issues. *Wood v. Daboval*, 40 La. An. 256.

2. *State v. Newkirk*, 49 Mo. 472.

In *Maryland*, it is held that when a decree of a circuit court is reversed in the appellate court, and the cause remanded with instructions, and the circuit court passes a new decree, in strict conformity to the instructions, such decree has the force and effect of a judgment of the appellate court, and an appeal therefrom cannot be entertained. *Graff v. Barnum*, 33 Md. 283.

3. *Braunsdorf v. Fellner*, 76 Wis. 1; *Boyd v. Brown*, 17 Pick. (Mass.) 458.

**Correction of Mistake in Decision.**—

Where, on appeal from a judgment for defendant, *non obstante veredicto*, the supreme court intend simply to reverse the judgment, but, by inadvertence, the words "and a new trial must be had in the court below, and we so adjudge," are added to the opinion after the words "the judgment is reversed," the court may, on discovering the error, and without notice to the parties, strike out the former words, and the trial court thereafter properly renders judgment on the verdict for plaintiff without a new trial. *Summerlin v. Cowles* (N. Car. 1890), 12 S. E. Rep. 234. So a general term order or judgment, reversing a judgment below and dismissing the complaint, may be amended so as to order a new trial, instead of a dismissal of the complaint. *Giles v. Austin*, 34 N. Y. Super. Ct. 540.

**Restitution.**—In cases of reversal on appeal from a final order in summary proceedings, the common pleas court is required to order restitution to the defendant; but the power of restitution is merely collateral to the disposition of the appeal, and therefore does not exclude the construction by which the larger power to order a new trial is given. *Moench v. Young*, 18 Civil Proc. Rep. (N. Y.) 259; s. c., 9 N. Y. Supp. 637.

4. And. L. Dict.; *Booth v. Vicars*, 1 Coll. C. C. 9; *Stockdale v. Nicholson*, L. R., 4 Eq. 359.

"The word 'next' means nearest or highest; not in the sense of propinquity alone, as, for example, three persons on three chairs, one in the midst,

those on each side of the middle one are equally near, each 'next' to the center one. But it signifies also order, or succession, or relation as well as propinquity." Per *KINDERSLEY*, V. C., *Southgate v. Clinch*, 27 L. J., Ch. 654.

"The 29th February next," means the 29th February in the next Leap Year. *Chapman v. Beecham*, 3 Q. B. 723.

"On the day of," any named month, "next ensuing," means *semble*, some day of that month next happening. *Chapman v. Beecham*, 3 Q. B. 723.

"When a day or month is mentioned as antecedent or subsequent to a contract and the precise day or month is not specified, it means the time nearest to the date of the contract. *Whitney v. Crosby*, 3 Cal. (N. Y.) 89.

In order to give a reasonable effect to a statute, the words "by the first of August next" were held to refer, not to the date of the passage of the act, but to another date mentioned in the act. *Couch v. Ulster etc. Turnp. Co.*, 4 Johns. Ch. (N. Y.) 26.

The "third Tuesday of February next" in an act passed Feb. 14th, regulating the election of constables, held to mean the "third Tuesday of next February." *In re Tallon*, 20 Pittsb. Leg. J., N. S. (Pa.) 324; s. c., 7 Pa. Co., 1 Ct. Rep. 636; 25 W. N. C. (Pa.) 554.

"**Next Assizes.**"—The "next assizes," as a time when an appeal was to be heard, held to mean not the next assizes, strictly and technically, but the next assizes at which the appeal could have been lawfully heard. *Burns v. Collum*, 4 L. R. I. 493.

"**Next Before.**"—Under the Minnesota statute which provides that notice of an administrator's sale shall be published three weeks successively, "next before such sale," it was held, nine days having elapsed between the last publication and the day of sale, that the sale was void. *Hartley v. Croze*, 38 Minn. 325.

Under Stat. 2 & 3, Wm. IV, ch. 71, §§ 1, 4, & 7, an enjoyment as of right for thirty years "next before" the commencement of an action, may be proved by showing that the party has enjoyed for several periods amounting together to thirty years, and that, during the whole time between such periods and between the last of them and the action (if such period intervened), the estate over which the right has been

exercised was in the hands of a tenant for life. *Clayton v. Corby*, 2 Q. B. 813; s. c., 42 E. C. L. 926; *Parker v. Michell*, 11 A. & E. 788. See *Glover v. Coleman*, L. R., 10 C. P. 116; s. c., 11 Eng. Rep. 282; *Lowe v. Carpenter*, 2 Ex. 825.

"**Next Court,**" in the act of 1799 of Georgia, means the next court after that to which a bill in equity is returned; and defendant in equity is not obliged to answer at the term to which the bill is returned. *Green v. McLaren*, 7 Ga. 107.

A statute providing that the report of referees shall be made to the next court of common pleas to be holden in the county, means the next term of that court held after the making of the award. *Durell v. Merrill*, 1 Mass. 411.

"**Next Court of Oyer and Terminer.**"—The Court of Queen's Bench is included in the term "next court of oyer and terminer." *Reg. v. Eyre*, 3 Q. B. 487.

"**Next Devisee.**"—In the act explanatory of New Jersey act to limit entails: "So, too, we are to understand the words 'next devisee,' not in a strict and technical sense, but in the sense in which the word devisee is sometimes used in common discourse; not as one named in the will, and taking by devise, strictly speaking, but as one taking as heir, according to the special limitation contained in the will upon the death of such first devisee." *Den v. Robinson*, 5 N. J. L. 689.

**Next election by the people**, occurring in a provision in a California statute, that the commission of a judge, appointed by the governor to fill a vacancy, shall expire at the "next election by the people," means the next election after the vacancy happens; and not the next judicial election. *People v. Mott*, 3 Cal. 506.

"**Next**" in some instances equivalent to "**Instant.**"—Where a contract for sale of reversionary interests was signed on the 15th Dec., 1885, and the day of completion was therein fixed for "the 28th of December next," and if not then completed interest to run on the next unpaid purchase money from that day, it was held that the day appointed for completion was the 28th Dec., 1885—i. e., that "next" was in that connection equivalent to "instant," for that "the 28th of Dec. next" was to be read as one noun substantive and meant the next 28th Dec. following the 15th Dec., 1885—viz, the 28th Dec., 1885. *Dawes*

**NEXT FRIEND.**—One who, though not regularly appointed guardian, represents, in a suit, a party thereto who is not *sui*

*v. Charsley*, 30 S. J. 401; *W. N.* (86) 78. See this case cited, *Dart*, n. 142, 143. So also, where an award dated 13th Oct., 1840, directed money to be paid "on the 28th Oct. next," "next" was read "instant." *Brown v. Smith*, 8 Dowl. 867; *Condon v. Barr*, 47 N. J. L. 113.

In 18 Vr. (N. J.) 113, a summons dated October the 5th, for an appearance on Thursday, the 16th day of October next, was read as the next 16th of the then month of October.

"Next Justice" in a statute held to mean not strictly the nearest, but one in the town where the land lies. *Cheeseborough v. Clark*, 1 Robt. (Conn.) 141. See **NEAREST MAGISTRATES**. See also 12 Am. & Eng. Encyc. of Law 441, n. 6.

"Next Quarter Sessions."—For a pauper settlement appeal, 13 & 14 Car. 2, ch. 12, § 2, means "next practically possible, in order that the appellants might have the possibility of exercising their right." Per *ERLE, C. J.*, delivering judgment of the court. *R. v. Sussex*, 4 B. & S. 966, and cases therein cited; so of a poor rate appeal under § 4, 17 Geo. II, ch. 38; *R. v. Surrey*, 6 Q. B. D. 100. See also *Rex v. Heath*, 5 A. & E. 343; s. c., 31 E. C. L. 353.

**Next Regular Sessions.**—As used in the Ill. Const. of 1870, art. 4, § 18, "Each general assembly shall provide for all the appropriations necessary for the ordinary and contingent expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session," means the end of the first fiscal quarter after the adjournment of the second regular session of the general assembly held after the adoption of the constitution. *People v. Lippincott*, 64 Ill. 256.

**Next Session.**—Under an act authorizing the governor to appoint a supervisor, subject to the approval of the senate at its "next session," next session means the next session in fact, whether special or regular. *State v. Williams*, 20 S. Car. 12.

**Next Term.**—In *Iowa*, where, by attachment, the defendant is required to appear and answer at the "next term," the next general term will be intended, unless a special term had been appointed at the time of the issuing of the writ. *Wilke v. Jones*, 1 Morr. (Iowa) 97.

Under a statute requiring an action to be entered at the term of court holden next after its removal to the court, an action was removed by an order passed March 2, which also was the first day of a term. *Held*, that the next subsequent term, and not the term commencing March 2, was the next term within the meaning of the law. *French v. Barnard*, 9 Cush. (Mass.) 403. See also *Durell v. Merrill*, 1 Mass. 411.

The phrase next term, in the act of 1799, meant the term holden after the termination of the circuit court. *Moodie v. Vandyke*, 4 Yeates (Pa.) 512.

In reference to appeals, the expression "next term" excludes a present or existing session of the court appealed to, and carries the appeal to the next succeeding term. *Town of Shelburn v. Eldridge*, 10 Vt. 123.

A writ being made returnable at the "term next to be holden," the term being fixed by general statute is sufficiently definite without stating the day on which the term would begin. *Dean v. Swift*, 11 Vt. 311.

The question is whether "the next term succeeding that at which the accused shall have been arraigned," means the next term of the trial court appointed by law, without regard to the condition and situation of the case, or does it mean the next term after the arraignment at which the petition "for a change of venue" might properly be presented to the court. After due consideration we have concluded that we ought to give the statute the latter construction. *State v. Sasse*, 72 Wis. 3. See generally *Smith v. Cutler*, 10 Wend. (N. Y.) 589; s. c., 25 Am. Dec. 580.

**Next Two Months.**—Evidence was held properly admissible that in the iron trade a custom prevails whereby the entire months of July and August would be included in the terms "during the next two months" in a contract entered into on June 17. *Bissell v. Beard*, 28 L. T., N. S. 740.

"Day Next Appointed."—As to the phrase "day next appointed" for holding brewster sessions, in the Sunday Closing (Wales) act, 1881 (44 & 45 Vict., ch. 61, § 3, see *Richards v. Macbride*, 8 Q. B. D. 119. The court in that case refused to read that phrase as though it ran the "next day appointed."

*juris*, as an infant or married woman. Synonymous with *prochein ami*, the Norman French term.<sup>1</sup>

**NEXT OF KIN**—(See also PROBATE AND LETTERS OF ADMINISTRATION; STATUTES OF DISTRIBUTION).

**I. Definition, 703.**

**II. How Next of Kin Are Ascertained, 703.**

**III. Gifts to Next of Kin, 705.**

**I. DEFINITION.**—The next of kin of a decedent are the persons or person nearest in degree of blood surviving him. LORD COKE defined the next of kin to be, "the next of blood who are not attainted of treason, felony, or have any other lawful disability."<sup>2</sup>

The practical difference between "next of kin" and "heirs at law" is that the former take the personal property, while the latter take the real estate.<sup>3</sup> In the United States, where primogeniture is not recognized as a rule of descent, the "next of kin," in the majority of cases, are the same as the heirs at law. But in many cases they may be different. Thus, in some of the States personal property is distributed to the parents of the intestate, while the real estate vests in his brothers and sisters. In such a case the parents take the personal property as next of kin, while the brothers and sisters take the real estate as heirs at law.

**II. HOW NEXT OF KIN ARE ASCERTAINED.**—No one is included within the term "next of kin," who does not come within the statutes of distribution. In *England* and the *United States* statutes of distribution, modeled upon the 118th novel of Justinian, have been enacted, which define with precision the order of preference among kindred. In construing these statutes the courts have generally applied the rules of the civil law in ascertaining the proximity of kindred.<sup>4</sup> In determining lineal consanguinity each step up or down from the decedent counts as one degree. Thus an intestate and his son or father are related in the first degree; an intestate and his grandson or grandfather are related in the second degree. In determining collateral consanguinity the rule is to count up from the intestate to the common ancestor and then down to the person whose kinship with the intestate is sought to be ascertained. In this computation, each step, both in the ascending and descending lines, counts as one degree. Thus an intestate and his brother are related in the second degree, an intestate and his cousin in the fourth degree.<sup>5</sup>

1. See PARTIES TO ACTIONS; BOUV. L. Dict.; ABBOTT'S L. Dict.

2. 91 Co. Rep. 39b.

3. Underwood v. Wing, 4 De G. M. & G. 633; 24 L. J. Ch. 293.

4. 1 Williams on Executors, 421; Schouler's Executors and Administrators, 133; Thomas v. Ketteriche, 1 Ves. Sr. 214; Wallace v. Hodgson, 2 Atk. 117;

Lloyd v. Trench, 2 Ves. Sr. 214; Slosson v. Lynch, 43 Barb. (N. Y.) 147; Baltimore etc. R. Co. v. Gettle, 3 W. Va. 376; Churchill v. Prescott, 2 Bradf. (N. Y.) 304; Anderson v. Potter, 5 Cal. 63.

5. 2 Black. Com. 202, 207. In Lee v. Sedgwick, 1 Root (Conn.) 52, administration was granted to the daughter in



In cases of distribution, relatives of the intestate on the father's side and the mother's side stand on an equal footing. It follows from this that there may be relatives, distant from the intestate by an equal number of degrees, who are not related to each other, but who have equal rights in the distribution of the intestate's estate, and stand on an equal footing as to rights of administration.<sup>1</sup>

In the distribution of personal property the half blood is entitled equally with the whole blood.<sup>2</sup>

In some cases the law discriminates between persons of the same degree of kinship, but of different classes. Thus grandparents and brothers and sisters are both of the second degree, but it is considered that the ties of kinship are closer between the intestate and his brothers and sisters than between him and his grandparents, and preference is, therefore, accorded to the former. On the same principle descendants are preferred to ascendants in the same degree.<sup>3</sup>

The civil law preferred lineal to collateral kindred of whatever degree, except in the case of brothers and sisters, but at common law preference is given to nearer collateral kin over more remote lineal kin.<sup>4</sup>

In most of the United States, in cases of administration, preference is given to the father, as next of kin, over the mother, where the intestate has died without leaving widow or issue to survive him.

A husband and wife, not being related to each other by blood, are not considered next of kin to each other.<sup>5</sup>

preference to the son of the eldest son of the intestate.

On the general subject of the right of next of kin to administer in preference to creditors, public administrators and strangers, see *Little v. Berry*, 94 N. Car. 433; *Public Administrator v. Watts*, 1 Paige (N. Y.) 347; *Butler v. Perrott*, 1 Dem. (N. Y.) 9; *Jordan v. Ball*, 44 Miss. 194; *Cutchin v. Wilkinson*, 1 Call (Va.) 1; *Hayes v. Hayes*, 75 Ind. 395; *Langmade v. Tuggle*, 78 Ga. 770; *Hill v. Alsbaugh*, 72 N. Car. 402; *Succession of Block*, 6 La. An. 810; *Cobb v. Beardsley*, 37 Barb. (N. Y.) 192; *Gusman's Succession*, 36 La. An. 299; *Succession of Brinkman*, 5 La. An. 27; *Watson v. Greenock*, 31 Ga. 694.

1. 1 P. Wms. 53. In *Maryland* relatives on the father's side are preferred. *Kearney v. Turner*, 28 Md. 408.

2. 2 Black. Com. 505; *Smith v. Tracy*, 1 Ventr. 323; *Collingwood v. Pace*, 1 Ventr. 424; *Lord Winchelsea v. Norcliffe*, 2 Freem. 112; *Croke v. Watts*, 2 Freem. 112; *Burnett v. Mann*, 1 Ves. Sr. 155.

In a contest between one of the whole blood and one of the half blood, the whole blood is preferable in the grant of administration to the half blood. *Stratton v. Linton*, 31 L. J., P. M. A. 48; *Single's Appeal*, 59 Pa. St. 55. Under the New York statutes relatives of the whole blood are preferred to those of the half blood. 2 R. S. 74, § 28.

3. 2 Black. Com. 504.

4. 1 P. Wms. 58; *Schouler's Executors and Administrators* 136. See *Brown v. Hay*, 1 Stew. & P. (Ala.) 102.

5. *Garrick v. Lord Camden*, 14 Ves. 372; *Kilner v. Leech*, 10 Beav. 362; *Watt v. Watt*, 3 Ves. 244; *Whitaker v. Whitaker*, 6 Johns. (N. Y.) 112; *Brookfield v. Allen*, 6 Allen (Mass.) 585; *Haraden v. Larrabee*, 113 Mass. 431; *Townsend v. Radcliffe*, 44 Ill. 446; *Stewart v. Stewart*, 7 Johns. Ch. (N. Y.) 229; *Wright v. Trustees M. E. Church*, 1 Hoffm. (N. Y.) 213; *Lucas v. New York etc. R.*, 21 Barb. (N. Y.) 245; *Green v. Hudson R. Co.*, 32 Barb. (N. Y.) 25; *Murdock v. Ward*, 67 N. Y. 387; *Luce v. Dunham*, 63 N. Y. 36;

Where several persons are of the same degree and class a court of probate will grant administration to the person who is most suitable, or who is most interested in the estate.<sup>1</sup>

**III. GIFTS TO NEXT OF KIN.**—Where a devise or bequest is made to the next of kin without reference to the statute, only those persons take who strictly answer this description. Thus, where a gift is to A, and at his decease to his next of kin, and A dies leav-

*Keteltas v. Keteltas*, 72 N. Y. 312; *Hamlin v. Osgood*, 1 Redf. (N. Y.) 409; *Slosson v. Lynch*, 43 Barb. (N. Y.) 147; *Donnington v. Mitchell*, 2 N. J. Eq. 247; *Waters v. Tazewell*, 9 Md. 291; *Peterson v. Webb*, 4 Ired. Eq. (N. Car.) 56; *Ivin's Appeal*, 106 Pa. St. 176; *Tillman v. Davis*, 95 N. Y. 17; *Stall v. Kurtz*, 28 Ohio St. 192; *Succession 7 Williamson*, 3 La. An. 261.

"The words 'next of kin' are limited in legal meaning, as in common use, to blood relations, and do not include a husband or wife, unless accompanied by other words clearly manifesting a purpose to extend their signification; and the mere addition of a reference to the statutes of distribution is not sufficient," per GRAY, C. J., in *Haraden v. Larrabee*, 113 Mass. 430.

In *New York* "next of kin" (as used in 2 R. S. 451, § 23, authorizing actions against the next of kin to recover back the assets) means those to whom, under the statute of distributions, the personal estate of the deceased would pass. It therefore includes the widow of the deceased. *Merchants' Ins. Co. v. Hinman*, 34 Barb. (N. Y.) 410; s. c., 13 Abb. Pr. (N. Y.) 110.

As used in the statutes authorizing action for causing death, the term does not include husband or wife. The phrase is used to signify relatives of a person who has died intestate. *Green v. Hudson River R. Co.*, 32 Barb. (N. Y.) 25. In *Peet v. Commerce etc. R. Co.*, 70 Tex. 522, the will of a married woman contained the following clause: "I give and bequeath to my beloved husband, in trust for my legal heirs, my street railroad property in the city of D., known as the C. Railroad, together with all stock, live and rolling, franchises and rights pertaining to the same, and direct that he superintend the management of the same . . . and after paying all expenses incidental to the running, maintaining, and keeping said property in good condition, the remainder of the revenues derived from the management of said property, I direct

shall be paid over to my legal heirs, share and share alike, with remainder after my husband's death, or the relinquishment of said trust by him for any cause to my legal heirs." In *Texas*, the husband of one dying intestate, without child or descendants, takes all her personal estate. Testatrix left no issue. The court held, in a proceeding by judgment creditors of her husband to reach the testatrix's shares of stock, that the words "legal heirs" meant her next of kin and did not include her husband.

1. Thus in *Hoskins v. Morel*, T. U. P. Charl't. (Ga.) 69, where two claimants for the appointment of administrator were in equal degree of affinity to the deceased, the one of them who was residuary legatee of one-quarter of the estate, real and personal, was held to have the preferable right. See also *Clay v. Jackson*, T. U. P. Charl't. (Ga.) 71; *Leverett v. Dismukes*, 10 Ga. 98; *Moody v. Moody*, 29 Ga. 519.

In *New York* the surrogate has power to select, from two persons, equally akin to the deceased, the one he deems more suitable, and appoint him sole administrator. *Taylor v. Delancy*, 2 Cal. Cas. (N. Y.) 143.

Under 3 N. Y. Rev. Stat. (5th ed.) 158, prescribing the order in which the next of kin shall be entitled to letters of administration—an intestate's married daughter, over twenty-one years of age, is entitled to the administration of his estate in preference to the guardian of a minor son. 1870, *Cottle v. Vanderheyden*, 56 Barb. (N. Y.) 622; 39 How. Pr. (N. Y.) 289.

Under article 93, § 23 of the Maryland Code, a grandson of an intestate, though indebted to the estate, is entitled to letters of administration in preference to a granddaughter; and the orphans' court has no power to deprive him of the right. *Cook v. Carr*, 19 Md. 1.

A died, leaving three sisters and one brother. The eldest sister was older than the brother, and unmarried. The other sisters were married. It was agreed by all concerned in the estate,

ing a brother and the children of a deceased brother, the brother takes, to the exclusion of the children of the deceased brother.<sup>1</sup>

In the case of devises or bequests, all persons of equal degree take, although, under the statute, one class may be preferred to another.<sup>2</sup>

that the eldest sister should administer the estate, and she expressed an intention to do so. She left the State to be gone for a month. In her absence, the husband of one of the sisters, without notice to or consent of the other parties, applied for and obtained the administration. *Held*, that the eldest sister was entitled to the administration of the estate, and the decree of the orphans' court, revoking the letters granted to her sister's husband, was confirmed. *Owings v. Bates*, 9 Gill (Md.) 463.

1. *Elmsley v. Young*, 2 Myl. & K. 780; *Redmond v. Burrough*, 63 N. Car. 242; *Brookfield v. Allen*, 6 Allen (Mass.) 585; *Lucas v. Brandreth*, 28 Beav. 274; *Avison v. Simpson*, 1 Johns. 43. In *Harrison v. Ward*, 5 Jones Eq. (N. Car.) 240, a daughter was held entitled to take exclusive of another daughter, deceased.

A testator gave property to his "nearest relations." *Held*, that his brothers took, to the exclusion of nephews and nieces. *Locke v. Locke*, 45 N. J. Eq. 97.

The words "next heir" in a will are words of purchase, not of limitation. *In re Parry's Contract*, 55 L. J. R., Ch. 237.

The words "next male kin" indicate a class. *Re Chapman W. N.* (83) 232. Where there is a bequest to the next of kin of a particular name, it has been held in some cases that change of name by marriage is immaterial. *Pyot v. Pyot*, 1 Ves. 335; *Carpenter v. Bott*, 15 Sim. 606; *Mortimer v. Hartley*, 6 Exch. 60.

In *Jobson's Case*, Cro. El. 576, however, where the gift was to "the next of kin of my name," the daughter of a brother, who was married at the testator's death, did not take. See also *Leigh v. Leigh*, 15 Ves. 100; *Doe v. Plumtre*, 3 B. & Ald. 474.

**Next Personal or Legal Representatives.**—Under a gift to a person's "next personal representatives," or "next legal representatives," his nearest of kin, in blood, will take. *Booth v. Vickers*, 13 L. J., Ch. 147; 1 Coll. C. C. 6; *Withy v. Mangles*, 10 L. J., Ch. 391; 10 Cl. & F. 215; *Stockdale v. Nichol-*

*son*, 36 L. J., Ch. 793; L. R., 4 Eq. 359.

2. The preference given to one class over another when all are in the same degree, seems to hold good only under the statutes of distribution and administration. Where the term "next of kin" is used in a will or a deed a different rule applies. This is illustrated by the interesting case of *Withy v. Mangles*, 4 Beav. 358. In that case a settlement was made on the marriage of Emily Mangles, by which the ultimate limitation of personal property was "to such person or persons as at the time of the death of Emily Mangles would be her next of kin." Emily died, leaving a father, mother and a child. The court held that, under this limitation, the father, the mother and child took as her next of kin in joint tenancy. The master of the rolls, in delivering the opinion of the court, said: "Whatever arbitrary distinctions may have been adopted in computing collateral degrees of consanguinity, all writers upon the law of England appear to concur in stating, that, in the ascending and descending line, the parents and children are in equal degree of kindred to the proposed person; and I think that, except for the purpose of administration and distribution in cases of intestacy, and except in cases where the simple expression may be controlled by the context, the law of England does consider them to be in equal degree of consanguinity."

"The law of England gives a preference to the child over the parent in distribution; but I think that we cannot therefore conclude, that with respect to every disposition of property, made in words to give the same to persons equally near of kin, the parents are to be held more remote than the child. If, in this case, the words of the limitation had, in any way, referred to the law of distribution, there would have been a guide to the interpretation; but there is no such reference. The words stand by themselves simply, the limitation is to the next or nearest of kin, and I cannot take upon myself to say, that the settler had in his contemplation the law

If, however, the testator refers expressly to the next of kin according to the statute, and does not state how they are to take, the beneficiaries take according to the proportions directed by the statute.<sup>1</sup>

The term "next of kin" has reference to the death of the ancestor, and those who are entitled to take under that term are to be ascertained at the death of the ancestor.<sup>2</sup>

**NIGHT**—(See BURGLARY; PROCESS).—That space of time during which the sun is below the horizon of the earth, except that short space which precedes its rising and follows its setting, during which, by its light, the countenance of a man may be discerned. In most of the States, however, night is defined by statute.<sup>3</sup>

of distribution of intestate's effects, and intended a limitation in conformity with that law. To act upon such an hypothesis would be, in effect, to introduce into the settlement an implied reference to the law of distribution of personal estates in cases of intestacy, and it does not appear to me that this can safely be done.

"Conceiving, therefore, that by the law of England, the father, the mother and child of any proposed person are equally near of kin to such person, I am of opinion that at the time of Mrs. Withy's death, her father, mother and child, being her next of kin, the limitation took effect in their favor; and I think that they took the property limited to them as joint tenants."

See also *Halton v. Foster*, L. R., 3 Ch. 505. See *Ennis v. Pentz*, 3 Bradf. (N. Y.) 382.

1. *Bullock v. Downes*, 9 H. L. 1; *Nichols v. Haviland*, 1 K. & J. 504; *Ash v. Ash*, 33 Beav. 187; *Ranking's Settlement Trusts*, 6 Eq. 601; *Martin v. Glover*, 1 Coll. 270; *Jenkins v. Gower*, 2 Coll. 537; *Horn v. Coleman*, 1 Sm. & G. 169; *Mattison v. Tanfield*, 3 Beav. 131; *Lewis v. Morris*, 19 Beav. 34; *Richardson v. Richardson*, 14 Sim. 526; *Phillips v. Garth*, 3 Bro. C. C. 69; *Holloway v. Radcliffe*, 23 Beav. 163; *Fielden v. Ashworth*, 20 L. R., Eq. 410; *Williams v. Ashton*, 1 John. & H. 115; *Lowndes v. Stone*, 4 Ves. 649; *Boys v. Bradley*, 10 Ha. 389.

2. *Spink v. Lewis*, 3 Bro. C. C. 355; *Doe v. Lawson*, 3 East 278; *Ware v. Rowland*, 2 Ph. 635; *Holloway v. Holloway*, 5 Ves. 399; *Barber's Will*, 1 Sm. & G. 118; *Gorbell v. Davison*, 18 Beav. 556; *Starr v. Newberry*, 23 B. 436; *Lang's Will*, 9 W. R. 589; *Murphy v. Donegan*, 3 J. & Lat. 534; *Baker v. Gibson*, 12 B. 101; *Harrison v. Harrison*,

28 B. 21; *Mitchell v. Bridges*, 13 W. R. 200; *Urquhart v. Urquhart*, 13 Sim. 613; *Minter v. Wraith*, 13 Sim. 52; *Seifferth v. Badham*, 9 Beav. 372.

The testator may, however, direct the class of next of kin to be ascertained at any time which he may choose. *Pinder v. Pinder*, 28 Beav. 44; *White v. Springett*, 4 Ch. 300.

If the gift is, after the decease of the tenant for life, to such persons as shall then be my next of kin, the word "then" must refer to the death of the tenant for life. *Long v. Blackall*, 3 Ves. 486; *Wharton v. Barker*, 4 K. & J. 483;

If, however, the word *then* is used as the equivalent of *thereupon*, the rule does not apply. In *Bullock v. Downes*, 9 H. L. 1, the testator gave the residue of his estate to three persons, in trust, to pay the dividends to his son for life, and after the son's decease to pay to any widow of the son (who was not then married) an annuity of £600 for life, and the residue to his son's children, and, in case there should not be any child of the son "then to stand possessed of the same in trust for such persons or person of the blood of me, as would by virtue of the Statutes of Distribution of Intestates' Effects have become and been then entitled thereto, in case I had died intestate." At testator's death, he left the son and four daughters him surviving. The son married, enjoyed the dividend of the residue during life, and died without ever having had a child. The court held that the word "then," even if treated as an adverb of time, referred only to the time when the persons entitled would come into possession of what had been bequeathed to them; and that the persons entitled were to be ascertained at the death of the testator.

3. *Bouv. L. Dict.*; *Robbins v. Smith*,

**NIGHT WALKER.**—Night walkers are persons who make themselves a common nuisance by going about nights committing bawdry or other petty offences or annoyances.<sup>1</sup>

**NIHIL EST.**—(See also SCIRE FACIAS).—There is nothing.<sup>2</sup>

47 Conn. 182; *Martin v. McCarty*, 10 (Tex.) S. W. Rep. 221; *Thomas v. State*, 5 How. (Miss.) 31; *State v. Bancroft*, 10 N. H. 105; *Lewis v. State*, 16 Conn. 32; *Cureton v. Queen*, 1 B. & S. 218.

The presence of sufficient daylight to discern a man's features has long been adopted as a criterion to determine whether or not the act was done in the night-time within the meaning of the law applicable to the crime of burglary. *People v. Griffin*, 19 Cal. 578. See also *Trull v. Wilson*, 9 Mass. 154.

A complaint for an offence committed in the night-time of a particular day may be dated on the same day. *Commonwealth v. Flynn*, 3 Cush. (Mass.) 525.

**"At Night" in an Insurance Policy.**—The policy stipulates that the assured, a country merchant, should keep a set of books, and that the books should be kept in a fireproof safe "at night," and at all times when the store was not actually open for business; the books to be produced in case of loss by fire, and, upon failure to produce them, the policy to be null and void. In a suit on the policy the evidence showed that it was customary for the merchants of the neighborhood to keep their stores open as late as nine or eleven o'clock at night, and that the loss occurred about nine o'clock when the store was open for business and the plaintiff posting his books, the most of the books being lost. *Held*, that "at night" in the sense of the policy did not mean from sunset to sunrise, but from the merchant's closing until his opening hour. *Jones v. Southern Ins. Co.*, 38 Fed. Rep. 21.

**"Sabbath Night."**—Where a statute made it an offence to keep open a tippling shop on the Sabbath day or night, it was held that a count of an indictment charging the offence to have been committed between midnight of Saturday and the morning of Sunday sufficiently charged its commission on Sabbath night to withstand a motion to quash. *Kroer v. People*, 78 Ill. 294.

Since the passing of St. 1847, ch. 13; Gen. Stat. of Mass., ch. 172, § 13, for defining "the time of night-time in criminal prosecutions," it is sufficient to

allege, generally, that an offence was committed in the night-time, without designating the particular hour of the night; and by such allegation is to be understood the period of night-time as defined in that statute. *Commonwealth v. Williams*, 2 Cush. (Mass.) 582.

An indictment on Rev. Stat. of Mass., ch. 126, § 5, which imposes a punishment on "every person who shall wilfully and maliciously burn either in the night-time or in the daytime," any building therein described, is not fatally defective by reason of its describing an offence as having been committed in the night-time, between the hour of sunset on one day and the hour of sunrise on the next day, notwithstanding St. 1847, ch. 13; Gen. Stat., ch. 172, § 13, defining the time of night-time in criminal prosecutions to be "the time between one hour after the sunset on one day and one hour before sunrise on the next day." *Commonwealth v. Lamb*, 1 Gray (Mass.) 493.

1. 1 Bishop on Crim. Law 501.

"Those who eave-drop men's houses, cast men's gates, carts and the like into ponds, or commit other outrages or misdemeanors in the night, or shall be suspected to be pilfering or otherwise like to disturb the peace, or that be persons of evil fame or report generally, or that shall keep company with any such, or with other suspicious persons in the night." 1 Burn's Justice 765; *State v. Dowers*, 45 N. H. 543. See also *State v. Russell*, 14 R. I. 506; *Lawrence v. Hedges*, 3 Taunt. 15; *Watson v. Con.* 1 Lewin 6.

In the absence of a motion for a bill of particulars, a charge that defendant is "a common night walker" is a sufficient description of the offence. *State v. Russell*, 14 R. I. 506.

2. A return of a sheriff appropriate to a writ of *scire facias*. It is a fuller return than that of *non est inventus*, and it means "that the defendant has nothing in the bailiwick, no dwelling-house, no family, no residence and no personal presence to enable the officer to make the service required by the act of assembly." "Nihil" is a good return to a writ of summons. *Sherer v. Easton Bank*, 33 Pa. St. 139.

**NISI**.—Unless ; conditionally.<sup>1</sup>

**NO**.—See note 2.

**NOLLE PROSEQUI**.

**I. In General, 709.**

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2. *Nature and Effect, 710.*

(a) *In Civil Cases, 710.*

(b) *In Criminal Cases, 711.*

**II. Nolle Prosequi in Civil Actions, 711.**

1. *As to Part of the Declaration, 711.*

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**III. Nolle Prosequi in Criminal Prosecutions, 713.**

1. *When It May be Entered, 713.*

(a) *Before Trial, 713.*

(b) *During Trial, 713.*

(c) *After Verdict, 713.*

2. *Who Has Authority to Enter, 714.*

3. *Effect of Entry, 714.*

**I. IN GENERAL**.—1. **Definition and Use.**—*Nolle prosequi*, usually abbreviated into *nol. pros.*, is a technical term of English law, used both in criminal and civil cases. It may be defined as a for-

**1. Anderson's Law Dict.**

"A continuance is an adjournment to a time certain; a continuance *nisi* is to a time certain unless something shall occur to cause action upon the case before that time." *Commonwealth v. Maloney*, 145 Mass. 208.

**Judgment Nisi.**—What is called a judgment *nisi* is nothing more than a rule to show cause why judgment should not be rendered. *Young v. M'Pherson*, 3 N. J. L. 455. As to decree *nisi* in divorce suits, see **DIVORCE**, 5 Am. & Eng. Encyc. of Law 745.

**2. The abbreviation "No."** signifies the word number and nothing else. *Burr v. Broadway Ins. Co.*, 16 N. Y. 271.

**No More.**—Where a testator gave legacies to each of his children and heirs at law, except one, and ended each bequest with the words, "and no more," and finally gave all of his realty to this son, without words of limitation, and without repeating the phrase "and no more," it was held that the son took an estate in fee. *Hitch v. Patten* (Del.), 16 Atl. Rep. 558.

**No Costs.**—An agreement of tenants to an action of dower to "submit to judgment for plaintiff for dower, no costs," construed under the circumstances, to refer only to costs up to the time of judgment for dower, and not to costs of the subsequent proceedings for the admeasurement of dower. *Smith v. Smith*, 4 R. I. 370.

**"No Man's Land."**—The court of the Eastern District of Texas has jurisdic-

tion of "No Man's Land." *In re Jackson*, 40 Fed. Rep. 372.

**"No Order."**—Plaintiff took out a summons before a judge at chambers for costs, under 13 & 14 Vict., ch. 61, § 13. The judge endorsed the summons with the words, "No order;" "that is, as I understand it, equivalent to a dismissal of the summons." *CAMPBELL, C. J.*, in *Merredith v. Gittings*, 18 Q. B. 257; s. c., 83 E. C. L. 258.

**No Particular Provocation Appearing.**

—The words, "no particular provocation appearing," are proper in an indictment for aggravated assault, under § 1293 Gantt's Ark. Dig., but are surplusage in an indictment for an assault with intent to commit murder. *Butler v. State*, 34 Ark. 480.

**"No Question as to the Validity."**—

The endorsement on a policy that there would be "no question as to the validity" of the same, unless raised in a certain way, held to preclude the insurance company from interposing the defence of fraudulent representations in an action on the policy, and not to be against public policy. *Wright v. Mutual Ben. L. Assoc.*, 26 N. Y. Wk. Dig. 18.

**"No Tenant."**—The owner of a house is not liable, under a Boston ordinance that provides that snow shall be removed from the sidewalk by the "tenant, occupant, and, in case there shall be no tenant, by the owner," where there are two tenants of the house, but no sole tenant on whom to fix the liability. *Commonwealth v. Watson*, 97 Mass. 562.

mal undertaking or agreement, entered on the record by the plaintiff or prosecutor, that he will, either wholly or partially, forbear to proceed further with the action or bill (*se ulterius nolle prosecute*), or that he will proceed no further against certain of the defendants.

The principal use of a *nolle prosecute* in civil cases was to clear the record of improper parties or objectionable counts, or parts of counts. It is now almost entirely superseded by the modern practice of discontinuance or amendment, but may be still found useful in some instances. In criminal cases its object is much the same, and it is usual to enter it during the trial or after conviction, so as to confine the verdict to those counts and parties which are good. Another object for which it is often used in criminal trials is to stay proceedings against an accomplice in order to secure his evidence. This latter is, however, now usually effected by the prosecution offering no evidence and the judge directing an acquittal.

**2. Nature and Effect.**—The effect of a *nolle prosecute*, in both civil and criminal cases, is simply that of an agreement to proceed no further in that particular suit or part of the suit, or prosecution; or as to some of the defendants. It is not in the nature of a *retraxit* or a release<sup>1</sup> in civil cases, or of an acquittal<sup>2</sup> in criminal prosecutions, and is not a bar to a future action for the same cause,<sup>3</sup> or to another indictment for the same crime.<sup>4</sup>

(a) *In Civil Cases.*—Formerly a *nolle prosecute* was thought to be a bar to a second civil action for the same cause, but it is not so now, except in those cases where, from the nature of the action—as for technical reasons in the case of joint contractors under the old common-law rules—judgment and execution against one is a satisfaction for all the damages sustained by the plaintiff.<sup>5</sup>

1. See 1 Wms. Saund. 207, note 2; Delroach v. Dixon, 1 Hempst. (U. S.) 264; Minor v. Mechanics' Bank, 1 Pet. (U. S.) 74; Quigley v. Merritt, 4 Iowa 475; Tuel v. Amick, 6 Blackf. (Ind.) 249; Keeler v. Bartine, 12 Wend. (N. Y.) 110.

2. See Com. Dig., Indictment (K.); 3 Cox C. C. 93; 1 Mod. 261; 1 Salk. 59; United States v. Stowell, 2 Curt. (U. S.) 170; United States v. Shoemaker, 2 McLean (U. S.) 114; *Ex parte* Wens-ton, 52 Ala. 419; State v. Garvey, 42 Conn. 232; Commonwealth v. Tuck, 20 Pick. (Mass.) 365; Bacon v. Towne, 4 Cush. (Mass.) 217, at page 235; Wortham v. Commonwealth, 5 Rand. (Va.) 669.

3. Hatcher v. Fowler, 1 Bibb (Ky.) 337; Brown v. Pearson, 8 Mo. 159; Beard v. Van Wickle, 3 Cow. (N. Y.) 335; Keeler v. Bartine, 12 Wend. (N. Y.) 110.

4. Aaron v. State, 39 Ala. 75; State v. Main, 31 Conn. 572; Williams v. State, 57 Ga. 478; Commonwealth v. Wheeler, 2 Mass. 172; State v. Thompson, 3 Hawks (N. Car.) 613; State v. Haskett, 3 Hill (S. Car.) 95; Commonwealth v. Lindsey, 2 Va. Cas. 345.

5. 3 Term. 511; 1 Wils. 98; United States v. Linn, 1 How. (U. S.) 104; Quigley v. Merritt, 4 Iowa 475; Brown v. Pearson, 8 Mo. 159; Woodward v. Newhall, 1 Pick. (Mass.) 500; Judson v. Gibbons, 5 Wend. (N. Y.) 224; Breidenthal v. McKenna, 14 Pa. St. 160; Pell v. Pell, 20 Johns. (N. Y.) 126.

"It has long been settled that a *nolle prosecute* does not amount to a *retraxit*, and that it may be entered as to a part of the suit, or as to one of the defendants, where the action is in its nature joint and several, or where the defendants sever in their pleas. Thus, in trespass, or other action founded upon tort,

(b) *In Criminal Cases.*—In criminal cases a *nolle prosequi* is not, as such, a bar to a fresh indictment for the same offence.<sup>1</sup> However, if, at the time the proceedings are stayed by a *nolle prosequi*, the defendant has been put in jeopardy, that fact will, of course, release him from the second indictment, upon his pleading second jeopardy, or *autrefois acquit*, as the case may be.

**II. NOLLE PROSEQUI IN CIVIL ACTIONS.**—To narrow slightly the definition before given: *nolle prosequi*, in civil practice, is an agreement or acknowledgment entered of record by the plaintiff in an action that he will forbear, either wholly or partially, to proceed in the particular action; or that he will proceed no further against one or more of the defendants. From the definition it appears that there are two distinct classes of cases in which a *nolle prosequi* may be used in civil practice; first, where it is entered as to some of the counts of the declaration; and, second, where it is entered as to some of the parties to the action.

**1. Nolle Prosequi as to Part of the Declaration.**—A *nolle prosequi* may be entered as to any of several counts in a declaration, or to any part of the action, without turning the plaintiff out of court as to the other counts, or the remaining part of the suit.<sup>2</sup> After a count is *nol. pros'd*, it is considered as stricken out of the declaration, except so far as it is referred to by the other counts, and the only effect of the *nolle prosequi* is to strike from the record that count and all the issues joined upon it. The residue of the issues remain to be tried the same as if no other had been formed.<sup>3</sup>

the plaintiff may enter it at any time before final judgment, as to one or more of the defendants, and proceed against the others." SMITH, J., in *Beidman v. Vanderslice*, 2 Rawle (Pa.) 334.

1. *United States v. Farrington*, 4 Cranch (C. C.) 465; *Battle v. State*, 54 Ala. 93; *Jones v. State*, 55 Ga. 625; *Commonwealth v. Kimball*, 7 Gray (Mass.) 328; *State v. Smith*, 49 N. H. 155; *People v. Vanhorne*, 8 Barb. (N. Y.) 158; *Baker v. State*, 12 Ohio St. 214; *McFadden v. Commonwealth*, 23 Pa. St. 12; *State v. Roe*, 12 Vt. 93.

2. *McLean v. Rutherford*, 1 Hempst. (U. S.) 47; *Thomas v. Farmer*, 6 B. Mon. (Ky.) 52; *Hatcher v. Fowler*, 1 Bibb (Ky.) 337; *Breckenridge v. Lee*, 3 A. K. Marsh. (Ky.) 446; *Brown v. Feeter*, 7 Wend. (N. Y.) 301; *Keeler v. Bartine*, 12 Wend. (N. Y.) 110.

It is not erroneous to enter a *nolle prosequi* as to one count of a declaration, even after the jury is sworn, and proceed to trial on the other counts. *Breckenridge v. Lee*, 3 A. K. Marsh. (Ky.) 446. Or when a count is adjudged bad on demurrer. *Brown v.*

*Feeter*, 7 Wend. (N. Y.) 301. A *nolle prosequi* as to one count of a declaration on a promissory note and money paid does not admit the truth of a plea of the statute of limitations. *Keeler v. Bartine*, 12 Wend. (N. Y.) 110. Where the plaintiff declares on a promissory note and the money counts, he can enter a *nolle prosequi* upon the latter and have his damages assessed by the clerk, or he may proceed by writ of enquiry, but the defendant cannot compel him to enter a *nolle prosequi*. *Beard v. Van Winkle*, 3 Cow. (N. Y.) 335.

3. *Brown v. Feeter*, 7 Wend. (N. Y.) 301. "There is an expression by CHIEF JUSTICE MARSHALL, in *Hughes v. Moore*, 7 Cranch 176, which is, when particularly examined, not in contradiction to this doctrine, but in confirmation of it. As a general proposition his statement cannot be supported, but is correct, taken in connection with other parts of the same opinion, and should be so regarded—i. e., 'After this discontinuance—which was a *nolle prosequi* to one count—the parties are in precisely the same position as if all



2. *Nolle Prosequi as to Parties to the Action.*—With regard to *nolle prosequi* as to some of the parties to the action, there is a distinction to be observed between actions in form *ex contractu* and those in form *ex delicto*.

(a) *In Actions Ex Contractu.*—In this class of actions the entry of a *nolle prosequi* as to any of the defendants discontinues the action as to all.<sup>1</sup> This is a result of the common-law rules of pleading in relation to actions against joint contractors. But, even in actions *ex contractu*, when the defendants sever in their pleas, and one pleads matter going only to his personal discharge, and not to the action itself, a *nol. pros.* can be entered as to him without discharging the others.<sup>2</sup> Where the common law rules as to joint contracts remain in force, the rules as above stated relating to *nol. pros.* in actions *ex contractu* remain as above stated. In some States, however, as Missouri and North Carolina, separate actions are, by statute, allowed against each of several joint contractors. It follows that, in those States, the reason for the distinction no longer existing, a *nolle prosequi* may be entered as to part of the defendants, in all actions *ex contractu*, without

the issues, both of law and fact, which were joined upon that count, had been decided in favor of the plaintiff below.' Suppose the count thus discontinued had been upon a note or other contract, which was competent evidence to sustain the common counts. It is clear that the instrument might be used for that purpose, and a recovery had upon it, notwithstanding the *nolle prosequi*, as it might if the count remained; and yet it could not thus be used if a verdict had been found upon the count for the defendant." NELSON, J., in *Keeler v. Bartine*, 12 Wend. (N. Y.) 110

1. *Noke v. Ingram*, 1 Wils. (Ind.) 89; *United States v. Linn*, 1 How. (U. S.) 104; *Smith v. Bouchine*, 2 Stra. (Eng.) 293; *Schermerhorn v. Tripp*, 2 Cai. (N. Y.) 108; *Moore v. Parker*, 3 Mass. 310; *Shields v. Perkins*, 2 Bibb (Ky.) 227; *Hall v. Rochester*, 3 Cow. (N. Y.) 374; *Hartness v. Thompson*, 5 Johns. (N. Y.) 160; *Morton v. Crogham*, 20 Johns. (N. Y.) 122; *Beidman v. Vanderslice*, 2 Rawle (Pa.) 374; *Governor v. Welch*, 3 Ired. L. (N. Car.) 249; 1 Chit. Pl. 546; *Tidd* Pr. 632.

"The result of the authorities is that in actions in form *ex delicto* the plaintiff may enter a *nolle prosequi* as to some, of several defendants, but in actions *ex contractu*, unless the defence goes merely to the personal discharge of one, a *nolle prosequi* cannot be entered as to one and the suit continued as to the

others; but the *nolle prosequi* discontinues the suit as to the whole. Actions *ex contractu* against several are joint; the plaintiff, to sustain his action, must show a joint contract made by all, and a plea by one to the action of the writ, enures to the benefit of all the defendants." *Hall v. Rochester*, 3 Cow. (N. Y.) 374.

2. As in the case of a *femme covert*, *Beidman v. Vanderslice*, 2 Rawle (Pa.) 334. *An infant*, *Kirley v. Cannon*, 9 Ind. 371; *Woodward v. Newhall*, 1 Pick. (Mass.) 500; *Decosta v. Davis*, 4 Zab. (N. J.) 319. Or bankruptcy. *Commonwealth v. Nesbitt*, 2 Pa. St. 16. Also see, in general, *Miner v. Mechanics' Bank*, 1 Pet. (U. S.) 80; *United States v. Linn*, 1 How. (U. S.) 105; *Butter v. Stump*, 4 Bibb (Ky.) 387; *Allen v. Andrews*, 4 Bibb (Ky.) 454; *Shields v. Perkins*, 2 Bibb (Ky.) 227; *Riley v. M'Gee*, 1 A. K. Marsh. (Ky.) 432; *Hardy v. Thomas*, 23 Miss. 544; *Hall v. Rochester*, 3 Cow. (N. Y.) 374; *Pell v. Pell*, 20 Johns. (N. Y.) 126; *Judson v. Gibbons*, 5 Wend. (N. Y.) 224; *Weakly v. Royer*, 3 Watts. (Pa.) 460; *Norman v. Hope*, 2 Miles (Pa.) 142; *Weist v. Jacoby*, 62 Pa. St. 110; *Breidenthal v. McKenna*, 14 Pa. St. 160; *Forbes v. Davis*, 18 Tex. 268.

Where there are too many defendants a *nolle prosequi* may be entered against the superfluous ones if no injury is done to the others. *Norman v. Hope*, 2 Miles (Pa.) 142.

discharging the others.<sup>1</sup>

(b) *In Actions Ex Delicto*.—In the case of joint *tortfeasors*, separate actions are maintainable against each of them, and, therefore, in all actions *ex delicto*, a *nolle prosequi* may be entered as to part of the defendants, and proceedings continued against the others.<sup>2</sup>

**III. NOLLE PROSEQUI IN CRIMINAL PROSECUTIONS.**—A *nolle prosequi* in criminal proceedings is the voluntary withdrawal by the prosecuting authority of present proceedings on a particular bill or information. Many reasons may arise which make it desirable to enter it before trial, and the practice is usual after verdict to enter it upon objectionable counts or parts of counts, so as to disencumber the record and confine the verdict to those which are good. *Nolle prosequi* after verdict is sometimes used as a method for recording executive clemency.

1. **When It May be Entered.**—There are three periods of the prosecution in which the question of the entry of a *nolle prosequi* may arise—before a jury is empanelled, while the case is on trial, and after verdict.

(a) *Before Trial*.—In the first stage, the right of the prosecution to enter a *nolle prosequi* at pleasure is perfectly clear.<sup>3</sup> Numerous considerations may move him to do this. The indictment may be defective, and he may desire to procure another. It may be discovered that the evidence will turn out different from what was expected, and the charge must be varied to correspond with the proof; or, there may be good reasons for not prosecuting at all.

(b) *During Trial*.—When a jury is empanelled for the trial of an indictment, the defendant then acquires new rights. Whether he shall be put on trial or not depends upon the will of the prosecution. But when once put on his trial, and a jury sworn, it is the defendant's right to have them pass upon his case. Their verdict will be a bar to another indictment for the same offence, but a *nolle prosequi* will not. The defendant is entitled to this bar. Therefore, at this stage of the proceedings a *nolle prosequi* cannot be entered without the consent of the defendant.<sup>4</sup>

(c) *After Verdict*.—After a verdict of guilty, the defendant is

1. *Brown v. Pearson*, 8 Mo. 159; *Governor v. Welch*, 3 Ired. (N. Car.) 249.

2. *Mechanic's Nat. Bank of Alexandria*, 1 Pet. (U. S.) 80; *Quigley v. Merritt*, 4 Iowa 475; *Brown v. Pearson*, 8 Mo. 159; *Hardy v. Thomas*, 23 Miss. 544; *Governor v. Welch*, 3 Ired. (N. Car.) 249; *Hall v. Rochester*, 3 Cow. (N. Y.) 374; *Weakley v. Rogers*, 3 Watts. (Pa.) 460; *Breidenthal v. McKenna*, 14 Pa. St. 160; *Forbes v. Davis*, 18 Tex. 268.

3. *Rex v. Moss*, 1 Russ. & Ryan 520;

*Levison v. State*, 54 Ala. 520; *State v. Burke*, 38 Me. 574; *Com. v. McGonagle*, 1 Mass. 517; *Com. v. Wheeler*, 2 Mass. 172; *Com. v. Briggs*, 7 Pick. (Mass.) 177; *Com. v. Tuck*, 20 Pick. (Mass.) 356; *Com. v. O'Donnell*, 12 Allen (Mass.) 45; *Com. v. Jenks*, 1 Gray (Mass.) 490; *Com. v. Cain*, 102 Mass. 487; *State v. Smith*, 49 N. H. 155; *State v. Roe*, 12 Vt. 93.

4. See the cases cited in the note immediately preceding and also in the following note:

to be sentenced on motion of the prosecuting attorney, and at this stage a *nolle prosequi* may be entered.<sup>1</sup> It cannot operate to the injury of the defendant, and cases may occur in which its exercise is beneficial and necessary to the due administration of criminal law. It may be discovered, after verdict, that the defendant, though convicted, is really innocent; it may become important to use him as a witness.

**2. Who Has Authority to Enter.**—As to the person in whom rests the authority to enter a *nolle prosequi*, there is considerable diversity in the various States. At the common law the right was a prerogative incident to the sovereign.<sup>2</sup> As a general rule, in the *United States*, the authority of the attorney-general, district attorney, State's attorney—as the prosecuting officer is variously styled in different jurisdictions—to conduct and manage all criminal prosecutions is unquestionable. It is his exclusive duty to do so; and although he may seek assistance, yet a private prosecutor has no right to employ counsel to aid him.<sup>3</sup> Such being the case, the entry of a *nolle prosequi* is generally a matter for his discretion. Courts have, however, frequently held that the prerogative is under their control when the case is on trial,<sup>4</sup> and that, after a jury is empanelled, a *nolle prosequi* cannot be entered without the sanction of the court. In many of the States the practice is regulated by statute,<sup>5</sup> and generally the consent of the court is made necessary.

**3. Effect of Entry of Nolle Prosequi.**—The entry of a *nolle prosequi*, before the empanelling of a jury, in a criminal prosecution, is not a bar to a subsequent indictment for the same offence.<sup>6</sup> At common law it could be at any time retracted, and must have be-

1. *State v. Whittier*, 21 Me. 341; *State v. Burke*, 38 Me. 574; *Com. v. Briggs*, 7 Pick. (Mass.) 177; *Com. v. Tuck*, 20 Pick. (Mass.) 356; *Com. v. Jenks*, 1 Gray (Mass.) 490; *People v. Van Horne*, 8 Barb. (N. Y.) 158; *State v. Fleming*, 7 Humph. (Tenn.) 152; *State v. Roe*, 12 Vt. 93.

2. *United States v. Watson*, 7 Blatchf. (U. S.) 60; *Com. v. Smith*, 98 Mass. 10; *State v. Tufts*, 56 N. H. 137.

3. *Com. v. Knapp*, 10 Pick. (Mass.) 481; *Com. v. Tuck*, 20 Pick. (Mass.) 356.

4. *United States v. Shoemaker*, 2 McLean (U. S.) 114; *United States v. Stowell*, 2 Curt. (U. S.) 153; *State v. Kreps*, 8 Ala. 951; *Statham v. State*, 41 Ga. 507; *Com. v. Briggs*, 7 Pick. (Mass.) 179; *Com. v. Tuck*, 20 Pick. (Mass.) 356; *Jennings v. Com.*, 103 Mass. 586; *Ex parte Donaldson*, 44 Mo. 149; *State v. Moody*, 69 N. Car. 529; *State v. McKee*, 1 Bailey (S. Car.) 651; *State v. I. S. S.*, 1 Tyler (Vt.) 178.

5. *People v. McLeod*, 1 Hill (N. Y.) 377. In *New Hampshire*, in prosecutions in the name of the State, the prosecuting officer has discretionary power to enter a *nolle prosequi* before a jury is empanelled, or after a verdict in favor of the State, without defendant's consent. With the defendant's consent he may enter it any time during trial and before verdict. *State v. Smith*, 49 N. H. 155.

In *Pennsylvania*, by the act of 1860, no district attorney shall, in criminal case, enter a *nolle prosequi*, either before or after bill found, without first obtaining the consent of the court. *Com. v. Gillespie*, 7 S. & R. (Pa.) 469. In *Agnew v. Commr. of Cumberland*, 12 S. & R. (Pa.) 94, it was doubted whether in a prosecution for perjury under the act of 1819, in *Pennsylvania*, a *nolle prosequi* could be entered, even with the consent of the court.

6. *United States v. Stowell*, 2 Curt. (U. S.) 170; *United States v. Shoe-*

come a matter of record to prevent a revival of proceedings on the original bill. If, however, the jury has been actually empanelled, then, unless the defendant consented to the entry, it will operate as an acquittal.<sup>1</sup> It may be otherwise in cases where the defendant has not been put in jeopardy, and the local law allows a *nolle prosequi* during trial.<sup>2</sup>

**NOLO CONTENDERE.**—I do not care to dispute it; a criminal plea, similar in effect to a plea of guilty, at least, so far as regards proceedings on the particular indictment.<sup>3</sup>

**NOMINAL.**—See note 4.

maker, 2 McLean (U. S.) 114; Gardner v. People, 6 Parker C. R. 155; State v. Blackwell, 9 Ala. 75; Aaron v. State, 39 Ala. 75; *Ex parte* Winston, 52 Ala. 419; State v. Main, 31 Conn. 572; State v. Garvey, 42 Conn. 232; Williams v. State, 57 Ga. 578; State v. Ingram, 16 Kan. 14; Com. v. Thompson, 3 Litt. (Ky.) 284; State v. Ormsby, 8 Rob. (La.) 583; State v. Byrd, 31 La. An. 419; Com. v. Wheeler, 2 Mass. 172; Com. v. Tuck, 20 Pick. (Mass.) 356; Bacon v. Towne, 4 Cush. (Mass.) 234; *Ex parte* Donaldson, 44 Mo. 149; Clarke v. State, 23 Miss. 261; State v. McNeill, 3 Hawks (N. Car.) 183; State v. Thornton, 13 Ired. (N. Car.) 256; State v. McKee, 1 Bailey (S. Car.) 651; State v. Haskett, 3 Hill (S. Car.) 95; Com. v. Lindsay, 2 Va. Cas. 345; Wortham v. Com., 5 Rand. (Va.) 669.

No personal agreement by the prosecuting officer will make a *nolle prosequi* a bar. In State v. Lopez, 19 Mo. 254, the circuit attorney in open court agreed with a defendant, against whom there were several indictments, that if he would plead guilty to some, he should be discharged as to the others. The defendant then pleaded guilty to four of the counts, and a *nolle prosequi* was entered on the record as to the remainder. It was held that the *nolle prosequi* could not have the legal effect of a *retraxit* by the agreement.

1. United States v. Farring, 4 Cranch (C. C.) 465; United States v. Shoemaker, 2 McLean (U. S.) 114; State v. Kreps, 8 Ala. 951; Cobia v. State, 16 Ala. 781; Crogan v. State, 44 Ala. 9; Battle v. State, 54 Ala. 93; Com. v. Goodenough, Thatch. Cr. Cas. (Mass.) 132; Durham v. State, 9 Ga. 306; Jones v. State, 55 Ga. 625; Weinzorpflin v. State, 7 Blackf. (Ind.) 186; Harker v. State, 8 Blackf. (Ind.) 545; Wright v. State, 5 Ired. (N. Car.) 290; Com. v. Kimball, 7 Gray (Mass.) 328; Com. v.

Tuck, 20 Pick. (Mass.) 356; State v. Smith, 49 N. H. 155; People v. Barrett, 2 Cal. (N. Y.) 304; People v. Van Horne, 8 Barb. (N. Y.) 158; Spier's Case, 1 Dev. (N. Car.) 491; Mount v. State, 14 Ohio 295; Baker v. State, 12 Ohio 214; McFadden v. Com., 23 Pa. St. 12; State v. McKee, 1 Bailey (S. Car.) 651; Ward v. State, 1 Humph. (Tenn.) 254; State v. Roe, 12 Vt. 93; Gruber v. State, 3 W. Va. 699.

2. United States v. Morris, 1 Curt. (U. S.) 23; State v. Garvey, 42 Conn. 432; Com. v. Seymour, 2 Brewst. (Pa.) 567; Taylor v. State, 35 Tex. 98.

3. The plea of *nolo contendere* to an indictment has the same effect as a plea of guilty, so far as regards the proceedings on the indictment; and a defendant who is sentenced upon such plea, to pay a fine, is convicted of the offence for which he was indicted. But a plea of *nolo contendere*, with a protestation of the defendant's innocence, will not conclude him in a civil action from disputing the facts charged in the indictment. Com. v. Horton, 9 Pick. (Mass.) 206.

In Com. v. Tilton, 8 Metc. (Mass.) 232, SHAW, C. J., said: "This plea, like a demurrer, admits, for the purposes of the case, all the facts which are well stated, but is not to be used as an admission elsewhere."

In United States v. Hartwell, 3 Cliff. (U. S.) 221, CLIFFORD, J., said: "Attempt was made at the argument to set up a distinction between the plea of *nolo contendere* and the plea of guilty, but the suggestion is entitled to no weight, as it is well settled that the legal effect of the former is the same as that of the latter, so far as regards all the proceedings on the indictment."

4. **Nominal Conditions.**—A Michigan statute provides that conditions annexed to a grant or conveyance of land, which are merely "nominal," may be

*NOMINATE—NON-CLAIM, STATUTES OF.*

**NOMINATE; NOMINATED; NOMINEE.**—See note 1.

**NON-ACCESS.**—Is used in a technical sense to signify privation of an opportunity of sexual intercourse between husband and wife; denial of cohabitation.<sup>2</sup>

**NON-ARRIVAL.**—See note 3.

**NON-CLAIM, STATUTES OF.**—Those statutes of limitation common to most of the States of the Union which are applicable to demands against the estates of deceased persons. These statutes are called frequently special statutes of limitation. The limitations created by them exist independent of and collateral to the general statutes of limitation, and require claims against the estates of deceased persons to be exhibited to the executor or administrator within such periods of time as are prescribed, and if rejected, sued upon also within such periods of time as are prescribed.<sup>4</sup>

wholly disregarded. The fair construction of this statute is that conditions in a conveyance which evince no intention of actual or substantial benefit to the grantor are merely "nominal." *Barrie v. Smith*, 47 Mich. 130. See also *Monroe v. Bowen*, 26 Mich. 523.

**Nominal Plaintiff.**—One who is named as plaintiff in an action, but who has no interest in it, having assigned the cause or right of action to another, for whose use it is brought; in general, he cannot interfere with the rights of his assignee, nor will he be permitted to discontinue the action or meddle with it. See *Bouv. L. Dict.* See also **PARTIES TO ACTION; REMOVAL OF CAUSES.**

1. **Nominate.**—See **APPOINT**, 1 Am. & Eng. Encyc. of Law 631, note.

In an agreement for reference, a provision that each party shall "nominate" a referee means not only naming him, but also the communication of the nomination to the other party. *Tew v. Harris*, 11 Q. B. 7.

The nomination of an heir, by such expressions as "I appoint" or "I nominate," passes the land in fee simple. *Shark v. Purnell*, Hob. 75.

**Nominated.**—The person nominated by an instrument creating a trust, as the person to appoint new trustees, is the person "nominated" for the purposes of § 31, Conv. & L. P. (act 1881), though the event on which such new appointment becomes necessary was not contemplated at the date of the instrument. *Re Walker*, 24 Ch. D. 608.

**Nominees.**—The act 56 Geo. III, ch. 73,

which establishes the customs annuity and benevolent fund, and rules made under the authority of that act, provide that a subscriber shall have a limited power of appointment "for the benefit of his widow, children and relatives and for such nominees as shall have been duly admitted by the directors." Upon the construction of this clause it was held that the "nominee" need not take a beneficial interest in the fund and that he cannot take as trustee. *Urquhart v. Butterfield*, 37 Ch. D. 375.

2. **Abb. L. Dict.** See also **ACCESS**, 1 Am. & Eng. Encyc. of Law 50; **BASTARDY**, 2 Am. & Eng. Encyc. of Law 139, note.

3. Where the charterers of a ship for a voyage from C. to St. B. and thence to G., to take in a homeward cargo, caused another ship to be chartered on their account to go out in ballast and bring home a cargo from G., with a proviso that in the event of the nonarrival of the first-mentioned ship at G., then the second charter should be void, held that "nonarrival" meant nonarrival within such time as might answer the purposes of the charter of the second ship; and that the first ship not having arrived in time to answer those purposes, and the delay not being attributed to the charterers, the charter of the second ship was void, and the charterers were not bound to provide a homeward cargo for her. *Soames v. Loney*, 2 B. & C. 564; s. c., 9 E. C. L. 179.

4. See **DEBTS OF DECEDENTS**, 5 Am. & Eng. Encyc. of Law 206.

## NON EST INVENTUS—NON-RESIDENT.

**NON EST INVENTUS**—(See also PROCESS).—Is not found. The sheriff's return to a writ requiring him to arrest the person of the defendant, which signifies that he is not to be found within his jurisdiction. The return is usually abbreviated N. E. I. The English form "not found" is also commonly used.<sup>1</sup>

**NON PROSEQUITUR**—(See also NONSUIT; RETRAXIT; JUDGMENT, 12 Am. & Eng. Encyc. of Law 61).—*Non prosequitur*, generally abbreviated into *non pros.*, is a species of judgment against a plaintiff who fails to take in due time, at any stage of the proceedings in an action at law, the steps which he ought to take in accordance with the rules of practice prescribed by the court. Such a judgment is taken when the plaintiff neglects to file a declaration, replication, etc., at the required time. The judgment taken is called judgment of *non prosequitur* (not followed up), and the plaintiff is said to be *non pros'd.* Judgments of like nature against a defendant are spoken of as judgments of the nature of *non pros.* *Non prosequitur* is technically a final judgment, and will be opened only upon cause shown to the court. Not being upon the merits of the case, it is, however, generally subject to be opened upon due explanation of the failure to take the proper steps within the prescribed time.<sup>2</sup>

**NON-RESIDENT**—See also DOMICILE; RESIDENTS.

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| I. Definition, 718.                         | III. How Proven, 719.   |
| II. When Non-residency Com-<br>mences, 718. | IV. In Attachment Cases, 720. [720.]<br>V. Process Against Non-Residents, |

### 1. Bouv. L. Dict.

"The sheriff's return of '*non est*,' although very brief, and also bad grammar when there are two defendants, is in the usual form, and the objection to it was properly overruled." Patterson v. Parker, 2 Hill (N. Y.) 598.

"To be Returned Non Est Inventus."—When a *ca. sa.* is delivered to the sheriff with an endorsement directing it to be returned *non est inventus*, the meaning is merely that the sheriff need not look for the defendant; it must be understood with this qualification that, if the defendant surrenders himself, the sheriff must take him. Mangay v. Monger, 4 Q. B. 818; s. c., 45 E. C. L. 820.

2. Judgment by *non prosequitur* against the plaintiff takes place where the plaintiff, at any stage of the action after appearance, and before judgment, abandons and fails to prosecute his action, as by not filing his pleadings in due succession, etc. In such case the entry is that, having been ruled to file his declaration (or other pleading), and failing so to do, it is ordered that he be

nonsuited, and pay, etc. 4 Minor's Inst. 781.

**Non Prosequitur.**—He does not prosecute. The name of an entry and judgment on the part of the defendant in an action at law, where the plaintiff fails to prosecute his action, or any part of it, in due time. Such an entry and judgment terminate the action, with costs to the defendant. The judgment is termed by abbreviation, judgment of *non pros.*; and the plaintiff is said to be *non pros'd.* Abb. L. Dict.

The difference between *nonsuit* and *non pros.* is that in the former the plaintiff, being called upon in court to proceed, advisedly abandons the suit, because he sees it is likely to go against him; in the latter, he simply neglects to take the proper steps. Mozley & W.

The word *nonsuit* is sometimes employed to express any failure on the part of the plaintiff to prosecute his suit, whether upon being called at the trial or at any other time; so that it includes not only the idea of a *nonsuit* proper, but also of a *non prosequitur*, and of a *nolle prosequi* (*non pros.* and

**I. DEFINITION.**—A non-resident is one who *resides* out of the jurisdiction in question.<sup>1</sup> In the general acceptance of the term it means one who *resides* out of the State. The mere being out of a State, or not *domiciled* there, does not constitute one a non-resident; a person may be domiciled in a State and yet be a non-resident.<sup>2</sup> The term is not merely the negative of resident; one who is not a resident is by no means necessarily a non-resident. Thus, one may be unable to vote because he is not a *resident* within the meaning of the election laws, yet he may at the same time be not a non-resident as regards service of process.<sup>3</sup>

**II. WHEN NON-RESIDENCY COMMENCES.**—The non-residence of a party begins as soon as he leaves the State with no present intention of returning; indeed, it has been often considered that one's non-residence was to be reckoned as from the time of his departure from *his present place of abode* with the intention of becoming a non-resident, so that he may become a non-resident before he has gone beyond the limits of the State.<sup>4</sup> But this rule is not uni-

*not. pros.*, as they are respectively called). 4 Minor's Inst. 782.

1. Abbott's Law Dict., art. Non-resident; Frost v. Brisbin, 19 Wend. (N. Y.) 11; s. c., 32 Am. Dec. 423.

Non-residence is thus defined: "An actual cessation to dwell within a State for an uncertain period without definite intention as to a time for returning, although a general intention to return may exist." Anderson's Law Dict., art. Reside; Weitkamp v. Loeler, 53 N. Y. Super. Ct. 83.

Thus where a mother left the State of Mississippi for that of Alabama in order that she might better attend to the education of her children, although she intended to return to Mississippi after her object had been accomplished, she was considered a non-resident of Mississippi, and therefore subject to the process of foreign attachment provided for such cases. Alston v. Newcomer, 42 Miss. 186; Morgan v. Nunes, 54 Miss. 311; Wheeler v. Cobb, 75 N. Car. 21; Frost v. Brisbin, 19 Wend. (N. Y.) 11; s. c., 32 Am. Dec. 423; Long v. Ryan, 30 Gratt. (Va.) 718; Brown v. Ashbough, 40 How. Pr. (N. Y.) 260.

But a mere temporary absence of a few weeks will not constitute the party a non-resident if at the time of departure from the State there was an intention of returning to it at the expiration of that period. Reed's Appeal, 71 Pa. St. 382; Pfoutz v. Comford, 36 Pa. St. 420.

One's *dwelling house* determines his place of residence in some cases. Thus

on a motion against a plaintiff in equity for security for costs, on the ground that he was a resident of a neighboring State, he proved that he was a man of family with which, so far as known, he lived, and that his *dwelling house* was fifteen feet within the State line on the Virginia side, it was held that *prima facie* he was a citizen of Virginia, and therefore not compellable to furnish security for costs. Evans v. Bradshaw, 10 Gratt. (Va.) 207.

2. Frost v. Brisbin, 19 Wend. (N. Y.) 11; s. c., 32 Am. Dec. 423; Pooler v. Maples, 1 Wend. (N. Y.) 65; Bartlett v. New York, 5 Sandf. (N. Y.) 44.

3. See RESIDENT—RESIDENCE.

The word resident is used in many different senses, and one may be a resident as regards some purposes, while he is not as regards others. It has a different meaning in almost every statute in which it is used, while the technical "non-resident" always imports one idea only—that of a party who is incapable of being served with process. See PROCESS.

4. Clark v. Ward, 12 Gratt. (Va.) 448; Moore v. Holt, 10 Gratt. (Va.) 284.

In the case of Spalding v. Simms, 4 Metc. (Ky.) 285, this state of facts appeared, viz: Simms left his home at — in Kentucky and went to Louisville, intending to leave there on the steamer for a distant State, where he would reside in future. He intended to leave on the *twentieth* of December, but was unavoidably detained until the

versally accepted.<sup>1</sup>

**III. HOW PROVEN.**—Evidence to prove the *intent* of a party when leaving a State is always admissible, to determine whether or not he has become a non-resident by so leaving;<sup>2</sup> and the declarations made by him at the time of removal are admissible as such evidence.<sup>3</sup> The non-residency of a party defendant is usually proven in cases where application is made for a foreign attachment, as well as where an order of publication is applied for by the plaintiff's affidavit. This is sufficient to give the court jurisdiction of the question,<sup>4</sup>

*twenty-fourth* of the month. On the twenty-first of the following April attachments provided for such cases were levied. The statute allowed such attachments to be sued out and levied upon the property of one who has been absent from the State *for four months*. The court held the attachments valid, saying that the absence from the State was to be considered as dating from the time the party left his *home* with the intention of leaving the State.

See also as sustaining the same views, *Speed & Beattie v. Gray & Co.* (decided 1862); *Sloan v. Bangs*, 10 Rich. L. (S. Car.) 15.

1. *Ballinger v. Lautier*, 15 Kan. 608, where it is held that to constitute one a nonresident until he leaves *the State* with the intention of becoming so. And in *Adams v. Evans*, 19 Kan. 174, it is stated that in order to become a non-resident there must exist both the intention to remove and the fact of actual removal. See also *Amsbaugh v. Exchange Bank*, 33 Kan. 100.

Consult also in this connection (but not as sustaining entirely the above case) *Bonnel v. Dunn*, 28 N. J. L. 153; *Chaine v. Wilson*, 8 Abb. Pr. (N. Y.) 78.

In the case of *Kugler v. Schreve*, 28 N. J. L. 129, the defendant had left the place of his tenancy and placed his goods and chattels in a canal boat lying in the basin at Trenton with the intention of taking them and his family to Pennsylvania. While the goods were yet on the boat an attachment was issued against them as being the goods of a non-resident. The court held, however, that such party did not lose his residence in *New Jersey* until he had actually left the State with intention of remaining therefrom. See also *City Bank v. Merrit*, 13 N. J. L. 131; *Clark v. Likens*, 26 N. J. L. 207.

2. *Reeder v. Holcomb*, 105 Mass. 93; *Flak v. Chester*, 8 Gray (Mass.) 506;

*Thorndike v. Boston*, 1 Metc. (Mass.) 242; *Kilburn v. Bennett*, 3 Metc. (Mass.) 199.

3. *Burnham v. Rangeley*, 1 Woodb. & M. (U. S.) 7; *Butler v. Farnsworth*, 4 Wash. (U. S.) 101; *Lee v. Simonds*, 1 Oreg. 158. They are part of the *res gestæ*. *Stansbury v. Arkwright*, 24 Eng. C. L. 462; s. c., 5 Carr. & P. 575; *Kilburn v. Bennett*, 3 Metc. (Mass.) 199; 1 Greenleaf's Ev., § 108. Compare *Howard College v. Gore*, 5 Pick. (Mass.) 370.

Such declaration must, however, have been made *ante litem motam*. *Doyle v. Clark*, 1 Flip. (U. S.) 536.

But in a case where the debtor has been absent from the State four or five years working as a contractor in the construction of railroads in the adjoining State, it not appearing that he might be absent as many years longer, the declarations of the debtor offered to show that he had not abandoned his home or domicile in the State, are not admissible. *Risewick v. Davis*, 19 Md. 82.

4. See ATTACHMENT, 1 Am. & Eng. Encyc. of Law 901, 902, 903. See also NOTICE BY PUBLICATION; PROCESS; N. Y. Code Civ. Proc., §§ 435-438.

Thus it is said in *Weber v. Weitling* that the proceedings by foreign attachment are not void merely because the defendant was a resident of the State at the time of the issuing of the attachment. By the act the foundation of the proceedings and of the jurisdiction of the court is not the non-residence of the defendant, but the filing of an affidavit by the plaintiff that he believes him to be a non-resident. If such affidavit is made in good faith, the proceedings are not void. The court pending the proceedings will enquire into the truth of the affidavit, and if it appears that the affidavit is not true will arrest the proceedings and quash the attachment; but if the affidavit is regular and made



although it is by no means conclusive,<sup>1</sup> but may be rebutted by proper evidence.

**IV. IN ATTACHMENT CASES.**—The question of *non-residency* occurs most frequently in cases touching service of process and the validity of foreign attachments. It is provided by statute in most States, inasmuch as non-residents frequently cannot be reached with ordinary process in suits, that a proceeding against them may be commenced by an attachment of their property. An attachment is, therefore, often valid against a non-resident which would not be so as against a resident, and thus the important question of the non-residency of the party is involved.<sup>2</sup>

**V. PROCESS AGAINST NON-RESIDENTS.**—See SERVICE OF PROCESS.

**NONSUIT**—(See ACTIONS; DISCONTINUANCE; NOLLE PROSEQUI; PARTIES TO ACTIONS; RETRAXIT; TRIAL).

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in good faith, the court cannot collaterally enquire into the fact of non residence and declare the proceedings void. *Weber v. Weitling*, 18 N. J. Eq. 441.

1. Brundred ads. Del. Hoyo, 20 N. J. L. 328, where it is held that in cases of foreign attachment the affidavit is not conclusive as to the residence of the defendant, but may be enquired into, and if the court is satisfied from the evidence that the defendant did not reside out of the State at the time the proceedings were instituted, they will be set aside, notwithstanding the plaintiff may have acted in good faith in making the affidavit. *City Bank v. Merritt*, 13 N. J. L. 131. See also FOREIGN ATTACHMENT, 8 Am. & Eng. Encyc. of Law 323.

2. See FOREIGN ATTACHMENT, 8 Am. & Eng. Encyc. of Law 320, 323; Anderson's Law Dict., art. Residence; *Clark v. Likens*, 26 N. J. L. 207; *Chaine v. Wilson*, 8 Abb. Pr. (N. Y.) 78; *Ballinger v. Lantier*, 15 Kan. 608; *Matter of Thompson*, 1 Wend. (N. Y.) 43; *Clark v. Ward*, 12 Gratt. (Va.) 448; *Spalding v. Simms*, 4 Metc. (Ky.) 285; *Long v. Ryan*, 30 Gratt. (Va.) 718; *Brown v. Ashbough*, 40 How. Pr. (N. Y.) 260; *Hackettstown Bank v. Mitchell*, 28 N. J. L. 516; *City Bank v. Merritt*, 13 N. J. L. 131; Brundred ads. Del. Hoyo, 20 N. J. L. 333.

Residence, in attachment laws, implies an established abode fixed permanently for a time, for business or other purposes. One's citizenship of a State

**I. DEFINITION.**—A nonsuit is the result of an abrupt termination of an action at law.<sup>1</sup> It is the name of a judgment given against the plaintiff when he is unable to prove his case, or when he refuses or neglects to proceed to the trial of a cause after it has been put at issue, without determining such issue.<sup>2</sup> Its origin can be easily traced to a very early period in the history of the common law.<sup>3</sup>

does not necessarily determine his residence. Absence of such a character, and so prolonged that the person cannot be reached by ordinary process, may amount to non-residence, though the party may have entertained and expressed an intent to return to the State of his former home at some remote and uncertain time. *Morgan v. Nunes*, 54 Miss. 308.

In the case of *Hackettstown Bank v. Mitchell* (28 N. J. L. 516), this state of facts existed: A party, M, resided in the State of New York, and his wife, previous to her marriage, and at the time of it, was a resident of this State (*i. e.*, New Jersey), and they were married here. After the marriage in 1859 they went to Europe, Mrs. M intending on their return to remain at her former residence in this State until the fall of 1860. While absent an attachment was issued against them both to recover a debt contracted by the wife before her marriage. On their return from Europe she came to her residence here, where her husband also spent a large part of his time, but retained his residence and attended to his business in New York. It was held that the residence of both was in the State of New York, and that since process by summons could not be served upon the husband, a foreign attachment provided for non-residents was a proper remedy. *Story on Conflict of Laws*, § 146; *Greene v. Greene*, 11 Pick. (Mass.) 415.

1. *Washburn v. Allen*, 77 Me. 344.

2. *Bouv. Law Dict.*

3. **Nonsuits at Common Law and Under English Statutes.**—*Washburn v. Allen*, 77 Me. 344. The English practice differs somewhat from that of our own courts. At common law, as early practiced in the English courts, upon every continuance or day given over before judgment, the plaintiff was demandable, and upon his nonappearance might have been nonsuit. *Bacon's Abr. Nonsuit*, D.; *Co. Litt.* 139 b. And no verdict could be returned and given unless in his presence or that of his counsel, but the plaintiff was said to be

nonsuit. Therefore, it was usual for a plaintiff, when he or his counsel perceived that he had not given evidence sufficient to maintain his issue, to withdraw himself and be voluntarily nonsuited. 3 *Black. Com.* 376; *Murphey v. Donlan*, 5 B. & C. 178 (11 Eng. Com. Law 195); and whenever the plaintiff ought to appear in court he was at liberty to withdraw. *Co. Litt.* 138 b, 139 a; *Robinson v. Lawrence*, 7 Exch. 123. The plaintiff had a right to be nonsuited at any step of the proceedings he might prefer, and thereby reserve to himself the power of bringing a fresh action for the same subject-matter; and this right continued to the last moment of the trial, even till after verdict rendered; or, where the case was tried by the court without the intervention of a jury, until the judge had pronounced his judgment. *Outhwaite v. Hudson*, 7 Exch. 380. Consequently, if he was not satisfied with the damages given by the jury, he might become nonsuit. *Bacon's Abr. Nonsuit*, D.; *Keat v. Barker*, 5 *Modern* 208. But by statute, 2 *Henry IV*, ch. 7 (*A. D.* 1400), it was ordained and established that if the verdict passed against the plaintiff, he should not be nonsuited, which before that time was otherwise at common law.

Notwithstanding this statute, which was an amendment of the common law, it was held that the plaintiff might be nonsuited after the finding of a special verdict, and the reason of this would seem to be that a special verdict is in the nature of a statement of facts, and also after a demurrer and argument thereon, and a rule for judgment for defendant, though it could not be done at the same term. *Bacon's Abr. Nonsuit*, D.; *Alderly v. Alderly*, *Cro. Jac.* 35. And this statute was afterwards construed as applying only to cases where the jury had passed upon the whole matter. *Earl of Oxford v. Waterhouse*, *Cro. Jac.* 575; *Com. Dig. Pleader W.* 5. Except in the cases above stated, the plaintiff could always become nonsuit upon any continuance.

1. **Voluntary Nonsuits.**—Nonsuits are voluntary when granted with the plaintiff's consent.<sup>1</sup>

2. **Involuntary Nonsuits.**—Nonsuits are involuntary when granted against the plaintiff's will.<sup>2</sup> In some jurisdictions involuntary nonsuits are not allowed. A nonsuit must be distinguished from a discontinuance.<sup>3</sup>

In 1740, the English practice was further regulated by statute of 14 Geo. II, ch. 17, which provides "that where issue is or shall be joined in any action or suit at law in any of his majesty's courts of record, and the plaintiff or plaintiffs in any such action or suit hath or have neglected, or shall neglect, to bring such issue on to be tried according to the course and practice of the said courts, respectively, it shall and may be lawful for the judge or judges of the said courts, respectively, at any time after such neglect, upon motion made in open court (due notice thereof having first been given), to give the like judgment for the defendant or defendants in every such action or suit, as in the case of nonsuit."

It would seem that the practice in *England*, under the common law as well as since the more modern statutes, has been perhaps more liberal in favor of allowing nonsuits to plaintiffs as matter of right, than is prescribed in this country. According to the practice there, as appears by the decisions of their courts, a plaintiff could not be nonsuited on the trial against his assent, but might insist, as a matter of right, on the cause going to the jury, and thus take his chance of a verdict. *Dewar v. Purday*, 4 A. & E. 633.

**Voluntary Nonsuits in New York.**—In *New York* there are but two cases (and those among the early decisions of that State) so far as we have been able to find, that incline towards the English practice. In one, where a verdict was received without the assent of the plaintiff, the court set it aside, remarking that it was the right of a plaintiff to submit to a nonsuit. *People v. Mayor's Court of Albany*, 1 Wend. (N. Y.) 36. In the other, it was held that a plaintiff has the right to submit to a nonsuit on the coming in of a jury, although they are prepared to render a balance in favor of the defendant, in an action of assumpsit, and where a notice of set-off had been given. *Wooster v. Burr*, 2 Wend. (N. Y.) 295. See also, *infra*, this title.

1 *Washburn v. Allen*, 77 Me. 344.

"Before proceeding to consider the authorities that bear upon this question, it may be remarked that nonsuits may be classed under two divisions: (1) Involuntary, as when ordered by the court against the plaintiff's objection; (2) voluntary, when allowed by the court on the plaintiff's own motion. Into the one or the other of the two classes the decided cases fall. The case under consideration comes within the last, and brings us to consider the rule of practice applicable in such cases."

Judge of the United States supreme court, in the case of *Hammergen v. Schuermier*, 1 McCrary (U. S.) 436, said: "Nonsuit is voluntary or involuntary. Voluntary nonsuit is where a party submits to the court and says: 'I have not made out a case,' and asks that it be dismissed; involuntary nonsuit is just this case: when the case is before the jury, and the plaintiff having introduced all of his evidence, the defendants say: 'It is not sufficient to go to the jury, and we ask for a nonsuit,' and the court says: 'You shall have it.'"

2. See, *infra*, this article XI, WHERE INVOLUNTARY NONSUITS ARE GRANTED AND WHERE REFUSED.

3. *Evans v. Clover*, 1 Grant (Pa.) 164, 169. "Before the case went to the jury the plaintiff asked leave to discontinue the suit, which the court refused. It is quite clear that a plaintiff may take a nonsuit on the trial whenever he thinks proper. At common law he might do so at any time before the verdict was actually recorded; and the only restriction of the right by our statute, is that which requires it to be exercised before the jury announce their readiness to deliver the verdict. But a discontinuance is not a nonsuit, though the difference in their legal effect is slight. A greater distinction exists in the mode of applying them, the one being subject to the discretion of the plaintiff, the other of the court . . . but a discontinuance may be allowed or refused according to the discretion of the court, which is not assignable for error."

a *retraxit*,<sup>1</sup> and a demurrer,<sup>2</sup> which closely resemble it in the abruptness with which they put an end to an action; in other respects a nonsuit is different in its results, and serves an entirely different purpose.

**II. COMMON-LAW RULE AS TO TIME WHEN VOLUNTARY NONSUITS ARE ALLOWED.**—At common law a plaintiff might take a nonsuit, as of right, at any time in the progress of a case, even after the verdict was rendered, but before judgment was entered.<sup>3</sup> But by the statute 2 Henry IV, ch. 7, amending common law, the plaintiff's right to take a nonsuit was limited to the time of the rendition of the verdict, and if the verdict passed against the plaintiff, he could not be nonsuited.<sup>4</sup> While the common law of *England*, as modified by the above statute, was in force in the colonies at the time of the Revolution and continued to be the law in the various States, many of which expressly adopted it by legislative enactment, a definite rule applicable alike to all the States, as to the exact time to which a plaintiff is limited in taking a nonsuit as of right, cannot safely be stated, further than that the common-law rule has never been extended. It may, however, be stated generally that in many of the States the plaintiff is, by statute, given the right to take a nonsuit at any stage of the proceeding or trial before the cause is finally submitted to the court or jury for decision.<sup>5</sup> In some States the

1. *Lowry v. McMillan*, 8 Pa. St. 157, 163. "A technical *retraxit* has been, and is, almost unknown in the practice of this State. It is where a plaintiff cometh personally into court where his action is brought, and saith he will not proceed in it; and this is a bar to that action forever. 2 Jacob's Law Dict. A *retraxit* must always be in person; if it is by attorney, it is error; 8 Rep. 58; 3 Salk. 245. It cannot be before a declaration; for before a declaration it is only a nonsuit. 3 Leonard 47; 2 Silby's Abr. 476. In the case in hand, the plaintiff did not go personally into court, and there was no declaration filed. It cannot, therefore, according to the authorities, be considered as a *retraxit*; for although the words "withdraw forever" are used in the paper filed, we cannot suppose that the parties had in their mind a legal technical rule, obliterated where it is not worn out." See also *South Branch R. Co. v. Long*, 26 W. Va. 692.

2. *Dodge v. Bank of Kentucky*, 2 A. K. Marsh. (Ky.) 616. "Motions to instruct, as in case of nonsuit, partake of the nature of a demurrer to evidence, and in modern practice is frequently indulged in lieu of a demurrer. It is frequently used when the *allegata et*

*probata* do not agree, and the plaintiff proves a case not as he has laid it. . . . In every motion, then, so to instruct a jury, every fact which the evidence proves and conduces to prove, as well as those facts which may naturally and rationally be inferred from those proved, must necessarily be considered as admitted by the party making the motion; and the court is appealed to to say, after all these admissions, whether in law the plaintiff has made out his cause of action. In the present case, then, the defendant's below, for the purposes of the motion, must be considered as taking the evidence as true without further contest. See also *Davis v. Greene*, 22 Me. 254; *Elles v. Ohio L. Ins. etc. Co.*, 40 Ohio St. 628; *Smyth v. Craig*, 3 W. & S. (Pa.) 14."

3. **Common-Law Rule.**—*Washburn v. Allen*, 77 Me. 344; *Judge of Probate v. Abbott*, 13 N. H. 21; *McLughn v. Bovard*, 4 Watts (Pa.) 308; *Graham v. Tate*, 77 N. Car. 120; *Wooster v. Burr*, 2 Wend. (N. Y.) 295.

4. *Washburn v. Allen*, 77 Me. 344; reviewing the entire subject.

5. *Wood v. Nortman*, 85 Mo. 298. See also *Templeton v. Wolf*, 19 Mo. 101; *Lawrence v. Shreve*, 26 Mo. 492;

language used is "until the jury retires from the bar;"<sup>1</sup> or, "where the jury have returned into court to give their verdict;"<sup>2</sup> or at any time before the jury retires and after the law is declared;<sup>3</sup> or before the verdict is read by the clerk;<sup>4</sup> or where the jury have returned into court to give their verdict, and after they have en-

Thompson on Trials, vol. 2, § 2231; *Rass v. Chicago*, 12 Ill. 366.

In order to bar the plaintiff's right to submit to a nonsuit, the jury must have the whole of the case, including not only all the evidence, but also the instructions of the court. Consequently, if for any cause the jury retire from the bar without having the whole of the case on which they are to render a verdict, the plaintiff's right to submit to a nonsuit is not taken away. *Berry v. Savage*, 3 Ill. 261. See also *Amos v. Sinnott*, 5 Ill. 440.

1. In *Gordon v. Goodell*, 34 Ill. 429, 435, *BREESE, J.*, observes: "By our Practice act, it is provided that every person desirous of suffering a nonsuit on trial, shall be barred therefrom unless he do so before the jury retire from the bar. (Scates' Comp., 261, § 29. Illinois.) By implication most clearly, a plaintiff has a right to suffer a nonsuit on trial if he makes his motion in time." In this case a judgment has been confessed, the defendant allowed to plead, the judgment remaining as security to the plaintiff; and while the issue made upon the defendant's plea was being tried, and before the jury retired from the bar, the plaintiff asked leave to take a nonsuit; and it was held that the plaintiff had a right to take a nonsuit notwithstanding the judgment. See also *Templeton v. Wolfe*, 19 Mo. 101; *Hancock Ditch Co. v. Bradford*, 13 Cal. 637; *Jones v. Fennimore*, 1 G. Greene (Iowa) 134.

The plaintiff has the right to take a nonsuit at any time before the jury retires from the bar. (Paschal's Dig., art. 1464, note 562. Texas.) Even after the defendant has pleaded in reconvention, the plaintiff may take a nonsuit, especially if the plea presents no cause of action. (Paschal's Dig., art. 3446, note 797. Texas.) *Frois v. Mayfield*, 31 Tex. 366.

When the jury comes in for further instructions, the plaintiff may, on their being given, elect to submit to a nonsuit. *Berry v. Savage*, 3 Ill. 261. See also *Hensley v. Peck*, 13 Mo. 587.

2. *McLughn v. Bovard*, 4 Watts (Pa.) 308.

A plaintiff may suffer a nonsuit at any time before the jury finds a verdict; but it is too late after a court has decided on the plea of *non tiel record*. *Stewart v. Gray*, 1 Hempst. (U. S.) 94.

Leave to enter a nonsuit will not be granted after verdict. *Taylor v. Alexander*, 6 Ohio 144.

3. Under Missouri Rev. St., § 3556, declaring that a nonsuit may be taken at any time before the case is finally submitted, it may be taken at any time before the jury retires and after the law is declared. *Wood v. Nortman*, 85 Mo. 298.

In *Tennessee*, a nonsuit may be entered even after the evidence has been heard by the jury and they have been charged by the court. *Partlow v. Elliott*, 1 Meigs (Tenn.) 547.

**Arizona.**—It is not proper to grant an involuntary nonsuit under Rev. St. Arizona, § 764, providing that at any time before the jury have retired the plaintiff may take a nonsuit; but he shall not thereby prejudice the right of an adverse party to be heard on his own claim for affirmative relief. *Bryan v. Pinney* (Ariz. 1889), 21 Pac. Rep. 332 (*WRIGHT, C. J.*, dissenting).

4. *Lawrin v. Hanks*, 3 McCord (S. Car.) 558, 559. "There can be no doubt that a plaintiff may, at any time before the verdict is read by the clerk, submit to a nonsuit; and a defendant who pleads a discount is, as to that, considered as if he had brought his action. The object of the act was to prevent unnecessary litigation, and thus to enable a defendant who had a demand against one who should sue him, to recover it without the necessity of a cross-action. What reason then, can be urged why a defendant in such a case, should not as well be permitted to withdraw his action as a plaintiff? It does not embarrass the plaintiff. If the discount is withdrawn, he goes on to receive his whole demand. In the case before us, the court should have granted the motion and directed the jury to find for the plaintiff the full amount of his demand. See also *Graham v. Tate*, 77 N. Car. 120.

tered the jury box and nine of them have been called;<sup>1</sup> or after the jury have agreed upon their verdict which is ready to be declared in court, and is known to the plaintiff;<sup>2</sup> or before the jury retire to consider their verdict, or the cause is submitted to the court for its decision.<sup>3</sup> In those States in which the time is not regulated by statute, the common-law rule, that a plaintiff may take a nonsuit, as of right, at any time before verdict rendered, prevails. The authorities are conflicting in cases where the issues of fact are submitted to the court for trial, in place of a jury, as to whether there is any limitation upon the right to take a nonsuit to any particular time.<sup>4</sup>

**III. EXCEPTIONS TO COMMON-LAW RULE.**—In *Maine*, *Massachusetts*, *New Hampshire*, and perhaps in a few other States, a plaintiff has not the absolute right to become nonsuit after the trial has begun. The courts in these States do not deny that a nonsuit at common law is allowed at any time, but claim that such a rule is vexatious to the defendants, and is not in accordance with the practice of their State. The rule as stated is, that, before opening his

1. *Easton Bank v. Coryell*, 9 W. & S. (Pa.) 153.

2. *Usher v. Sibley*, 2 Brev. (S. Car.) 32.

3. *Tennessee Code 2064-2066*; *Hendrick v. Stewart*, 1 Overt. (Tenn.) 476. See also *Hays v. Turner*, 23 Iowa 214; *Mansfield v. Wilkerson*, 24 Iowa 482; *Chadwick v. Miller*, 6 Iowa 35; *Partridge v. Welsey*, 8 Iowa 459.

4. In *Illinois* it has been decided that a nonsuit should be granted at any time after the court has announced its opinion and before a note thereof is entered. In *Howe v. Herron*, 17 Ill. 494, the court observes: "When the case is tried by a jury, the plaintiff, before he determines whether he will take a nonsuit, not only has an opportunity of knowing precisely what the testimony is upon which his rights depend and upon which the jury are to act, but he also hears the charge of the court to the jury, so that he knows by what rules of law the jury are to be governed in deciding upon those facts. These desirable ends cannot be attained when the court tries the question of fact in place of the jury. Either the plaintiff must have the benefit of the views of the court upon the law by which the case is to be governed, which can only be done after the court has expressed an opinion, or else he must be deprived of the right which was always guaranteed to him by the common law, and which is preserved to him by our statutes in all cases of jury trial." And see

also *Prindville v. Leon*, 11 Ill. App. 657; *Wilson Sewing Machine Co. v. Lewis*, 10 Ill. App. 191; *Travers v. Wormer*, 13 Ill. App. 42. Or so long as any material issue in the case remains undetermined. *Adams v. Shepherd*, 24 Ill. 464.

In this case the court had found the law and facts and a note was made; but the court opened the finding as to the damages, which was again taken under consideration and was undetermined when the nonsuit was entered. See also *Gordon v. Goodell*, 34 Ill. 429.

*Contra* in *Indiana*, but in these cases the court places upon the same footing, cases tried by the court and those tried by a jury. *Doughty v. Elliott*, 8 Blackf. (Ind.) 405; *Long v. Thwing*, 9 Ind. 179; *Burns v. Riegelsberger*, 70 Ind. 522.

Where, in a case tried by the court, the parties request a declaration of the law, which the court gives, an opportunity should be allowed for a nonsuit before the case is decided." *Lawrence v. Shreve*, 26 Mo. 492; *Washburn v. Allen*, 77 Me. 344.

"The plaintiff had a right to be nonsuited at any stage of the proceedings. . . . and this right continued to the last moment of the trial, even till after verdict rendered; or where the case was tried by the court without the intervention of a jury, until the judge had pronounced his judgment. *Outhwaite v. Hudson*, 7 Exch. 380." See also *Hall v. Schuchardt*, 37 Md. 15.

case, the plaintiff may become nonsuit as a matter of right. After the case is opened and before verdict, he may have leave to become nonsuit in the discretion of the court; after verdict, there can be no nonsuit.<sup>1</sup>

1. *Washburn v. Allen*, 77 Me. 344. "Whatever may be the practice elsewhere, the courts of *Massachusetts* and *New Hampshire* have never adopted the early English practice; but, on the contrary, have declared that, after a cause has been opened to the jury, the plaintiff cannot become nonsuit, as a matter of legal right, but the court might allow it at that stage of the case, in its discretion . . . also in *Locke v. Wood*, 16 Mass. 317, the court were of the opinion 'that there was no such right; and that after a cause is opened to the jury, and begun to be proceeded in before them, the parties are entitled to a verdict, unless the court should in its discretion allow a nonsuit or discontinuance.' . . . In the cases to which we have referred, our courts have fully recognized, though they have not seen fit to follow the ancient common law as laid down many years ago in *England*. Many of the customs of our courts are different from those existing at that time, when no verdict could be returned for or against a plaintiff unless he or his counsel was present in court, and to avoid which, or if in his favor and the damages were not satisfactory to him, he might withdraw himself and become nonsuit. '*Cessante ratione legis, cessat ipsa lex*.' See also *Truro v. Atkins*, 122 Mass. 418; *Judge of Probate v. Abbott*, 13 N. H. 21; *Shaw v. Boland*, 15 Gray (Mass.) 571. In the present case the trial having been begun, and the question of law reserved at the trial being still undisposed of, the ruling by which the demandant was allowed to become nonsuit as of right and of course, against the objection of the tenant, and without any exercise of discretion on the part of the court, was erroneous. . . . Whether the superior court can allow a plaintiff to become nonsuit, after a question of law has been reserved on report for the opinion of this court, and before the question has been disposed of by this court, is not presented by these exceptions, and we express no opinion." *Shaw v. Boland*, 15 Gray (Mass.) 571. "A plaintiff who has opened his case to the jury, called witnesses, and, after they had been sworn generally, examined them as to the existence and loss

of a document with a view to the introduction of secondary evidence of its contents, is not entitled as of right to become nonsuit, and cannot except to the refusal of the judge to permit him to do so."

In *Texas*, although the power of a plaintiff to take a nonsuit is much greater than in *Maine*, *Massachusetts* and *New Hampshire*, it is still not so great as at common law. *Frois v. Mayfield*, 31 Tex. 366.

"Where no cause of action is set forth in the pleadings, the plaintiff may suffer a nonsuit at any time before the jury retire from the box; or at least, at any time before the judge commits the case to them." So it is held that the plaintiff cannot take a nonsuit after the case has been finally submitted. *Hays v. Turner*, 23 Iowa 214; *Brown v. Harter*, 18 Cal. 76; *Jones v. Fennimore*, 1 G. Greene (Iowa) 134; *Mansfield v. Wilkerson*, 26 Iowa 482; *Peters v. Dioso*, 3 E. D. Smith (N. Y.) 115.

But the rule is different in suits in equity according to the old rules of distinction. *Hesse v. Mississippi etc. Ins. Co.* 21 Mo. 93.

In *Benton v. Bellows*, 61 N. H. 107, the court held that a plaintiff who has elected a jury trial, upon the report of the referee of the court, may, if the report cannot be used, become nonsuit at any time before the commencement of the trial.

**Nonsuit for Want of Jurisdiction.**—A plaintiff may elect to be nonsuited when the judge intimates an opinion that the court has no jurisdiction of the action, and when the defendant has moved to dismiss for want of jurisdiction. See also *McKesson v. Mendenhall*, 64 N. Car. 502; *Mercantile Bank v. Pettigrew*, 74 N. Car. 326.

A nonsuit cannot be entered after judgment. *Mauney v. Long*, 91 N. Car. 170.

In *Bynum v. Poire*, 97 N. Car. 374, the court held that a plaintiff might have a judgment of voluntary nonsuit entered, where he has made a motion for a preliminary injunction, which has been denied, provided no rights have been acquired by the defendant by virtue of anything done in the course of the action.

**IV. HOW ASKED OR TAKEN.**—No formality is required as to the manner in which a plaintiff may take a nonsuit.<sup>1</sup> He may absent himself from court when his presence is required, and thus accomplish his purpose. He may remain silent when his name is called by the clerk of the court, prior to the jury giving their verdict, and thus become nonsuit; and again, at any time before the case is tried, he may have the clerk enter a nonsuit on the court docket. Usually when the case is on trial, and the plaintiff desires a nonsuit, his attorney announces the fact in a few appropriate words to the court. The reasons which induce the plaintiff to take the nonsuit need not be stated. Where a plaintiff needlessly takes a nonsuit, the appellate court will not relieve him.<sup>2</sup>

**V. RULE WHEN SET-OFF IS PLEADED.**—In some States it is settled that, where a defence of set-off has been pleaded, the plaintiff cannot take a nonsuit; this is on the theory that when a set-off is pleaded, then two suits are in existence to be tried at the same time before the court, and that, therefore, a plaintiff would have no more right to discontinue the defendant's suit than the defendant would the suit of the plaintiff. It is further agreed that a contrary construction of the statutes on the subject of set-off, which were enacted in order that, in an equitable and economical manner, all controversies between the parties to a suit might be determined in the same action, would defeat their object.<sup>3</sup> But generally

**Petition in Nature of a Cross Action.**—Where the answer of a defendant contains matters which constitute a cause of action against the plaintiff, and prays judgment upon the same, whether the answer is called a plea in reconviction, or a petition in the nature of a cross action, or by whatever designation, the plaintiff cannot take a voluntary nonsuit. *Bradford v. Hamilton*, 7 Tex. 55; *Thomas v. Hill*, 3 Tex. 270; *McCoy v. Jones*, 9 Tex. 363.

**Where Plaintiff Is Taken by Surprise.**—Where the plaintiff is taken by surprise during the trial, he may submit to a voluntary nonsuit, and afterwards move to set it aside, and ask leave to amend his petition so that it may correspond with his evidence; and if the court grants his motion, the supreme court will not reverse the decision unless serious injury has been done to the defendant. *Austin v. Townes*, 10 Tex. 24; *Easterling v. Blythe*, 7 Tex. 210.

1. *Hammergen v. Schuermier*, 1 McCrary (U. S.) 436; *Washburn v. Allen*, 77 Me. 344, quoted in note 1, p. 726; 3 Black. Com. 376; *Murphy v. Donlan*, 5 B. & C. 178; Co. Litt. 138 b, 139 a; *Robinson v. Lawrence*, 7 Exch. 123; *Murphy v. Donlan & Marshall*, 5 B. &

C. 178, 179. "The ancient practice which I remember to have prevailed in some places, was for the officer of the court to ask the jury after they had considered their verdict, if they were agreed. If they answered in the affirmative, the officer then called the plaintiff by name to hear the verdict; and if he appeared, the verdict was pronounced. If he did not appear to prosecute his suit, he was nonsuited . . . A verdict against a plaintiff cannot be taken but in his presence, but a verdict against a defendant may be taken in his absence."

2. *Gentry v. Black*, 32 Mo. 542. See also *Robbins v. Stevenson*, 5 Mo. 105.

3. *Francis v. Edwards*, 77 N. Car. 271, 275. "A counter claim is a distinct and independent cause of action, and when properly stated as such with a prayer for relief, the defendant becomes in respect to the matters alleged by him an actor, and there are then really two simultaneous actions pending between the same parties, wherein each is at the same time both a plaintiff and a defendant. The defendant is not obliged to set up his counter claim. He may omit it and bring another action. He has his election. But when he does set up his counter claim, it becomes a cross action and both opposing claims



a nonsuit is allowed, notwithstanding a set-off has been pleaded. It is so held on the ground that, as the right of the plaintiff to discontinue his suit at any time before the verdict is undoubted, therefore, in the absence of a statute taking away the right, it

must be adjudicated. The plaintiff, then, has the right to the determination of the court of all matters thus brought in issue, and mutually the defendant has the same right, and neither has the right to go out of court before a complete determination of all the matters in controversy, without or against the consent of the other. This is the proper construction of the provisions of the code in relation to counter claim. C. C. P., § 100, 104. Any other construction would defeat or impair these equitable and economical provisions of it, by which all matters in controversy between the parties to a suit may be determined in the same action. *Pomeroy or Remedies*, §§ 734, 800; *Holzbauer v. Heine*, 37 Mo. 443; *Woodruff v. Garner*, 27 Ind. 4; *Sloan v. McDowell*, 71 N. Car. 356. There was error in allowing the judgment of nonsuit." See also *McNeill v. Lawton*, 97 N. Car. 16; *Harris v. Burwell*, 65 N. Car. 584; *Bitting v. Thaxton*, 72 N. Car. 541; *Walsh v. Hall*, 66 N. Car. 233; *Tate v. Phillips*, 77 N. Car. 126; *People's Bank v. Stewart*, 93 N. Car. 402.

In *Block v. Weiller*, 61 Tex. 692, the court held, that under R. S. Texas, §§ 1260, 1301, a plaintiff is allowed to take a nonsuit at any time before the decision of the court is announced, provided he does not prejudice the right of defendant to obtain affirmative relief upon any counter claim he may have pleaded.

*Merchants' Bank v. Schulenberg*, 54 Mich. 49, 51, dissenting opinion of Judges SHERWOOD and CAMPBELL: "The question is simply this: Whether, under our statute, when the defendant has given notice of set-off, and claims a balance in his favor, the plaintiff can discontinue his suit, or be permitted to discontinue it without the consent and against the wishes of the defendant. Set-off is a mode of defence . . . The object of the statute is beneficial and equitable, and in its operation it proceeds upon equitable principles. *Downer v. Eggleston*, 15 Wend. (N. Y.) 55, 56. . . . The statute requires the defendant to bring forward his claim for adjudication at the time the plaintiff brings his suit, and thereby determines the time when the de-

fendant shall have his claim adjudicated, at the peril of doing so at his own expense. In all other respects the case stands as though two separate suits were brought to determine the rights of the parties; and I fail to see why both cases should not be governed by the same rules, and receive the same treatment at the hands of the court. Simple justice requires this, and I can see no reason why the equitable rules upon which the whole doctrine of set-off is based, should not be carried out in the practice in these cases. Adopting this rule, the plaintiff would have no more right to discontinue the defendant's suit, than the latter would that of the former; and such, I think, should be the law."

The court in the above case was divided, and so the case was affirmed, contrary to the above opinion of Judge Sherwood. *Hancock Ditch Co. v. Bradford*, 13 Cal. 637.

"The error assigned here is, that the court refused to permit the plaintiff to take a nonsuit after the testimony for plaintiff and defendants was closed. No counter claim seems to have been made in this case by defendants. By the 148th section of the Practice act, it is provided, 'that the plaintiff may, at any time before trial, upon the payment of costs, if a counterclaim has not been made, take a nonsuit.'" *Brown v. Pfouts*, 53 Tex. 221.

"Although, as a general rule, when a plea in reconvention has been filed, the plaintiff is not entitled to a voluntary nonsuit, yet a motion to set it aside will be refused where no reason is given for not objecting to it at the time, and where no merit is shown in the plea." See also *Partridge v. Wilsey*, 8 Iowa 459.

Where the defendant in a suit sets up a reconventional demand, the plaintiff is not permitted to discontinue his suit when defendant opposes it. And if the plaintiff has discontinued the suit without opposition on the part of defendant, the latter has the right to prosecute against him, his claim in reconvention notwithstanding the discontinuance. *Barrow v. Robichaux*, 15 La. An. 70. See also *McDonough v. Copeland*, 9 La. An. 310.

still exists.<sup>1</sup>

1. *Merchants' Bank v. Schulenberg*, 54 Mich. 49, 54. COOLEY, C. J., delivered the opinion: "In this case the defendant relied upon a set-off which, he claimed, was larger than the plaintiff's demand; and he brings the case to this court, assigning for error the order of the circuit court permitting the plaintiff, notwithstanding his objection, to submit to a nonsuit.

"The general right of the plaintiff to discontinue his suit or to submit to a nonsuit at any time before verdict, is undoubted; and in the absence of any statute taking away the right, it exists in the cases where set-off is relied upon, to the same extent as in other cases. This is fully recognized in *Cummings v. Pruden*, 11 Mass. 206, and *Branham v. Brown*, 1 Bailey (S. Car.) 262. In several States, statutes have been passed taking away the right, but we have no such statute. The fact that the statute of set-offs permits judgment to be taken by the defendant for the balance found due him, does not preclude a discontinuance. *Cummings v. Pruden*, 11 Mass. 206.

"But it is said there are decisions to the contrary of these, and several are referred to. The Texas cases are not in point, as they are decided under the civil law, which does not prevail in this State. *Egery v. Power*, 5 Tex. 501; *Bradford v. Hamilton*, 7 Tex. 55. The case of *Francis v. Edwards*, 77 N. Car. 271, was decided upon a construction of the Code of that State, and therefore has no bearing. In *Riley v. Carter*, 3 Humph. (Tenn.) 230, the defendant had obtained judgment for his set-off in a justice's court, and the plaintiff removed the case to the circuit court by *certiorari*, and then, in that court, was given leave to dismiss his suit. This was palpable error, and the court so held; but we discover no analogy between that case and this. The defendant had his judgment, and unless error was shown had a right to retain it. The three New York cases of *Cockle v. Underwood*, 3 Duer (N. Y.) 676, *Rees v. Van Patten*, 13 How. Pr. (N. Y.) 258, and *Van Alen v. Schermerhorn*, 14 How. Pr. (N. Y.) 287, are not in point, because decided under the State code; but so far as they can be considered as having a bearing, they are against the defendant instead of for him, for they all recognize the power of

the court in its discretion to permit the plaintiff to discontinue, which is all that is necessary to sustain this judgment."

The above case was affirmed on this judgment, but JUDGES SHERWOOD and CAMPBELL dissented.

Where the defendant answers and pleads a set-off and counter claim, he cannot, if the plaintiff fails to appear at the trial, take a verdict and judgment for the amount of his set-off and counter claim. The proper judgment is that of nonsuit of the plaintiff, or a dismissal of his suit. *Nordmanser v. Hitchcock*, 40 Mo. 178.

The plaintiff has a right to suffer a nonsuit at any time before publication of the verdict, although the defendant has filed a discount and introduced evidence to establish it. And the defendant has the same right to withdraw his discount. *Branham v. Brown*, 1 Bailey (S. Car.) 262.

Under §§ 363 and 365 of the Indiana Code, 2 G. & H. 216, a plaintiff may, at any time before the jury retire or the finding of the court is announced, dismiss his action without prejudice; and a defendant who has pleaded a set-off, must, as to that, be regarded as a plaintiff, and may, therefore, in like manner dismiss as to his set-off. *Crain v. Hilligross*, 21 Ind. 210.

In *Missouri*, a plaintiff may take a nonsuit, although the defendant pleads a set-off exceeding the amount sued for. *Fink v. Bruhl*, 47 Mo. 173. So also *McCredy v. Frey*, 7 Watts (Pa.) 496; *Wolf v. Ament*, 1 Grant Cas. (Pa.) 150.

An executor offering a will for probate, cannot take a nonsuit. *Roberts v. Trawick*, 13 Ala. 68.

In *Lyon v. Adams*, 24 Vt. 268, it was held that a plaintiff in an action on book account, is not at liberty to become nonsuit after judgment to account and after the case goes before the auditor. And in *Farmington v. Copp*, 56 N. H. 218, the court held that a plaintiff could not become nonsuit as matter of right while the cause was pending before an auditor. See also *Pollard v. Moore*, 51 N. H. 188; *Fulford v. Converse*, 54 N. H. 543.

But in *McNeill v. Lawton*, 97 N. Car. 16, the court held that a plaintiff may take a nonsuit while the case is before a referee, if the defendant has not pleaded a counter claim arising out of the same contract or transaction which is the

**VI. MUST BE ENTERED AS TO ALL THE PLAINTIFFS.**—Where one of several co-plaintiffs prays to be nonsuited, a nonsuit must be entered as to all the plaintiffs;<sup>1</sup> for, at common law, all the plaintiffs were merged into one, in the contemplation of the law. An admission of one plaintiff was the admission of all. If a nonsuit was taken fraudulently by one plaintiff for the purpose of injuring his co-plaintiffs, the rule was different.

**VII. VOLUNTARY NONSUIT NO BAR TO ANOTHER SUIT.**—It has been uniformly held, that a voluntary nonsuit will not deprive a plaintiff of his right to try a case a second time,<sup>2</sup> when, with more favorable conditions, he may attain greater success than in the first case. It is owing to this fact alone that nonsuits are so frequent. •

foundation of the plaintiff's cause of action. See also *Whedbee v. Leggett*, 92 N. Car. 469; *Plant v. Fleming*, 20 Cal. 92.

1. *Brown v. Wentworth*, 46 N. H. 490; s. c., 8 Am. Dec. 223.

*Caverly v. Jones*, 23 N. H. 573, 577. "It is a rule of law, says C. J. RICHARDSON in *Kimball v. Wilson*, 3 N. H. 96, that in personal actions the nonsuit of one is the nonsuit of all the plaintiffs, although the rule is otherwise in real and mixed actions. We think no doubt can be entertained that the rule is correctly stated. In this case of trespass, a nonsuit must of course be entered as to all the plaintiffs. *Wilson v. Moore*, 5 Mass. 411. The counsel for both parties agree that in personal actions, tenants in common must join; and it is not to be questioned that a release by one of the plaintiffs is a bar to the action, both of which points were directly in question in the case of *Kimball v. Wilson*, 3 N. H. 96. The case of nonsuit stands manifestly on the same ground as a release. An admission by one of the plaintiffs is also evidence against his co-plaintiffs. 1 Ph. Ev. 378; 1 Greenl. Ev. 203, § 172. The writing presented to the court in this case, contains admissions which are almost necessarily fatal to the case of the parties making them, and consequently to the case of all the plaintiffs. If either of these, the release, the nonsuit, or the admissions can be excluded, the same principle would require that all of them should be rejected. . . . Any fraudulent or covinous contrivance to defeat the action would present a different case from the present."

A motion for judgment as in case of nonsuit cannot be made by one of several defendants without the concurrence

of the others; so of a motion made by all, if either of them has no right to move on account of a default or otherwise. *Bancroft v. Wilson*, 2 Cow. (N. Y.) 495.

**As to Defendants.**—*Prunty v. Mitchell*, 76 Va. 169; *Hammond v. Walker*, 1 S. Car. 109.

2. **No Bar to Another Suit.**—*Freeman* on Judgments, § 261.

In *March on Arbitraments* 215, cited in *Clapp v. Thomas*, 5 Allen (Mass.) 158, it is well said that a nonsuit "is but like the blowing out of a candle which a man at his own pleasure may light again." See also *Ellington v. Crockett*, 13 Mo. 72; *Harris v. Tiffany*, 8 B. Mon. (Ky.) 225; *Holton v. Gleason*, 26 N. H. 501; *Snowhill v. Hillyer*, 9 N. J. L. 38; *Elwell v. McQueen*, 10 Wend. (N. Y.) 519; *Bournonville v. Goodall*, 10 Pa. St. 133; *McEwen v. Mazck*, 3 Rich. (S. Car.) 210; *Pillow v. Eliot*, 25 Tex. Supp. 322; *Peck v. McKellar*, 33 Tex. 234.

"Every judgment against a plaintiff is either upon a *retraxit non pros.*, nonsuit, *nolle prosequi*, discontinuance, or a judgment on an issue found by jury in favor of defendant, or upon demurrer. The inducements or preliminary recitals in these several kinds of judgment are variant, but the conclusion in each is always the same; it is as follows: 'Therefore it is considered by the court that plaintiff take nothing by his suit, and that the defendant go without day, and recover of plaintiff his costs.' Of these several judgments, none but a *retraxit*, or one on the merits, will bar subsequent actions" . . . under no circumstances will such a judgment be deemed final, whether entered before or at the trial. *Foster v. Wells*, 4 Tex. 101; *Pillow v. Eliot*, 25 Tex. Supp. 322;

**VIII. VOLUNTARY NONSUITS NOT APPEALABLE.**—When a plaintiff has voluntarily taken a nonsuit, and afterwards desires the benefit of an appeal, he will not be allowed the privilege, for it is not a decision of the judge below which the plaintiff complains of, but of something which he himself has done.<sup>1</sup> A contrary rule would enable a plaintiff at the same time to have all the advantages of a nonsuit and none of its disadvantages. A peculiar practice prevails in *North Carolina*, which apparently is an excep-

Taylor v. Larkin, 12 Mo. 103; s. c., 45 Am. Dec. 119; Greely v. Smith, 1 Woodb. & M. (U. S.) 181." See also Bond v. McNider, 3 Ired. (N. Car.) 440.

Gummer v. Village of Omro, 50 Wis. 247, 252. "The books of practice agree that there is no difference in the effect of the judgment between a voluntary and an involuntary nonsuit. Freeman on Judgments, § 261, cites many authorities to sustain his text asserting the same principle. 2 Whittaker's Pr. 357; 3 Wait's Pr. 163. That the facts in evidence given by the plaintiff are fully considered by the court, upon a motion for a nonsuit, in determining the question whether in law they entitle the plaintiff to recover, constitutes no such trial on the merits as to make the nonsuit a bar. It is the form of the judgment of nonsuit which gives to it its legal effect, and not the facts considered on the motion. Fisk v. Parker, 14 La. Ann. 406. We conclude, then, that a judgment of nonsuit, whether voluntary or involuntary, is never a bar to another action for the same cause. The rule in respect to involuntary nonsuits is not only sustained by the authorities, but by reason, and is evidently recognized generally by the courts and the bar, from the common practice of nonsuits granted on motion, without a question as to their effect in barring another action. The defendant, instead of moving for a nonsuit on the case made by the plaintiff, may, if he have confidence in his position, have a judgment which will be a bar to another action by submitting the cause to the verdict of a jury, or to the court if a jury be waived. He should not be allowed to experiment with a motion for a nonsuit, and obtain the opinion of the court of the plaintiff's case, and, if he fails in his motion, then go to a full trial on the merits, without also allowing the plaintiff, if he is the losing party on the hearing of the motion, to sue over. If the defendant is not bound and concluded by the decision of the

motion, the plaintiff should not be." See also Hammergen v. Schuermier, 1 McCrary (U. S.) 436; Jay v. Almy, 1 Woodb. & M. (U. S.) 262.

In Murray v. McDougall, 3 N. J. L. 556, the court held, that, where a party voluntarily suffers a nonsuit, he is out of court and cannot be reinstated.

Blair v. McLean, 25 Pa. St. 77, 78. "But there is no case which decides that the plaintiff may not become nonsuited on his own motion, or that he may not if he pleases, discontinue or withdraw his action. We held in Gibson v. Gibson, 20 Pa. St. 9, that a record which showed that the plaintiff withdrew his suit and confessed judgment for costs, was no bar to another suit for the same cause." See also National Water Works v. Kansas City School District, 23 Mo. App. 227; Ellington v. Crockett, 13 Mo. 72; Harris v. Tiffany, 8 B. Mon. (Ky.) 225; Holton v. Gleason, 26 N. H. 501; Snowhill v. Hillyer, 9 N. J. L. 38; Elwell v. McQueen, 10 Wend. (N. Y.) 519; Bourbonville v. Goodall, 10 Pa. St. 133; McEwen v. Mazyck, 3 Rich. (S. Car.) 210; Pillow v. Eliot, 25 Tex. Supp. 322; Evans v. White, Hempst. (U. S.) 206; Darensbourg v. Chauvin, 6 La. Ann. 778; Bridge v. Sumner, 1 Pick. (Mass.) 371; Eaton v. George, 40 N. H. 258; Audubon v. Excelsior Ins. Co., 27 N. Y. 216; Jay v. Carthage, 48 Me. 353.

**1. Not Appealable.**—Van Wormer v. Mayor etc. of Albany, 18 Wend. (N. Y.) 169, 172. See also Hedvick v. Pratt, 94 N. Car. 101; Marsh v. Graham, 6 Iowa 76.

Gentry Co. v. Black, 32 Mo. 542, 543.

"In this condition of the issues, the parties went to trial, when the plaintiff (for what purpose we cannot say) offered the bond in evidence, to the reading of which the defendants objected (for what reason the record does not show); and their objection being sustained by the court, the plaintiff thereupon voluntarily suffered a nonsuit, which the court afterwards refused

tion to the above rule, but in reality is not.<sup>1</sup> In an action of replevin an appeal is allowed from a voluntary nonsuit.<sup>2</sup>

**IX. MOTION FOR INVOLUNTARY NONSUIT.**—While the motion for a nonsuit is usually made by the defendant, it has been held that

to set aside; and the rejection of the evidence and the refusal to set aside the nonsuit are assigned for error . . . the plaintiff needlessly took a nonsuit. In such case, this court has no power to relieve. The nonsuit must stand." See also *Louisiana Plank Road Co. v. Mitchell*, 20 Mo. 432.

If the plaintiff submits to a nonsuit, he cannot by writ of error or appeal procure a reversal thereof, on account of any erroneous opinion delivered in the progress of the trial. *Watson v. Anderson*, Hard. (Ky.) 458; *Moore v. Herndon*, 5 Blackf. (Ind.) 168; *Worke v. Byers*, 3 Hawks (N. Car.) 228; *Thornton v. Zett*, 1 Wash. (Va.) 138; *People v. Browne*, 8 Ill. 87; *Beall v. Breckenridge*, 3 J. J. Marsh. (Ky.) 695.

In *Spruill v. Trader*, 5 Jones (N. Car.) 39, the court held, that a submission to a nonsuit, by a plaintiff in a county court, is not a voluntary abandonment of a suit, and he may appeal.

1. **North Carolina Cases.**—In *Mobley v. Watts*, 98 N. Car. 284, the practice in *North Carolina* appears to allow a plaintiff to take a nonsuit and then appeal, but an examination of the cases will show that the nonsuit has been taken in consequence of the court intimating an adverse opinion to the plaintiff's case (p. 291), "that when on the trial the court intimates an opinion that the plaintiff cannot maintain the action, he may, in deference to the opinion of the court, submit to a judgment of nonsuit, assign ground of error, and appeal to this court. In such cases the judgment is not regarded as entered simply at the instance of the plaintiff; he submits to it with the understanding on the part of the court that he shall have the right to except and appeal. In *Graham v. Tate*, 77 N. Car., PEARSON, C. J., says: 'Even when the plaintiff appears at the trial, takes a part in it by challenging jurors, examining and cross examining witnesses, and the argument of his counsel, if he finds from an intimation of the court that the charge will be against him, he may submit to a nonsuit and appeal. This is every day practice.' And the Chief Justice gives the reasons for it. But, says the learned

counsel, there was in this case no intimation that the charge of the court would be against the plaintiff, and there could be no such intimation until the whole case was before the court. We cannot take this narrow view of the case; it is 'sticking in the back.' In the progress of the trial the plaintiff offers evidence to establish necessary links in his chain of title, without which he cannot make out his case. This evidence is excluded. Can he go any further? He submits to a nonsuit. Is not the irresistible inference that he does so because, not under the intimation simply, but under the ruling of the court, if correct, he must fail?"

2. *Reed v. Carpenter*, 2 Ohio 79. "The plaintiff replevied the property, and on the return of the writ filed his declaration . . . At the term, when by the rules and usages of court, the cause stood for trial, the plaintiff became nonsuit, and judgment of nonsuit was rendered against him. At the request of the defendant, a jury was impanelled to ascertain the value of the property replevied. A verdict of the value was returned, for which judgment, with a penalty of fifty per cent., was rendered. The plaintiff gave notice of appeal . . . The defendant moved to quash the appeal, upon the ground that the law did not permit the plaintiff to appeal from a voluntary nonsuit (the court). The action of replevin is one of a peculiar nature; both parties are actors . . . The situation of the parties is changed. The defendant becomes plaintiff, or actor. He claims to recover not only his costs, but also the value of the goods and chattels replevied, together with damages. Upon the verdict of the jury, the court render a judgment for the value of the property . . . This judgment is final. It is not, strictly speaking, a judgment of nonsuit. The plaintiff cannot afterwards recommence his action of replevin, for the property is already in his own possession . . . The propriety of sustaining an appeal, under our statute, from a judgment by default, has never been doubted, and the same reason applies for sustaining the appeal in the present case."

a judge may order a nonsuit of his own motion, although he has refused it on motion of the defendant.<sup>1</sup>

**X. NON-APPEARANCE OF PLAINTIFF.**—If a plaintiff fails to appear, either in person or by attorney, when his case is called for trial, he will be considered as electing to become nonsuit, and a judgment of nonsuit will be entered against him.<sup>2</sup> It has been held, however, that the action of replevin is an exception to this rule.<sup>3</sup>

**XI. WHERE INVOLUNTARY NONSUITS ARE GRANTED AND WHERE REFUSED.**—The decisions in many of the States are in conflict as to whether a nonsuit can be granted by the court against the will of the

**1. Nonsuits With and Without Motion.**  
—*Couch v. Charlotte etc. R. Co.*, 22 S. Car. 557.

Under the North Carolina act of 1777, a nonsuit will not be ordered, unless on motion of the defendant. *Allison v. Hancock*, 2 Dev. (N. Car.) 296.

In *Allgro v. Duncan*, 24 How. Pr. (N. Y.) 210, the court held, that in a clear case the judge should direct a nonsuit, though not asked to do so.

Where the proof shows that plaintiff's injury was caused by the negligence of a fellow servant, defendant may move for nonsuit without having pleaded such defence in his answer. *Sayward v. Carlson* (Wash.), 23 Pac. Rep. 830.

**Where Plaintiff Opposes a Motion for Nonsuit.**—A plaintiff by opposing a motion for a nonsuit, does not thereby waive his right to have the case submitted to the jury without a particular request to the court to that effect, nor assume thereby that the question is one of law only. It is otherwise with the defendants, for by their motion for a nonsuit they assume that the case is a proper one for the disposition of the court; and that assumption is a waiver of their right to have it submitted to the jury without some specific request being afterward made in their behalf, provided they do not succeed on their motion for a nonsuit. *Slade v. McMullen*, 45 How. Pr. (N. Y.) 52.

A dismissal and a nonsuit are not equivalent to two nonsuits, under the Alabama statute providing that two nonsuits shall be equal to a verdict against the party suffering the same. *Bullock v. Perry*, 2 Stew. & P. (Ala.) 319. This statute does not apply to nonsuits set aside before the end of the term. *Kennedy v. Geddes*, 8 Port. (Ala.) 263; s. c., 33 Am. Dec. 289. It means nonsuits for the same cause and

not such as are set aside. *King v. McLoskey*, 4 Ala. 91.

**2. Non-appearance.**—*Nordmauser v. Hitchcock*, 40 Mo. 178; *Herring v. Poritz*, 6 Ill. App. 208. See also *Merrick v. Mayhue*, 40 Mich. 196; *Phillips v. Cassidy*, 36 La. Ann. 288; *Petit v. Hewlett*, 2 How. Pr. (N. Y.) 157.

**Adjournment of a Cause.**—If, on adjournment of a cause the plaintiff does not appear, he will be nonsuited. *Holliday v. Large*, 3 N. J. L. 653.

**Where Plaintiff Fails to Carry Down His Cause.**—Where a plaintiff neglects to carry down his cause for trial at the next circuit, after a new trial has been awarded, a judgment of nonsuit will be entered against him. *Fox v. Lambson*, 8 N. J. L. 366. See also *Wright v. Bartlett*, 45 N. H. 287.

**Where Plaintiff Fails to Reply to a Plea in the Required Time.**—By the Tennessee act of 1794, ch. 1, § 26, the plaintiff may be nonsuited if he fails to reply to a plea in the time prescribed by the act. If, however, the defendant takes no steps against the plaintiff for his failure, but goes to trial on issues or other pleas, he waives his defence on the plea, to which there is no replication. *Harris v. Snider*, 9 Humph. (Tenn.) 743.

**Failure to File Declaration.**—Where the declaration is not filed ten days before the second term of the court, a nonsuit will be granted. *Downey v. Smith*, 13 Ill. 671.

**Where Plaintiff Refuses to Proceed.**—Where a cause is set down for trial by plaintiff, who, when it is called, refuses to proceed, it may be dismissed on defendant's motion. *Haberstich v. Fischer*, 67 How. Pr. (N. Y.) 318.

**3. Barret v. Forrester**, 1 Johns. Cas. (N. Y.) 247; *Phillips v. Cassidy*, 36 La. Ann. 288. But see *Gale v. Hoysradt*, 7 Hill (N. Y.) 179.

plaintiff. The Supreme Court of the United States holds that an involuntary nonsuit cannot be granted,<sup>1</sup> and in many of the States the rule is the same,<sup>2</sup> while in others it has been the practice to

1. Where Granted and Where Refused.—*De Wolfe v. Raband*, 1 Pet. (U. S.) 476, 496.

"After the evidence for the plaintiffs was closed the defendant moved for a nonsuit, which motion was overruled. This refusal certainly constitutes no ground for reversal in this court. A nonsuit may not be ordered by the court upon the application of the defendant, and cannot, as we have had occasion to decide at the present term, be ordered in any case without the consent and acquiescence of the plaintiff." *Elmore v. Grymes*, 1 Pet. (U. S.) 469. In which case CHIEF JUSTICE MARSHALL said: "The circuit court had no authority to order a peremptory nonsuit against the will of the plaintiff. He had a right by law to a trial by a jury, and to have had the case submitted to them. He might agree to a nonsuit; but if he did not so choose, the court could not compel him to submit to it." Dissenting opinion by JOHNSON, J. See also *Crane v. Morris*, 6 Pet. (U. S.) 598; *Castle v. Bullard*, 23 How. (U. S.) 172; *Boucicault v. Fox*, 5 Blatchf. (U. S.) 87; *Foot v. Silsby*, 1 Blatchf. (U. S.) 445; *Elmore v. Grymes*, 1 Pet. (U. S.) 469.

**New York.**—In *Pratt v. Hull*, 13 Johns. (N. Y.) 334, the court held that "a court of common pleas may compel a plaintiff to be nonsuited against his consent, when in their opinion the evidence offered by him is not sufficient to support his action, there being no question of fact to be decided." See also *Foot v. Sabin*, 19 Johns. (N. Y.) 155, 158; s. c., 10 Am. Dec. 208.

And it has been held that a justice of the peace has the same power. *Clements v. Benjamin*, 12 Johns. (N. Y.) 208. See also *Betts v. Jackson*, 6 Wend. (N. Y.) 173.

In *Jansen v. Acker*, 23 Wend. (N. Y.) 480, the court held that a nonsuit might be granted after evidence had been given on both sides. See also *Fort v. Collins*, 21 Wend. (N. Y.) 109.

A nonsuit may be granted at the trial of a cause on the testimony adduced by the defendant, and it is not necessary that the evidence given by the defendant be in its nature conclusive, *e. g.*, a record or something importing absolute verity. It is enough that a verdict for the plaintiff would be against the clear

weight and effect of the defensive evidence whatever may be its character. *Rudd v. Davis*, 3 Hill (N. Y.) 287. See also *Stuart v. Simpson*, 1 Wend. (N. Y.) 376, 379; *Demyer v. Souzer*, 6 Wend. (N. Y.) 436; *Wilson v. Williams*, 14 Wend. (N. Y.) 146; s. c., 28 Am. Dec. 518.

2. **Alabama.**—"It has been the continuous practice in this State (*Alabama*) that the court cannot order the plaintiff to be nonsuit against his consent, and whenever he submits his case to a jury he must be understood to insist upon a verdict." *Hunt v. Stewart*, 7 Ala. 525. See also *Smith v. Seaton*, Minor (Ala.) 75; *Saunders v. Coffin*, 16 Ala. 421.

**Arkansas.**—"A nonsuit cannot be ordered in any case, by the court, without the consent and acquiescence of the plaintiff." *Martin v. Webb*, 5 Ark. 72; s. c., 39 Am. Dec. 363. See also *Ringo v. Field*, 6 Ark. 43; *Carr v. Crain*, 7 Ark. 241.

In *Hill v. Rucker*, 14 Ark. 706, 709, WATKINS, C. J., observes, after stating that the court has no power to order a peremptory nonsuit: "But the practice has prevailed for the court, sitting as a jury, or the jury under instructions from the court, to find as in case of nonsuit, which is a determination of the case upon the merits as presented by the evidence, a bar to any future action for the same cause, and to which error lies. *Fagan v. Faulkner*, 5 Ark. 161; *Cocke v. Brogan*, 5 Ark. 694; *Palmer v. Ashley*, 3 Ark. 75, though the correctness of it was doubted in *Goodrich v. Fritz*, 4 Ark. 525, and in *Carr v. Crain*, 7 Ark. 241, where the court said, 'the correct motion is, to instruct the jury that if the evidence has not proved a matter necessary to be proven, they must find for the defendant,' though in this last case mentioned the distinction does not appear to be noticed, that to order a nonsuit is to say the jury shall not pass on the evidence, while the better authority is that the court has not this power. . . . To instruct the jury to find as in case of nonsuit, is only the opinion of the court that the plaintiff has failed to make out his case in evidence, and so far from taking the case from the jury is every way favorable to the plaintiff, because it is analogous to a demurrer to evidence, where all legiti-

grant involuntary nonsuits.<sup>1</sup> The court of appeals of *Maryland*

mate presumptions of fact are to be indulged in favor of the evidence. There is no real discrepancy between the cases adverted to. They all tend to establish, that however dangerous it may be for a defendant to ask the court to instruct the jury to find as in case of nonsuit . . . it is no assumption of power for the court to give such an instruction, the only question being whether it was properly given."

**Indiana.**—*Williams v. Port*, 9 Ind. 551.

**Kansas.**—The court is not authorized to dismiss a suit upon the application of the defendant, for want of sufficient proof, or even in absence of proof, to sustain the plaintiff's claim, and the court erred in granting a judgment of nonsuit against the plaintiff's will." *Case v. Hannahs*, 2 Kan. 490.

**Massachusetts.**—*Rose v. Learned*, 14 Mass. 154.

In *Mitchell v. New England Marine Ins. Co.*, 6 Pick. (Mass.) 117, the court held that a plaintiff cannot be nonsuited against his consent, if he insists on his right to appear when called.

**Michigan.**—"A plaintiff has always a right, if he chooses, to go to the jury with his case. The circuit court cannot compel him to become nonsuit." *Ca-hill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 124; s. c., 43 Am. Dec. 457.

**Mississippi.**—In *Winston v. Miller*, 12 Smed. & M. (Miss.) 550. JUSTICE CLAYTON observes: "In this country there is no such thing as a compulsory nonsuit, if the party insists that a jury shall pass upon his case; but what by the English practice would be good ground to compel a party to take a nonsuit would in our law, where the parties have entered on a trial, be good reason for a verdict against him."

**Missouri.**—*St. Louis Floating Dock Ins. Co. v. Soulard*, 8 Mo. 665; *Barada v. Carondelet*, 8 Mo. 644-649; *Wells v. Gaty*, 8 Mo. 681; *Clark v. Steamboat Mound City*, 9 Mo. 146; *Perrin v. Williams*, 9 Mo. 148; *Wells v. Biddle*, 9 Mo. 159; *Marshall v. Wolfe*, 11 Mo. 608; *Martin v. Henley*, 13 Mo. 312.

**New Mexico.**—*Herrera v. Chaves*, 2 New Mex. 86; *Montoya v. Donohoe*, 2 New Mex. 214.

**North Carolina.**—"If the court be dissatisfied with the verdict of a jury, they can only grant a new trial. They can-

not, unless by the agreement of the parties, go farther and direct the plaintiff to be nonsuited." *Dickey v. Johnson*, 13 Ired. (N. Car.) 450.

In *Hatchell v. Odom*, 2 Dev. & B. (N. Car.) 304, the court held, that it was not error in law for the judge to refuse to nonsuit the plaintiff; and if the defendant relies upon the objection, he should move it in the shape of instructions to the jury.

In *Smith v. Smith*, 8 Ired. (N. Car.) 31, RUFFIN, C. J., observes: "Error will not lie for a refusal to nonsuit, because the court is not bound to do so in any case, but has the discretion to leave the matter to the decision of the jury, except in the few cases in which the duty is imposed by statute."

In *Tiddy v. Harris*, 101 N. Car. 589, the court held that, when the proofs are all in, and the judge intimates an opinion that, under the old practice, plaintiff cannot recover, or, under the new, fails to establish the issue necessary to his having judgment, he may suffer a nonsuit, and have the correctness of the ruling reviewed by appeal; and the same course may be taken where the judge announces that, if the jury believe the facts to be as testified to, he will instruct them to find the issue in favor of defendant. See also *Magruder v. Clayton*, 29 S. Car. 407; *Petrie v. Columbia etc. R. Co.*, 29 S. Car. 303.

**Tennessee.**—"A court upon the trial of a cause, cannot order and adjudge a nonsuit to be entered for the misconception of the action, or for want of testimony. The party alone has the right to decide whether he will take a nonsuit or have a trial." *Scruggs v. Bracken*, 4 Yerg. (Tenn.) 528.

**Vermont.**—*French v. Smith*, 4 Vt. 363; s. c., 24 Am. Dec. 616; *Smith v. Crane*, 12 Vt. 487.

**Wyoming.**—*Mulhern v. Union Pac. R. Co.*, 2 Wyoming 446; *Hoy v. Smith*, 2 Wyoming 440.

1. **California.**—In *Ringgold v. Haven*, 1 Cal. 108, BENNETT, J., observes: "As to the right of the court to direct a compulsory nonsuit, upon this point we are met with a contrariety of authorities and a diversity of argument. In some of the States the affirmative, in others the negative of the proposition is asserted in theory and maintained in practice. In some, it is held that the court has no right, in any case, to non-



suit the plaintiff, even though his evidence be insufficient in law to support his action, whilst in others it is settled that a jury should be allowed to receive no cause until the court is satisfied that the evidence is sufficient *in law* to authorize the jury to find a verdict in favor of the plaintiff. In all, however, it is agreed that cases may sometimes, under certain forms, be withdrawn from the jury and reserved for the sole consideration and determination of the court. This last is a common ground in the English courts, in the Federal courts of the Union and in the courts of the various States. The only difference upon the subject which appears to exist, is as to the manner in which the conceded end shall be reached. In the federal courts, and in the courts of some of the States, the object is attained by means of the cumbrous and complicated machinery of a demurrer to evidence; in the courts of other States, through the simpler and easier process of motion for nonsuit at the trial. In both cases the same end is arrived at; and the one remedy as well as the other can be applied only where the plaintiff shall have failed to make out a case which the law says is proper to be submitted to a jury. The former practice is constantly passing more and more into disfavor and the latter usurping its place. Thus, at the present day, in the English courts, although it is held in theory to be optional with the plaintiff whether he will be nonsuited or not, and that he may compel the defendant to resort to a demurrer to evidence, yet the constant practice there is for the plaintiff upon the suggestion of the judge that the evidence is insufficient, to submit to a nonsuit, with leave to move the court in banc to set it aside." See also *Dalrymple v. Hanson*, 1 Cal. 125; *Mateer v. Brown*, 1 Cal. 221; s. c., 52 Am. Dec. 303; *Ensminger v. McIntire*, 23 Cal. 593.

**Connecticut.**—In *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468, the court held that, the act of 1852 (*Connecticut*), authorizing the granting of nonsuits in civil actions, where the plaintiff, who has produced his evidence and rested his cause, shall have failed to make out a *prima facie* case, is not repugnant to the constitution of this State, as impairing the right of trial by jury.

**Georgia.**—A motion for a nonsuit at law is like a demurrer in equity; and if, admitting all the facts proved, and all reasonable deductions from

them, the plaintiff, on all the proof, ought not to recover, the nonsuit ought to be awarded. *Tison v. Yawn*, 15 Ga. 491; s. c., 60 Am. Dec. 708. See also *Long v. Lewis*, 16 Ga. 154.

**Iowa.**—In an action *ex delicto*, where there is no evidence against a defendant, or such deficient evidence, that the court would be justified in setting aside the verdict, the court may order a nonsuit without the consent of the plaintiff, *Eddy v. Wilson*, 1 G. Greene (Iowa) 259.

**Illinois.**—In the federal courts of Illinois, where, at the conclusion of the plaintiff's testimony, the court would, if he obtained a verdict, set it aside, and motion is made by defendant to direct a verdict for him, plaintiff is not allowed to take a nonsuit, but may withdraw a juror and discontinue. *Wolcott v. Studebaker*, 34 Fed. Rep. S.

**Kentucky—Instructions as in Case of Nonsuit.**—*Shay v. Richmond*, etc. Turnpike Road Co., 1 Dush (Ky.) 108; *Jackson v. Holliday*, 3 B. Mon. (Ky.) 366; *Jarman v. Howard*, 3 A. K. Marsh. (Ky.) 384; *Munsell v. Bartlett*, 6 J. J. Marsh. (Ky.) 22; *Fightmaster v. Beasley*, 7 J. J. Marsh. (Ky.) 410.

**Maine.**—A nonsuit may be ordered if the plaintiff's testimony is incompetent to maintain the suit, but after evidence has been given by both parties, a nonsuit cannot rightfully be entered. *Lyon v. Sibley*, 32 Me. 576; *Emerson v. Joy*, 34 Me. 347; *Thorn v. Rice*, 15 Me. 263.

**New Hampshire.**—*Bailey v. Kimball*, 26 N. H. 351; *Stickney v. Stickney*, 21 N. H. 61.

**New Jersey.**—Rule governing a court on a motion to nonsuit fully discussed in *Central R. Co. v. Moore*, 24 N. J. L. 830; *Aycrigg v. New York etc. R. Co.*, 30 N. J. L. 460; *Steves v. Oswego etc. R. Co.*, 18 N. Y. 422, 425; *Wilds v. Hudson River R. Co.*, 24 N. Y. 430; *Shelley v. Vail*, 38 How. Pr. (N. Y.) 406; *Sheldon v. Hudson River R. Co.*, 29 Barb. (N. Y.) 226; *Deyo v. New York Central R. Co.*, 34 N. Y. 9; s. c., 88 Am. Dec. 418; *Scott v. Simpson*, 1 Sandf. (N. Y.) 601; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615; s. c., 34 Am. Dec. 273; *Labar v. Koplin*, 4 N. Y. 547.

**Ohio.**—The courts of this State, in a proper case, have the power to take the evidence given by the plaintiff from the jury, and order a peremptory nonsuit. *Ellis v. Ohio L. Ins. etc. Co.*, 4 Ohio St. 628.

Whenever it appears in the progress

declares that the expression common in English books, "that the judge directed a nonsuit," means that the judge having expressed his opinion that the plaintiff was not entitled to recover, the plaintiff then voluntarily submitted to a nonsuit.<sup>1</sup>

**XII. AT WHAT TIME GRANTED.**—In those courts where an involuntary nonsuit is allowed, it has been held error to grant a nonsuit before the plaintiff has closed his testimony, for it has been said that a motion for a nonsuit is the same as a demurrer.<sup>2</sup> It has

of a trial that the plaintiff is not entitled to maintain his action, the court may interpose and direct a nonsuit, although the same objection appears on the face of the declaration, and might have been made upon demurrer. *Powell v. Jones*, 12 Ohio 35. See also *Robinson v. Abell*, 17 Ohio 36-44; *Jones v. Smith*, 14 Ohio 606; *Showers v. Emery*, 16 Ohio 294.

**Oregon.**—*Grant v. Baker*, 12 Oregon 329.

**Pennsylvania.**—The Pennsylvania act of March 11th, 1875, No. 8, p. 6, authorized the entering of compulsory nonsuits. Prior to this act it seems the court could not compel a plaintiff who has given evidence in support of his case to suffer a nonsuit. See *Irving v. Taggart*, 1 S. & R. (Pa.) 360; *Girard v. Gettig*, 2 Binn. (Pa.) 234, where the court held that the refusal of the court to order a nonsuit was no ground for a bill of exceptions. *Lyon v. Daniels*, 14 Pa. St. 197. But see *Myers v. Girard Ins. Co.*, 26 Pa. St. 192; *Munn v. Mayor of Pittsburgh*, 40 Pa. St. 364.

**South Carolina.**—*Turnbull v. Rivers*, 3 McCord (S. Car.) 131; s. c., 15 Am. Dec. 622; *Clason v. Bird*, 2 Brev. (S. Car.) 370; *Rogers v. Madden*, 2 Bailey (S. Car.) 321.

**Wisconsin.**—*Woodward v. McKeynolds*, 1 Chand. (Wis.) 244; *Cutler v. Hurlbut*, 29 Wis. 152-165; *Hoeflinger v. Stafford*, 38 Wis. 391; *Spensler v. Lancashire Ins. Co.*, 54 Wis. 433-437.

1. *Kettlewell v. Peters*, 23 Md. 312, 316: "Whatever may be the mode of proceeding in other States, this is not adopted in *Maryland*. The court may, in its discretion, content itself with a simple refusal of any prayer not sanctioned by the rules of law. *Maryland Ins. Co. v. Bathurst*, 5 Gill & J. (Md.) 159.

"When the court cannot grant the entire prayer as made, though a portion of it, in a separate distinct form, might have been given, it is not error to reject the whole. *Doyle v. Baltimore*

*County*, 12 Gill & J. (Md.) 484; *Gray v. Cook*, 12 Gill & J. (Md.) 236.

"The motion of the defendant below, being contrary to the practice established in this State, was properly overruled, however sufficient the reasons might have been for defeating the action, if presented in another form, upon which we do not mean to express an opinion in this case. A nonsuit must be the voluntary act of the plaintiff. *Evans' Prac.* 304. 'The expressions common in English books that the judge directed a nonsuit, and others of a similar import, mean no more than this, that the judge expressed in that form of words his opinion that the plaintiff was not entitled to recover, and that the party submitted to a nonsuit rather than the judge should enforce his opinion by a direction to the jury as to the verdict.' *Evans' Prac.* 315; *Silsby v. Foote*, 14 How. (U. S.) 222, and authorities there cited."

2. *Walker v. Supple*, 54 Ga. 178, 179, 180. "But it was error for the court to have nonsuited the plaintiff until he had closed his evidence, for the reason that he might have introduced testimony which would have taken the case out of the operation of the statute . . . A motion for a nonsuit is in the nature of a demurrer to the plaintiff's evidence; that is to say, admitting all the plaintiff has proved to be true, it is not sufficient in law to entitle him to recover. Inasmuch as the court nonsuited the plaintiff before he had closed his evidence, it was error to overrule his motion to reinstate the case on that ground. Whether the plaintiff will be able to take his case out of the operation of the statute by the introduction of evidence for that purpose we cannot tell, but he is entitled to have the opportunity to do so."

In *Clews v. New York Nat. Banking Assoc.*, 105 N. Y. 398, the court held that where a complaint is dismissed on the opening of counsel, all the facts referred to in his opening, or offers of proof, should be considered, including

been held that a nonsuit will be granted at the close of the opening statement; still a nonsuit should not be granted at this stage unless the statement of the plaintiff has been made in a clear manner.<sup>1</sup> In another court it was decided that the plaintiff could be nonsuited at the end of his opening statement, if it contained an admission fatal to his action.<sup>2</sup> At the very opening of the case a motion for a nonsuit is often made by the defendant on the ground of the misjoinder of plaintiffs.<sup>3</sup> In regard to the point of time, a defendant is allowed about the same privileges in applying for an involuntary nonsuit as is a plaintiff when he voluntarily submits to a nonsuit. But not until the trial of the case can a defendant apply for an involuntary nonsuit, and we have seen above that nonsuits usually are not granted at an early stage of the trial. Motions for involuntary nonsuits should be made before the jury retires to consider its verdict. And an involuntary nonsuit consequently will not be granted after the verdict.<sup>4</sup> This rule is the same as that in voluntary nonsuits,

facts not stated in the complaint, as well as those stated, unless objection to proof of such additional facts is made on the specific ground that it is not admissible under the pleadings.

1. *Emmerson v. Weeks*, 58 Cal. 382, 384.

"It is not the practice to grant a nonsuit on the opening of the plaintiff's counsel." *Fisher v. Fisher*, 5 Wis. 472.

And it has been held that a nonsuit will not be granted on the ground that the plaintiff's counsel has not stated in his opening facts sufficient to constitute a cause of action. *Stewart v. Hamilton*, 3 Robt. (N. Y.) 672.

2. *Stewart v. Hamilton*, 3 Robt. (N. Y.) 672. "I think it is not good practice to nonsuit upon the plaintiff's opening address to the jury, merely for the reason that he has failed to state to them sufficient facts to constitute a cause of action, although I am aware that such a practice has obtained in some of our courts. In his opening, the plaintiff's counsel may properly, and usually does, state such facts only as he desires to impress upon the minds of the jurors. To hold him, in his address, to the exactness and certainty of a pleading would, in many cases, be to impose upon him a duty which would be exceedingly inconvenient, if not impossible, for him to perform orally. Indeed, I see no reason why he may not state to the jury, or refrain from stating, just so much of the case as his judgment dictates. I do not mean to say that a fatal admission made by the plaintiff's counsel in his opening may

not entitle the defendant thereupon to a judgment dismissing the complaint, without the formality of taking evidence which must necessarily be useless." See also *Stewart v. Hamilton*, 18 Abb. Pr. (N. Y.) 298; 28 How. Pr. (N. Y.) 265.

3. Such motions will not be granted where the misjoinder appears on the record. In such cases, demurrers, writs of error, motions in arrest of judgment and pleas in abatement are the proper means of taking advantage of the errors. See the case of *Bond v. Hilton*, 6 Jones (N. Car.) 180; *Hammond v. Walker*, 1 S. Car. 109; *Prunty v. Mitchell*, 76 Va. 169.

"Where by a special written contract put in evidence by the plaintiff, as part of the main case, it appeared that the action should have been brought by another party thereon, *held*, that a nonsuit was properly awarded." *Southwestern R. Co. v. Millian*, 62 Ga. 607. See also *Perry v. Butt*, 14 Ga. 699.

4. *Magwood v. Milne*, 12 Rich. (S. Car.) 474. "In trespass *quare clausum fregit* on very slight evidence the jury found for the plaintiff. *Held*, that after the verdict the court would not grant a nonsuit, though a new trial, if asked for, might have been granted."

It has been held that after evidence has been given by both parties, a nonsuit cannot be rightfully ordered. *Lyon v. Sibley*, 32 Me. 576; *Emerson v. Joy*, 34 Me. 347. But for a contrary doctrine, see *Jansen v. Acker*, 23 Wend. (N. Y.) 481.

Under the *North Carolina* practice,

and arises from the statute of 2 Henry IV, ch. 7.<sup>1</sup> If a motion for a nonsuit is not made at the trial, the superior court will not consider whether the plaintiff should have been nonsuited or not.<sup>2</sup>

**XIII. HOW ASKED FOR.**—The reasons on account of which the judge is asked to grant an involuntary nonsuit must be clearly stated;<sup>3</sup> if this is not done the judge should not consider the motion. One object of this requirement is to direct the judge's

a motion for nonsuit may, by consent of the parties, be heard and determined out of term time. *Gatewood v. Leak*, 99 N. Car. 363.

A plaintiff cannot be nonsuited at the return term of the writ in an action in the Circuit Court of *Mississippi*, for failing to reply to the special pleas of the defendant. If, however, at the term succeeding, the plaintiff fails to perfect the pleadings *instantly*, the court may enter a judgment of nonsuit against him. *Kain v. May*, 5 Smed. & M. (Miss.) 368.

1. See the case of *Washburn v. Allen*, 77 Me. 344, quoted in note 1, p. 722.

2. *Rockingham Bank v. Claggett*, 29 N. H. 292.

3. **How Asked for.**—*Binsse v. Wood*, 37 N. Y. 526; *Coffey v. Greenfield*, 62 Cal. 602, 608.

"On the trial, after the plaintiffs had closed their evidence, Hefner moved for a nonsuit, on the ground that plaintiffs had not introduced any testimony tending to sustain the action. The motion was denied and Hefner excepted. The motion was properly denied. It is settled law in this State, that a party moving for a nonsuit should state in his motion precisely the grounds on which he relied, so that the attention of the court and the opposite counsel may be particularly directed to the supposed defects in the plaintiff's case. *People v. Banvard*, 27 Cal. 470; *Sanchez v. Neary*, 41 Cal. 485, 487; *Kiler v. Kimbal*, 10 Cal. 267; *McGarity v. Byington*, 12 Cal. 426, 429. The general ground above stated did not comply with the rule, and therefore the court did not err in denying the motion. We have, however, examined the evidence, and are of opinion that there was testimony tending to sustain the action."

See also *Trustees of St. Mary's Church v. Cagger*, 6 Barb. (N. Y.) 576, 581; *Underhill v. Pomeroy*, 2 Hill (N. Y.) 603; affirmed upon error, 7 Hill (N. Y.) 388.

"But to say that a plaintiff should be nonsuited because he has shown no right to recover, amounts to little else than to move for a nonsuit on the ground that the plaintiff ought to be nonsuited. No one can say, looking at this first ground of the motion, what question or proposition the defendants' counsel intended to present. If, as may perhaps be inferred from the agreement, though certainly not from anything in the record, it was intended to present the point that the plaintiff was not shown to be the legal representative of William Cagger, it should have been so presented as to apprise her counsel that such was the objection, that he might, if in his power, offer further proof to meet it." *Trustees of St. Mary's Church v. Cagger*, 6 Barb. (N. Y.) 576. See also *Castle v. Duryea*, 32 Barb. (N. Y.) 480; *Kiler v. Kimbal*, 10 Cal. 267; *Booth v. Bunce*, 31 N. Y. 246; *People v. Banard*, 27 Cal. 470; *Binsse v. Wood*, 37 N. Y. 526.

So in *Maryland*, where involuntary nonsuits are not allowed, a prayer, offered by defendant asking the court to rule that upon the proof produced the plaintiff is not entitled to recover, was refused because too general. *Blair v. Blair*, 39 Md. 556. See also *Miller v. Luco*, 80 Cal. 257; *Belcher v. Murphy*, 81 Cal. 39; *Coffey v. Greenfield*, 62 Cal. 602; *Brown v. Warren*, 16 Nev. 228.

A misjoinder of defendants or of causes of action, not specified by defendants as a ground of a motion for a nonsuit, will not justify an order granting the motion, as it is the settled law of *California* that the grounds for a nonsuit must be precisely stated by the moving party, and none other can be considered by the court in granting or refusing the motion, or by the appellate court in reviewing the order. *Shain v. Forbes*, 82 Cal. 527.

Where no grounds for nonsuit were shown by defendant. *Silva v. Holland*,

attention to the particular point and to give fair notice to the opposing counsel. Another object is to make the arguments of the counsel comprehensive, and thus save time and expense. A party who moves for a nonsuit on a specific ground cannot, on appeal, assume a new one.<sup>1</sup>

**XIV. GRANTED WHERE THE COURT HAS NOT JURISDICTION.**—Although usually an objection on the part of the defendant, that the court has not jurisdiction of the case is made in other ways, it may be made by a motion for a nonsuit.<sup>2</sup>

**XV. WHERE THE LAW IS AGAINST PLAINTIFF'S CLAIM.**—The most common ground upon which an involuntary nonsuit is granted to a defendant, is where the evidence shows that, as a matter of law, considering the whole case, the plaintiff cannot recover;<sup>3</sup> for the court, and not the jury, is the proper tribunal to determine questions of law.

74 Cal. 530. See also *Loring v. Stuart*, 79 Cal. 200.

1. *Mateer v. Brown*, 1 Cal. 221; s. c., 52 Am. Dec. 303.

2. **Jurisdiction.**—*Compare*, generally, **JURISDICTION**, 12 Am. & Eng. Encyc. of Law 306, *et seq.*; *Wilson v. Owens*, 1 How. (Miss.) 126, 127.

"It is the question arising upon the motion of the plaintiff to enter a nonsuit in the court below after verdict found. The jury had returned a verdict for the defendant for twelve dollars; and the motion of the plaintiff in error was predicated upon the 18th section of the circuit court law, which provides, that if any suit shall be commenced in any circuit court for a less sum than such court can legally take cognizance of: or if any person shall demand a greater sum than is due on purpose to evade this act, in either case the plaintiff shall be nonsuited and pay costs, provided, etc. In this case there is nothing to show that suit was commenced for more than was due; or that the defendant demanded in his writ a greater sum than was due, on purpose to evade the law defining the jurisdiction of the circuit court . . . judgment will therefore be affirmed."

*Vaughan v. Cade*, 2 Rich. (S. Car.) 49. "Where in such a matter the plaintiff does not prove himself entitled to more than twenty dollars, or the defendant reduces the demand to or below that sum, by proof of payments made before the action was commenced, there should either be a nonsuit, or a verdict should be rendered for the defendant, *semble*. Where, however, the verdict is for the plaintiff, the court

cannot afterwards grant a nonsuit, or, it seems, arrest the judgment, though it will order the proceedings to be stayed, and might, on proper application, order judgment to be entered for the defendant, as on a verdict in his favor." See also *Mera v. Scales*, 2 Hawks (N. Car.) 364; *Tate v. Blakely*, 3 Hill (S. Car.) 297; *Pescud v. Hawkins*, 71 N. Car. 299.

In *Mississippi*, a motion by the defendant to enter a nonsuit for want of jurisdiction, after verdict for the plaintiff, will not be sustained, unless the suit was commenced for a sum less than the court can take cognizance of, or for a sum greater than was due, in order to evade the question of jurisdiction. *Wilson v. Owens*, 1 How. (Miss.) 126.

3. *Carpenter v. Smith*, 10 Barb. (N. Y.) 663, 664. "The plaintiff's proofs showed that he had not procured a purchaser on the terms on which he was authorized, and so proved that as a matter of law he was not entitled to recover for brokerage. The defendant below moved for a nonsuit, which the court refused, and the defendant excepted . . . There was no matter of fact in this case to go to a jury. The evidence showed that as matter of law the plaintiff could not recover . . . The judge in such case should have nonsuited him . . . To allow such a case to go to them, is to make them pass on a question of law, and to deprive the defendant of the right which he has to have, the judge (and not the jury) determine the law." See also *Healey v. Utly*, 1 Cow. (N. Y.) 346, 353; *Pratt v. Hull*, 13 Johns. (N. Y.)

**XVI. FOR INSUFFICIENCY OF PLAINTIFF'S EVIDENCE.**—When no sufficient evidence has been adduced by the plaintiff to justify the jury in finding a verdict in his favor, the court may order a nonsuit.<sup>1</sup> But where there is any evidence for the plaintiff, it is improper to grant a nonsuit, and to the plaintiff's evidence must be given the most

334; *Foot v. Sabin*, 19 Johns. (N. Y.) 154; s. c., 10 Am. Dec. 208; *Stanley v. Southwood*, 4 Phila. (Pa.) 291.

*Sacia v. De Graaf*, 1 Cow. (N. Y.) 356. "The defendant's discharge, under the insolvent act of April 3rd, 1811, will not prevent the statute of limitations running against an account of assumption, upon a contract made before the act; though the money did not fall due upon the contract till after the discharge . . . . When the plaintiff proved nothing more than an insolvent discharge, in answer to a plea of the statute of limitations, held that the court should have nonsuited him, and they refusing to do so, error lies upon a bill of exceptions taken to their decision."

"Where a plaintiff fails to make out a case, it matters not upon what grounds a nonsuit is ordered." *Pope v. Boyle*, 98 Mo. 527.

"After the supreme court, upon review of both law and facts, has held that there can be no recovery in an action for personal injuries alleged to have been caused by the negligence of defendant because of the gross negligence of the plaintiff, it is not error for the superior court on a second trial to award a nonsuit; the evidence for the plaintiff being precisely the same as that submitted by him on the former trial." *Smith v. Central R. & Banking Co.*, 82 Ga. 801.

"In a clear case the judge should direct a nonsuit, though not asked to do so." *Allgro v. Duncan*, 24 How. Pr. (N. Y.) 210."

1. **Evidence.**—*Bragdon v. Appleton Mut. F. Ins. Co.*, 42 Me. 259, 260.

"The nonsuit, in this action, was directed by the judge after the evidence on both sides had been presented to the jury. To this direction the plaintiffs' exception . . . . When the plaintiffs' evidence, taken in its full strength, has no tendency, in the opinion of the judge, to maintain the issue for him, it is a useless consumption of time to hear evidence in defence, and after that direct a nonsuit. *Bailey v. Kimball*, 26 N. H. 351." *Mason v. Lewis*, 1 G. Greene (Iowa) 494; *Ellis v. Ohio L. Ins. etc.*

*Co.*, 4 Ohio St. 628; *Woodward v. McReynolds*, 1 Chand. (Wis.) 244; 3 Chitty Pr. 910; 1 Archb. Pr. 787; *Bacon Abr.*; 15 Viner Abr. 560; 3 Black. Com. 376; 2 Tidd. Pr. 916, *et seq.*; 1 T. & H. Pr., § 715; *Parker v. Jenkins*, 3 Bush (Ky.) 587.

*Colt v. Sixth Ave. R. Co.*, 49 N. Y. 671. "It is not enough to justify a nonsuit that the court upon a case made might in the exercise of its discretion, grant a new trial. It is only where there is no evidence in law, which, if believed, will sustain a verdict, that the court is called upon to nonsuit; and the evidence may be sufficient in law to sustain a verdict, although so greatly against the apparent weight of evidence as to justify the granting of a new trial." See also *Penley v. Little*, 3 Me. 97; *Clason v. Bird*, 2 Brev. (S. Car.) 370; *Thrings v. Central Park R. Co.*, 7 Robt. (N. Y.) 616; *Ringgold v. Haven*, 1 Cal. 108; *Dalrymple v. Hanson*, 1 Cal. 125; *Mateer v. Brown*, 1 Cal. 221; s. c., 52 Am. Dec. 303; *Ensminger v. McIntire*, 23 Cal. 593; *Tison v. Yawn*, 15 Ga. 491; s. c., 60 Am. Dec. 708; *Long v. Lewis*, 16 Ga. 154; *Renwick v. Lagrange Bank*, 29 Ga. 200; *Woodruff v. Alabama etc. R. Co.*, 75 Ga. 47; *Wiley v. Shoemaker*, 2 G. Greene (Iowa) 205; *Head v. Sleeper*, 20 Me. 314; *Pray v. Garcelon*, 17 Me. 145; *Call v. Bodfish*, 17 Me. 310; *Denny v. Williams*, 5 Allen (Mass.) 1; *Aycriggs v. New York etc. R. Co.*, 30 N. J. L. 460; *Van Wormer v. Mayor of Albany*, 18 Wend. (N. Y.) 169; *Rudd v. Davis*, 7 Hill (N. Y.) 529; *Smith v. Sanger*, 3 Barb. (N. Y.) 360; *Sheldon v. Hudson River R. Co.*, 29 Barb. (N. Y.) 226; *Weaver v. Darby*, 42 Barb. (N. Y.) 411; *Scott v. Simpson*, 1 Sandf. (N. Y.) 601; *Powell v. Jones*, 12 Ohio 35; *Myers v. Girard Ins. Co.*, 26 Pa. St. 192; *Munn v. Pittsburgh*, 40 Pa. St. 364; *Frost v. Marshall*, 2 Brev. (S. Car.) 114; *Turnbull v. Rivers*, 3 McCord (S. Car.) 131; s. c., 15 Am. Dec. 622; *Calvert v. Bowdoin*, 4 Call (Va.) 217; *Hunter v. Warner*, 1 Wis. 141; *Gardinier v. Otis*, 13 Wis. 460; *Blue v. Ford*, 12 Ga. 45; *McClendon v. Bennett*, 18 La. Ann. 49; *Cowand v. Pulley*,

favorable construction.<sup>1</sup> It must be remembered that it is for

11 La. Ann. 1; *Stone v. Knowlton*, 3 Wend. (N. Y.) 374; *Love v. Haddon*, 3 Brev. (S. Car.) 1; *Lalande v. McDonald* (Idaho), 13 Pac. Rep. 347; *Hoeflinger v. Stafford*, 38 Wis. 391; *Beaulieu v. Portland Co.*, 48 Me. 291; *Smith v. Frye*, 14 Me. 457.

Where a plaintiff has pleaded matters sufficient to make out a contract, and others wholly immaterial, he must prove the material parts or he will be nonsuited. *Boyd v. Townsend*, 4 Hill (N. Y.) 183.

In *Continental L. Ins. Co. v. Rogers*, 119 Ill. 49; s. c., 59 Am. Rep. 810, the court held, that where no evidence has been offered to prove any material allegation in the declaration, put in issue by the pleadings, and not admitted for the purposes of the trial, or otherwise waived or dispensed with, the court will, on motion, exclude the evidence offered on other issues in the case, and direct the jury to find for the defendant. See also *Frazer v. Howe*, 106 Ill. 563; *Abend v. Terre Haute etc. R. Co.*, 111 Ill. 202; s. c., 53 Am. Rep. 616.

If the evidence will not warrant a verdict it is error to overrule a motion to instruct the jury as in case of nonsuit. *Hanks v. Roberts*, 3 J. J. Marsh. (Ky.) 298; *Mead v. Crane*, 5 N. J. L. 82; *Stuart v. Simpson*, 1 Wend. (N. Y.) 376; *Sanford v. Emery*, 2 Me. 5.

A nonsuit has also been held proper where the evidence leaves the right of the plaintiff to recover in doubt. *Yerke v. Allen*, 20 La. Ann. 237; *Smith v. Thielen*, 17 La. Ann. 239.

The test of the power of a judge to order a nonsuit, does not lie in the absence of all testimony in opposition to the case in favor of which the ruling is made, but whether there is any testimony from which the jury can reasonably conclude that the facts sought to be proven are established. *Baldwin v. Shannon*, 43 N. J. L. 596.

1. *Spensley v. Lancashire Ins. Co.*, 54 Wis. 433, 439. "From the authorities cited it is manifest that the trial court was not, and this court is not, called upon to weigh and determine the preponderance of evidence. If a plaintiff has no right to have his cause submitted to the jury unless there is a preponderance of the evidence in his favor, then by parity of reasoning the defendant has no right to have it submitted to

the jury unless there is a preponderance of evidence in his favor. If this is so, then, as the evidence must always preponderate in favor of one party or the other, or else be equally balanced, it would follow that the court would always be justified in taking the case from the jury on the motion of one party or the other, except when the evidence was equally balanced. Such, however, is not the rule.

The simple question is, whether the evidence in behalf of the plaintiff, had it remained undisputed, and giving it the most favorable construction it will legitimately bear, including all reasonable inference from it, is sufficient to justify a verdict in favor of the plaintiff. In other words, is there evidence, when so construed, tending to prove that lightning was an agency in the destruction of the plaintiff's building, within the meaning of the policy?" See also *Sabatta v. St. Paul F. etc. Ins. Co.*, 54 Wis. 687; *Fickett v. Swift*, 41 Me. 65; s. c., 66 Am. Dec. 214; *Reed v. Deerfield*, 8 Allen (Mass.) 522; *Shay v. Richmond etc. Turnpike Road Co.*, 1 Bush (Ky.) 103; *Langhaff v. Milwaukee etc. R. Co.*, 19 Wis. 489; *Wheeler v. Meriden Cutlery Co.*, 23 Wis. 584, 585; *Barden v. Smith*, 7 Wis. 439; *Dodge v. McDonnell*, 14 Wis. 553; *Delaplaine v. Turnley*, 44 Wis. 31; *Phillips v. Brigham*, 26 Ga. 617; s. c., 71 Am. Dec. 227; *Dyson v. Beckam*, 35 Ga. 132; *Bryan v. Southwestern R. Co.*, 37 Ga. 26; *Baker v. Lewis*, 33 Pa. St. 301; s. c., 75 Am. Dec. 598; *Jones v. Bland*, 116 Pa. St. 190; *Petrie v. Columbia etc. R. Co.*, 27 S. Car. 63; *Dulaney v. Elford*, 22 S. Car. 304; *State v. Boles*, 18 S. Car. 534.

A nonsuit will not be granted where the evidence offered tends to show facts sufficient to support the action, although remotely. *Foster v. Dixfield*, 18 Me. 380; *Page v. Parker*, 43 N. H. 363; s. c., 80 Am. Dec. 172; *Davis v. Hoxey*, 2 Ill. 406; *Coxe v. Field*, 13 N. J. L. 215; *Bartow v. Brands*, 15 N. J. L. 248; *McKee v. Greene*, 31 Cal. 418; *Johnston v. Hamburger*, 13 Wis. 175; *Imhoff v. Chicago etc. R. Co.*, 22 Wis. 681; *Taylor v. Whiting*, 2 B. Mon. (Ky.) 268; *Adams v. Tiernan*, 5 Dana (Ky.) 394; *Thornton v. Gibson*, 43 Ga. 395; *Wilkinson v. Scott*, 17 Mass. 249.

Or where there is any evidence at all for the plaintiff proper to go to the jury.

the jury to determine the weight of any competent evidence.<sup>1</sup> Where there is a conflict of evidence the court will adopt the view of the contested facts claimed by the plaintiff.<sup>2</sup> And it has been held that to justify a nonsuit, there must have been such a total failure of proof as would have required a verdict for the plaintiff

*Crawford v. Burton*, 6 Iowa 476; *Black v. Lewiston* (Idaho), 13 Pac. Rep. 80; *Thompson v. Dickerson*, 12 Barb. (N. Y.) 108; *Eaton v. Lancaster*, 79 Me. 477; *Works v. Crosswell* (Me. 1887), 10 Atl. Rep. 494; *Bevan v. Ins. Co.*, 9 W. & S. (Pa.) 187.

Nor will a nonsuit be granted on the ground of the insufficiency of the evidence to warrant a verdict for the plaintiff. *Williams v. Norton*, 3 Kan. 295; *Clark v. Hannibal etc. R. Co.*, 36 Mo. 202.

An exception to the admissibility of evidence on one point will not ordinarily raise the question of nonsuit for want of evidence on another. *Wiley v. Portsmouth* (N. H.), 9 Atl. Rep. 220.

A nonsuit ought not to be granted where the effect will be to take from the jury questions of fact which are not free from every reasonable doubt. *Gravis v. Santway* (Supreme Ct.), 6 N. Y. Supp. 892.

The refusal to order a nonsuit on account of the insufficiency of the plaintiff's evidence affords no ground of exception, it being a matter merely of discretion. *French v. Stanley*, 21 Me. 512; *Wentworth v. Leonard*, 4 Cush. (Mass.) 414.

**1. Jury Must Pass Upon the Evidence.**—*Wilkinson v. Scott*, 17 Mass. 249, 256, 257. "The plaintiff was nonsuited. . . . If we were called upon to say whether the evidence, as reported by the judge, was sufficient to enable the plaintiff to recover, we should probably not hesitate to decide in the negative. But, as the evidence was legally competent, it was for the jury to pass upon it. The nonsuit therefore must be set aside and a new trial granted."

Where there is any evidence upon the question at issue before the court and jury, upon which the jury may found a verdict, the question should be submitted to the jury, and it is error in the court to grant a nonsuit. *Thornton v. Gibson*, 43 Ga. 395; *Eaton v. Lancaster*, 79 Me. 477; *Black v. Lewiston* (Idaho), 13 Pac. Rep. 80; *Green v. Collins*, 36 Ga. 581; *Woodrow v. Cooper*, 3 Iowa 214; *Coleman v. Simpson*, 2 Dana (Ky.) 166; *Hornsby v.*

*South Carolina R. Co.*, 26 S. Car. 187; *Lehman v. Kellerman*, 65 Pa. St. 489, *Oothaut v. Leahy*, 23 Wis. 114.

"The prerogative of the court to withdraw from the jury the consideration of facts, is not exercised except in cases where the evidence is so indefinite and uncertain that nothing but wild conjecture . . . could induce the jury to find the verdict that is sought; or where the evidence is all on one side and not controverted." *Ferguson v. Tucker*, 2 Har. & G. (Md.) 182; *Babb v. Clemson*, 12 S. & R. (Pa.) 328; *Mercer v. Walmsley*, 5 Har. & J. (Md.) 27; s. c., 9 Am. Dec. 486; *Perley v. Little*, 3 Me. 97; *Fleming v. Shepherd* (Ga.), 9 S. E. Rep. 789; *Mercier v. Mercier*, 43 Ga. 323; *Byrd v. Blessing*, 11 Ohio St. 362.

**2. Where Evidence Is Conflicting.**—*Shay v. Richmond etc. Turnpike Road Co.*, 1 Bush (Ky.) 108, 109. "On motion of the defendants, the court instructed the jury, peremptorily, to find for the defendants; and, in accordance with this instruction, a verdict and judgment were rendered, from which Shay had appealed to this court.

To authorize a nonsuit for insufficient evidence, it must appear that, admitting the testimony to be true, and giving the plaintiff the benefit of every inference that is fairly deducible from it, the plaintiff has still failed to support his claim. This, in our opinion, is not such a case; and the jury should have been permitted to determine for themselves what weight was due to the evidence." See also *Sheridan v. Brooklyn etc. R. Co.*, 36 N. Y. 39; s. c., 93 Am. Dec. 490; *Wheaton v. Newcomb*, 48 N. Y. Super. Ct. 215; *Myers v. Dixon*, 45 How. Pr. (N. Y.) 48.

"Where an issue of fact is to be determined by a jury, and the evidence is conflicting, or conduces to make out plaintiff's cause of action, it is improper to direct a nonsuit. *Lingenfelten v. Louisville etc. R. Co.* (Ky.), 4 S. W. Rep. 185. See also *Bentley v. Owego Mut. Ben. Assoc.* (Supreme Ct.), 5 N. Y. Supp. 223.

Where the plaintiff's evidence makes out a *prima facie* case, and the de-



to be set aside for want of evidence to support it.<sup>1</sup> Where a plaintiff, on the evidence, should be allowed to recover nominal damages, it is proper to deny a nonsuit. The court should not consider the evidence of the defendant.<sup>2</sup> And where the defendant offers evidence in his own behalf, which supplies the defect existing in the plaintiff's proofs, he waives the error in overruling his motion for a nonsuit.<sup>3</sup>

#### XVII. INTRODUCTION OF NEW EVIDENCE AFTER MOTION FOR NONSUIT.

—Whether a plaintiff shall be allowed to introduce new testimony after he says he has closed his opening evidence, and the defendant has moved for a nonsuit, generally has been held to be a matter within the discretion of the judge conducting the trial.<sup>4</sup>

defendant's evidence simply raises a conflict, his motions to dismiss the complaint at the close of plaintiff's case, and at the close of the testimony on both sides, are properly denied. *Weckmann v. Am Ende*, 57 N. Y. Super. Ct. 595.

1. *Grant v. Baker*, 12 Oregon 329, 331. "The first ground of the motion for the nonsuit was wholly untenable. The question whether the evidence was sufficient to entitle the appellant to a recovery was for the jury, and not the court. To authorize the court to nonsuit a plaintiff, the latter must fail to prove a cause sufficient to be submitted to the jury. It must be such a case that, if the jury were to find a verdict for the plaintiff, the court could be required to set it aside for want of evidence to support it (Civ. Code, §§ 243, 244). It would have to be a case where there was a total failure of proof of some material allegation of the complaint, which appears from the bill of exceptions, not to have been the fact in this case." See also *Wombaugh v. Cooper*, 4 Thomp. & C. (N. Y.) 586; *People v. Metropolitan Telephone & C. Co.*, 64 How. Pr. (N. Y.) 120; *Vanderford v. Foster*, 65 Cal. 49; *Colt v. Sixth Ave. R. Co.*, 49 N. Y. 671.

2. *Evidence Produced by Defendant.*—*Rose v. Learned*, 14 Mass. 154, was a case of assumpsit on a promissory note. At the trial on the general issue after the plaintiff had produced the note declared on, the execution of which on the part of the defendants was not denied, the defendants read in evidence a deposition which went to show that the note was originally given on a condition, which had wholly failed, and that of course nothing was due upon the note." The court said (p. 155): "The nonsuit must be set aside, and a new

trial granted; because the nonsuit was ordered, not for the defect of evidence on the part of the plaintiff; but on evidence produced by the defendant, which might not have been believed by the jury." See also *Hancock v. Hubbell*, 71 Cal. 537; *Pillsbury v. Pillsbury*, 20 N. H. 93; *Chappell v. Bates*, 56 Conn. 568; *People v. Metropolitan Telephone etc. Co.*, 64 How. Pr. (N. Y.) 120; s. c., 11 Abb. N. Cas. (N. Y.) 304; *Ramsey v. O'Leary*, 61 Me. 366.

Where the evidence shows that plaintiff is entitled to nominal damages, it is error to take the case from the jury, at least if the recovery of such damages will also entitle him to costs. *Potter v. Mellen*, 36 Minn. 122.

"On a motion for a nonsuit, the court takes into consideration all the evidence of the plaintiff, whether given on cross-examination or on the examination-in-chief." *Eastman v. Howard*, 30 Me. 58; s. c., 50 Am. Dec. 611.

But see *contra*, *Rudd v. Davis*, 3 Hill (N. Y.) 287, where a nonsuit was granted on evidence furnished by defendant alone.

3. *Waiver of Error.*—*Denver etc. R. Co. v. Henderson*, 10 Colo. 1. See also *Dean v. Corbett*, 51 N. Y. Super. Ct. 103; *Barton v. Kane*, 17 Wis. 37; s. c., 84 Am. Dec. 728; *Perkins v. Thornburgh*, 10 Cal. 189; *Oakes v. Thornton*, 28 N. H. 44; *Jackson v. Leggett*, 7 Wend. (N. Y.) 377.

4. *New Evidence.*—*Larman v. Huey*, 13 B. Mon. (Ky.) 436; *Robinson v. Abell*, 17 Ohio 36.

In *May v. Hanson*, 5 Cal. 360, the court held in an action against a ferryman, that it was no error to allow the plaintiff to introduce the ferry licence after motion of nonsuit, as this was a matter within the discretion of the court.

"It is almost a matter of course to

**XVIII. WHERE FACTS PROVED ARE DIFFERENT FROM FACTS ALLEGED.**—If a plaintiff proves a contract substantially different from the one alleged in his complaint the defendant is entitled to a nonsuit;<sup>1</sup> but a trifling variance will not suffice.<sup>2</sup>

**XIX. MISCELLANEOUS CASES.**—Several other instances in which nonsuits have been granted and refused will be found in the notes.<sup>3</sup>

let in new evidence for the plaintiff, on a motion for a nonsuit." *McColgan v. McKay*, 25 Ga. 631.

It is no abuse of discretion for the court to re-open a case after nonsuit and permit the plaintiff to supply proof omitted by oversight. *Remlinger v. Young*, 22 Wls. 426; *Browning v. Hoff*, 2 Bailey (S. Car.) 174; *Poole v. Mitchell*, 1 Hill (S. Car.) 304.

**1. Facts Proved Different from Facts Alleged.**—*Johnson v. Moss*, 45 Cal. 515-517.

**2.** *Walker v. Briggs*, 8 Rich. (S. Car.) L. 440. "In a case for malicious prosecution the declaration described the finding of the grand jury to be 'No bill. S. Cannon Foreman.' The finding proved was 'No bill. Richard S. Cannon, Foreman.' Nonsuit for the variance refused." The Court 441. "The finding was sufficiently described by the words 'No bill,' and, indeed, that was the whole finding of the grand jury. It cannot be pretended that the mistake in the name of the foreman showed that the plaintiff had no cause of action, for, with or without it, the declaration sets out a good cause of action. I therefore conclude that the name of the foreman was surplusage; the motion for a nonsuit must necessarily fail." So "A variance between the note set out in justice's return and the one offered in evidence which is corrected by an amended return, is no ground for a nonsuit." *Higley v. Bryan*, 3 G. Greene (Iowa) 284.

**3. Miscellaneous Nonsuits—Other Instances in Which Nonsuits Have Been Granted.**—Where there were too many or too few plaintiffs. *Wells v. Gaty*, 8 Mo. 682.

Where there was a joinder of a plaintiff having no interest in the cause of action. *Myers v. Myers*, 1 Bailey (S. Car.) 306.

Where a plaintiff, after severance, in an action against two defendants, carries on the action against both defendants. Anonymous, 4 Hill (N. Y.) 19.

Where a consideration in addition to the true one, moving to the promisee, is

alleged, but not supported by proof. *Stone v. Knowlton*, 3 Wend. (N. Y.) 374.

Where plaintiff took no steps after the return of the writ for eighteen months. *Boney v. Moses*, 1 Nott & M. (S. Car.) 38.

Where a demurrer to a plaintiff's amended declaration was sustained. *Exposition Cotton Mills v. Western etc. R. Co. (Ga.)*, 10 S. E. Rep. 113.

Where a cause was set down for a later day in the term to accommodate the plaintiff and was afterwards not reached. *Root's Case*, 4 Hill (N. Y.) 38. See also *Reynolds v. Fountain*, 4 Hill (N. Y.) 52.

It has been held that a clerical error in evidence may entitle a party to a nonsuit. *Peck v. McKeller*, 33 Tex. 234.

One suing as commissioner of highways is properly nonsuited for a failure to allege or prove himself such commissioner. *Albro v. Rood*, 24 Hun (N. Y.) 72. See also *Boots v. Washburn*, 79 N. Y. 207.

A nonsuit was properly ordered where the only evidence offered by the defendant consisted of city records and deeds, the genuineness of which were admitted, and the force and effect of which alone were disputed. *White v. Bradley*, 66 Me. 254.

A nonsuit was awarded, where, by a special written contract put in evidence by the plaintiff as part of the main case, it appeared that the action should have been brought by another party thereon. *Southwestern R. Co. v. Millian*, 62 Ga. 607.

**Some Instances in Which Nonsuits Were Refused.**—*Uncertainty in declaration* was held not ground for a nonsuit. *Jossey v. Stapleton*, 57 Ga. 144.

Failure to separately designate two distinct causes of action stated in a complaint was held not ground for nonsuit, as any doubt might have been remedied by a motion to make more definite. *Commercial Bank v. Pfeiffer*, 22 Hun (N. Y.) 327.

**XX. SETTING ASIDE A NONSUIT.**—A nonsuit will be set aside, in the discretion of the court, where justice requires it,<sup>1</sup> and a motion

*A variance between allegation and proofs* is not ground for a nonsuit under the *South Carolina Code*. The only remedy is an amendment by affidavit. *Ahrens v. State Bank*, 3 S. Car. 401.

The refusal of plaintiff to answer interrogations filed by defendant in an action on a note, for the purpose of establishing the fact that the ownership of the note is in a third person, furnishes no sufficient ground for a nonsuit. *Knight v. Booth*, 35 Tex. 10.

*Error Without Injury.*—Where a cause was continued "until the next term, with the express understanding that it is to be tried then or dismissed from the docket," held, that a nonsuit entered at the second ensuing term was error without injury. *Stewart v. Ross*, 58 Ala. 264.

*Where plaintiff was adjudged a bankrupt after suit was begun*, it was held, not to be ground for nonsuit. But the court may direct the jury, if they find for plaintiff, to find that he recover for the use of his assignee in bankruptcy. *Woodall v. Holliday*, 44 Ga. 18. See also *Austin v. Markham*, 44 Ga. 161.

Whenever a defendant is wrongfully dispossessed of his land by legal process, he is entitled to a writ of restitution, and an inquisition of damages in that action, of which the plaintiff is not permitted to deprive him by taking a nonsuit. *Lane v. Morton*, 81 N. Car. 38.

**1. Setting Aside.**—*Williams v. Sinclair*, 3 McLean (U. S.) 289; *Boyce v. Mooney*, 40 Mo. 104; *George v. Taylor*, 55 Tex. 97; *Peck v. McKellar*, 33 Tex. 234; *Walker v. Boaz*, 2 Rob. (Va.) 485; *Wright v. Thomas*, 6 Tex. 420; *Robinson v. Abell*, 17 Ohio 36; *Martin v. Van Bergen*, 1 Greene (Iowa) 314. A judge may set aside an order of nonsuit made by himself at the same term. *Chichester v. Hastie*, 9 S. Car. 330.

**Surprise.**—A party who is surprised by the decision of the court in ruling out his testimony, may take a nonsuit, and afterwards move to set it aside and reinstate the cause on the docket, and an appeal will lie from the judgment of the court overruling such motion. *Huston v. Berry*, 3 Tex. 235. See also *Bank of Illinois v. Hicks*, 4 J. J. Marsh. (Ky.) 128.

<sup>1</sup>Unavoidable accidents to the plain-

tiff and his witnesses are a reasonable ground for setting aside a nonsuit, ordered because the plaintiff was not ready for trial when the docket was called." *Douglass v. Frizzle*, 2 Bailey (S. Car.) 417.

Where a note is filed without a *warr.*, and the defendant pleads, puts the case on the trial list, and obtains a nonsuit, the nonsuit will be set aside on motion. *Taylor v. Pearl*, 2 Miles (Pa.) 291.

If one insists, on account of the ruling of the judge, on being nonsuited after giving all his evidence, he will not be allowed to make a case on which to found a motion for setting aside the nonsuit. *Forbes v. Luyster*, 2 Hall (N. Y.) 403.

**Trial With or Without a Jury.**—A motion to set aside a nonsuit cannot be made, if the case nowhere shows whether the trial was with or without a jury; in such case the rulings at the circuit can only be reversed on appeal. *Cronk v. Canfield*, 31 Barb. (N. Y.) 171.

A nonsuit improperly rendered in the court below will be set aside upon exception, although no request to have the questions submitted to the jury whether such were the facts has been made. *Sheldon v. Atlantic etc. Ins. Co.*, 26 N. Y. 460; s. c., 84 Am. Dec. 23.

**After Evidence Given on Both Sides.**—A nonsuit granted after evidence given on both sides will not be set aside for that cause alone. *Fort v. Collins*, 21 Wend. (N. Y.) 109.

**Death of Plaintiff.**—The court will not hear a motion to set aside a nonsuit at the trial, the plaintiff having since died, and the effect obviously being merely to unsettle the question of costs. *Seymour v. Deyo*, 5 Cow. (N. Y.) 289.

The court will not set aside a nonsuit given on a contract where the damages are merely nominal, in order to allow the plaintiff to recover such nominal damages. *Brantingham v. Fay*, 1 Johns. Cas. (N. Y.) 255.

A nonsuit improvidently entered may be set aside, but the court cannot order on the trial at the same term, in the absence of the defendant. *Fifield v. Leeds*, 18 N. J. L. 166.

**Mistake of Counsel.**—Where the plaintiff was nonsuited through a mistaken construction by his counsel of a certain statute and judicial decision thereupon,

to set aside a nonsuit cannot be assigned for error.<sup>1</sup> Where a nonsuit is set aside, the presumption is that it was set aside for sufficient cause, unless the contrary appears from the record.<sup>2</sup> And a nonsuit will not be set aside, though improperly directed, unless a verdict in favor of the plaintiff will lay the foundation for a legal judgment.<sup>3</sup>

**XXI. REINSTATEMENT OF CAUSE.**—Where, after a judgment of nonsuit, a motion is made on specific grounds to reinstate the case, and none of the grounds are sufficient, a judgment denying the motion is proper and will not be reversed, although, it seems, had another ground been presented, the motion to reinstate might have been well founded.<sup>4</sup> Reinstating a case is a matter in the discretion of the court.<sup>5</sup> And where a party voluntarily suffers a nonsuit, the cause cannot be reinstated.

**XXII. INVOLUNTARY NONSUIT NO BAR TO ANOTHER SUIT.**—An involuntary nonsuit is not a bar to a new action, just as we have seen that a voluntary nonsuit is not a bar. It is not a judgment on the

the nonsuit was set aside upon payment of costs. *Boyce v. Mooney*, 40 Mo. 104.

**When Voluntarily Taken.**—The supreme court will not set aside a nonsuit voluntarily taken by a plaintiff. *Dumey v. Shoemaker*, 20 Mo. 323; s. c., 24 Mo. 170; *Shulter v. Bockwinkle*, 19 Mo. 647.

A nonsuit will not be set aside and a new trial granted, where it appears that a verdict in favor of the plaintiff would be against the evidence produced at the trial, if it does not appear that other evidence exists. *Hoyt v. Gilman*, 8 Mass. 336; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Monfort v. Hogland*, 2 N. J. L. 144.

1. *Rankin v. Curtenius*, 12 Ill. 334; *Leighton v. Manson*, 14 Me. 208; *Wallace v. Cooper*, 2 Watts (Pa.) 108; *Squires v. Burgess*, 31 Vt. 466.

Where a party plaintiff in the circuit court in *Mississippi*, upon the rejection by the court of his testimony, suffers a nonsuit, with leave to set it aside during the term, upon the refusal of the court subsequently to set the nonsuit aside, he cannot prosecute a writ of error thereto. *Thornton v. Demoss*, 13 Miss. 609; *Earwig v. Glidwell*, 4 Miss. 332; *Copeland v. Means*, 10 Miss. 519.

2. *Heydon v. Lockhart*, 1 Bibb (Ky.) 308.

Although, as a general rule, when a plea in reconvention has been filed, the plaintiff is not entitled to a voluntary nonsuit, yet a motion to set it aside will

be refused where no reason is given for not objecting to it at the time, and where no merit is shown in the plea. *Brown v. Pfouts*, 53 Tex. 221.

"A nonsuit cannot be set aside upon suggestion; an affidavit is necessary." *Dearing v. Taylor*, 1 Overt. (Tenn.) 49.

"It does not require so strong ground to set aside a nonsuit as to grant a new trial." *McAlister v. Williams*, 1 Overt. (Tenn.) 119.

3. *Jones v. Smith*, 14 Ohio, 606. See also *Tompkins v. Phipps*, 68 Ga. 155.

Where a nonsuit is ordered for want of evidence, and the plaintiff afterwards offers to introduce the necessary evidence before judgment is entered, and moves to have the nonsuit set aside, it is within the discretion of the court to grant or refuse the motion. *Robinson v. Abell*, 17 Ohio 36.

4. **Reinstatement.**—*McBride v. Latham*, 79 Ga. 661; *Shipley v. Eiswald*, 54 Ga. 520.

**Rules Governing a Case Reinstated.**—A case reinstated and standing for trial, is subject to the same rules as any other, and the failure to have the party in court when called having arisen out of a misapprehension as to where he was to be, a motion to open a nonsuit should be allowed. *Lindsay v. Wayne* Circuit Judge, 63 Mich. 735.

5. *George v. Taylor*, 55 Tex. 97; *McDermaid v. Earnest*, 4 Strobb. (S. Car.) 192.

6. *Murray v. McDougall*, 3 N. J. L. 956.

merits.<sup>1</sup> A judgment on a nonsuit before verdict is no bar to another action for the same cause.<sup>2</sup>

**XXIII. NONSUIT ON APPEAL.**—Wherever a nonsuit has been granted against the will of the plaintiff, such ruling of the court is always ground for exception, and an appeal can be taken.<sup>3</sup> But it has been held that, where a defendant makes a motion for a nonsuit and the motion is refused, he will not be allowed to take an appeal. Such is clearly the law in *Pennsylvania*, where, since a refusal to enter a compulsory nonsuit is not assignable for error, the remedy of the defendant is by prayer to the court for instruction to the jury upon the insufficiency of the plaintiff's evidence; he may always prepare the particular point on which instruction is desired, and the court is bound to give it.<sup>4</sup> It

1. **No Bar to Another Suit.**—*Morgan v. Bliss*, 2 Mass. 111, 113.

A nonsuit, especially when enforced, is no bar to another action. *National Water Works Co. v. Kansas City School Dist.*, 23 Mo. App. 227.

2. *Gummer v. Omro Trustees*, 50 Wis. 247; *Hammergen v. Schuermier*, 1 McCrary (U. S.) 436, and cases cited *supra*.

3. **Appeal.**—*Van Wormer v. Mayor etc. of Albany*, 18 Wend. (N. Y.) 169, 172.

"It is settled in this State, that if the plaintiff fails to make out his case so as to authorize the jury to find a verdict in his favor, the defendant may move for a nonsuit, which the judge is bound to grant, even without the plaintiff's consent. In such a case, therefore, if the plaintiff thinks the decision of the judge in granting the nonsuit erroneous, he has a right to tender a bill of exceptions, for the purpose of raising the question of law upon the evidence adduced, and also to show that the nonsuit was compulsory and not voluntary on his part." See also *Cravens v. Dewey*, 13 Cal. 40; *Spruill v. Trader*, 5 Jones (N. Car.) 39.

4. *Girard v. Gettig*, 2 Binn. (Pa.) 234. "As it seems to be growing into a custom to take an exception, because the court below would not order a nonsuit, it may save future trouble of that kind to declare our opinion, that such exceptions cannot be sustained, because it is out of the power of the court to order a nonsuit against the consent of the plaintiff, who may refuse to enter it, and insist on taking the verdict. This is no injury to the party who wishes the court's opinion, because he may always prepare the particular point on which the opinion is desired,

and the court is bound to give it." See also *Borough of Easton v. Neff*, 102 Pa. St. 474; s. c., 48 Am. Rep. 213; *Lehman v. Kellerman*, 65 Pa. St. 489; *Ballentine v. White*, 77 Pa. St. 20; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; s. c., 93 Am. Dec. 251; *Mobley v. Bruner*, 59 Pa. St. 481; s. c., 98 Am. Dec. 360; *Pownall v. Steele*, 52 Pa. St. 446; *Bavinton v. Pittsburgh etc. R. Co.*, 34 Pa. St. 358; *Burkholder v. Stahl*, 58 Pa. St. 371; *Borough of Shenandoah v. Erdman* (Pa.), 12 Atl. Rep. 814; *Millicreek Township v. Perry* (Pa.), 12 Atl. Rep. 149; *Withowski v. Hern*, 82 Cal. 604; *Stephenson v. Piscataqua etc. Ins. Co.*, 54 Me. 55, 70; *Smith v. Smith*, 8 Ired. (N. Car.) 31; *Hatchell v. Odone*, 2 Dev. & B. (N. Car.) 304; *Caffey v. Greenfield*, 62 Cal. 602.

*French v. Stanley*, 21 Me. 512, 517. "There is still another ground of exception relied upon. It is that the judge should have nonsuited the plaintiff, because it was not proved in the first instance, directly, that the execution reached Davis within thirty days after the rendition of the judgment against Barker . . . From these facts the plaintiff insisted that the jury would be authorized to presume that it must have reached him in due season. The judge declined to order the plaintiff to be called. This afforded no ground for an exception to be taken. It was purely a matter of discretion with the judge, whether to take or decline to take that course. In *Massachusetts* and in *England*, it has been held that a nonsuit cannot be ordered in the course of a trial to the jury, but upon the express or tacit consent of the plaintiff." See also *Wentworth v. Leonard*, 4 Cush. (Mass.) 414.

seems, however, that the rule set out above has not been followed in *New York*.<sup>1</sup>

**XXIV. Costs.**—A judgment of nonsuit should always award costs.<sup>2</sup> When the plaintiff in a pending action has previously brought suit in the same forum for the same cause of action, and has been nonsuited on the merits, the court will stay proceedings until he has satisfied the judgment for costs recovered against him,<sup>3</sup> but if the nonpayment of costs is not pleaded in abatement of the second action, it cannot be made the subject of exceptions.<sup>4</sup> A

1. *Rochat v. North Hudson Co. R. Co.* (N. J.), 9 Atl. Rep. 688; 10 Atl. Rep. 710. In this case the court held that, if the trial court erroneously refuses to nonsuit the plaintiff for want of evidence of the defendant's responsibility for the injury complained of, and exception is thereupon sealed, and the defect in proof be not subsequently remedied, error may be assigned upon the exception, and the judgment may be reversed. See also *dictum*, by *BOYCE, J.*, in *French v. Smith*, 4 Vt. 363; s. c., 24 Am. Dec. 616.

In *French v. Smith*, 4 Vt. 363; s. c., 24 Am. Dec. 616, *BOYCE, J.*, observes: "The alleged right of the court to order a nonsuit on trial, is to be distinguished from the practice of entering up judgment, as in case of a nonsuit, which in *England* had its origin in the statute of 14 Geo. II, ch. 17, and in this State is commonly founded on the general rules or special orders of the court, as in case of ordering bail, and the like, because, in all cases of the latter description, there is no doubt but the court is to act without reference to the will of the party. But a nonsuit, in its legal and appropriate sense, imports a voluntary act of the plaintiff in withdrawing his appearance to the suit; and notwithstanding the very frequent mention in the English books of nonsuits said to be directed on trial, we are not satisfied that the courts of that country have ever asserted the right of enforcing a nonsuit while the plaintiff insisted on proceeding to a verdict. Much less do we find what appears to have been often decided in *New York*, that at common law the refusal to order a nonsuit was ever considered such a denial of right to the defendant, that a writ of error would lie to correct it. If, however, the subject were to be regarded in the light of mere practice, and as not concluded by authority, still the course contended for could not be generally beneficial, except

under a system of jurisprudence which regularly admits but one trial in a cause. In this State, where the right to review is given by statute, a nonsuit should not be ordered at the first trial, as the plaintiff may be able to supply the defects in his first proofs; nor at the last, because public policy will then require that the controversy should be ended."

2. A judgment of nonsuit, without awarding costs, is incomplete, and can neither be affirmed nor reversed. *Monnell v. Weller*, 2 Johns. (N. Y.) 8.

3. *Robinson v. Merchants' etc. Transp. Co.* (R. I.), 14 Atl. Rep. 860. See also *Jackson v. Edwards*, 1 Cow. (N. Y.) 138; *Jackson v. Carpenter*, 3 Cow. (N. Y.) 22; *Perkins v. Hinman*, 19 Johns. (N. Y.) 237; *Gummer v. Omro Trustees*, 50 Wis. 247.

In *Smith v. Allen*, 79 Me. 536, the court held that the statutory requirement, Rev. Stat. Maine, ch. 82, § 124, that a plaintiff who becomes nonsuit shall pay the costs of the first action, before he shall be allowed to proceed in a subsequent action, brought for the same cause, applies to a real action twice instituted in precisely the same form, although the plaintiff, after the nonsuit, obtains a mortgage title to the premises which he had not before, and offers, when the defendant moves the dismissal of the second action, to waive the grounds of recovery which he relied on to sustain the first action. See also *Morse v. Mayberry*, 48 Me. 161.

**Where Plaintiff Offers to Pay Costs.**—A plaintiff should not be nonsuited for the non-payment of the costs of two former suits for the same cause of action, on motion of the defendant, when the plaintiff offers to pay them, and asks their amount, and no bill of costs is produced and no demand for any certain amount is made. *Janeway v. Skerritt*, 30 N. J. L. 97.

4. Plaintiff's failure to pay costs for

## NON SUM INFORMATUS—NONUSER—NORTH.

plaintiff may become nonsuit without costs upon the bankruptcy of the defendant.<sup>1</sup>

**NON SUM INFORMATUS.**—A judgment *non sum informatus* is rendered against a defendant when he enters upon the record that he is not informed of any defence to the action.<sup>2</sup>

**NONUSER.**—Omission to assert some privilege; exercise some franchise; exert some right.<sup>3</sup>

**NORTH; NORTHERN; NORTHWARD.**—See note 4.

nonsuit before bringing a second, action, if not pleaded in abatement, the second action cannot be made the subject of exceptions. *Stirk v. Central R. & Banking Co.*, 79 Ga. 495.

1. *Farr v. Cate*, 58 N. H. 367.

**Authorities.**—Thompson on Trials.

2. *Freeman on Judgments*, § 7.

3. *Abbott's Law Dict.*

As an enjoyment for twenty years is necessary to found a presumption of a grant, the general rule is that there must be a similar nonuser to raise the presumption of a release. The mere nonuser of an easement for twenty years will afford a presumption of a release or extinguishment, but not a very strong one in a case unaided by circumstances. 3 *Kent's Com.* 448; *Wright v. Freeman*, 5 Har. & J. (Md.) 477.

A nonuser or cessation for twenty years unexplained, is regarded as a presumption that the right has been surrendered or that it never existed; but a mere nonuser for any time less than twenty years does not amount to an abandonment of the right. *Jamaica Pond Aqueduct Co. v. Chandler*, 121 Mass. 3; *Williams v. Nelson*, 23 Pick. (Mass.) 141; *Carlisle v. Cooper*, 19 N. J. Eq. 256. See also **EASEMENT; PRESCRIPTION.**

4. **Northerly** is not, in a description in a deed, synonymous with north. *Garvin v. Dean*, 115 Mass. 577; *Howard v. College of the Holy Cross*, 116 Mass. 117.

"The words 'northerly and easterly' may be more comprehensive in their meaning than north and east, depending very largely for that meaning upon the facts to which they are applied. Where there is no object to direct the course they must, at least in the description in a deed, be taken to indicate a direction due north or east; but when there are monuments upon the face of the earth to which they are applicable, they may have their legiti-

mate meaning and full force and yet the course incline either way to any distance, so long as it tends toward the north or east, and in connection with these facts retain a definite and unmistakable meaning. The course will still retain its characteristic as northerly, or easterly, or both." *Foster v. Foss*, 77 Me. 280; *Irwin v. Towne*, 42 Cal. 329.

**Northern Passage.**—"What 'the northern passage,' as used in this contract, means, therefore, is either a question of fact or a question of construction applicable to understood facts. If it is, as the court below says it appears to be, a term of art, which, taken by itself, without the aid of the testimony, is unintelligible, then its meaning in 'the art'—the trade—is one of the material facts in the case on which the rights of the parties depend, and it should have been found and put into the findings of fact which the circuit court was required by law to make . . . If, in point of fact, there is no passage to which the name or description of 'the northern' has been given in the trade, then the question becomes one of construction, as applied to the known facts of the business. The enquiry is not as to which passage would be the quickest, or even the best, or which another contract would require of another vessel, but which is 'the northern passage' within the meaning of this contract." *Waite, C. J.*, in the *John H. Pearson*, 121 U. S. 469.

As to what constitutes a "northern passage" from Gibraltar to Boston, *Colt, J.*, uses the following language: "In the Mediterranean fruit trade the term 'northern passage' had a distinct meaning, and that was, a course from Gibraltar north of the Azores, if possible; if not, just south of the islands; thence to the southern point or tail of the Great Banks, and then direct to Boston." *The John H. Pearson*, 33 Fed. Rep. 846.

**NOSCITUR A SOCIIS**—(See also INTERPRETATION, 11 Am. & Eng. Encyc. of Law 507).—It is known from its associates or associations. A word or a paragraph is to be read in the light of its context or surroundings.<sup>1</sup>

The rule is applied in the construction of written instruments and statutes, in ascertaining the meaning of a word or clause by reference to the context.

**NOT**.—See note 2.

**Northerly**, in a deed of land, where there is no object mentioned to incline the course towards the east or west, is construed to mean due north. *Brandt v. Ogden, 1 Johns. (N. Y.) 156.*

**Northward**.—In running out patents a line northward, etc., means a line due north, etc. *Jackson v. Reeves, 3 N. Y. 293.*

**Northwardly**, westwardly, etc. (in a grant), mean due north, due west, etc. *Seaman v. Hogeboom, 21 Barb. (N. Y.) 298, 404.* The term "northwardly" was held not synonymous with north in *Craig v. Hawkins, 1 Bibb (Ky.) 53.*

1. *Anderson's Law Dict.* For examples of the application of this rule, see *Broom Max. 588.*

2. "**Not able to work**" is not equivalent to the word "chargeable," in the sense of the Poor Laws. "The terms are not convertible, for a person might be able to work, and yet not able to earn enough for his maintenance." *Re Morton, 5 Q. B. 591; s. c., 48 C. C. L. 590.*

**"Not Accountable for Depreciation."**—A testator gave to his widow his personal estate, including his farming implements and stock, live and dead, for her life, and declared that she should not be accountable for any depreciation or diminution of stock or implements, and after her death he gave the residue to his children. *Held*, that the widow took an absolute interest in the stock and implements. *Breton v. Mocket, 9 Ch. D. 95; s. c., 25 Eng. Rep. 791.*

**Not as Common Carriers.**—"We hold not as common carriers, but as warehousemen, at owner's sole risk, and subject to usual warehouse charges." This notice from a railroad to a consignee, after the arrival of goods to their destination, was held not to free the road from liability for loss through their negligence. *Mitchell v. Lancashire R., L. R., 10 Q. B. 256.*

**Not Before Devised.**—"A devise of lands 'not before devised,' or 'not before disposed of,' carries the reversion in

lands which the testator had previously devised for life" (1 *Jarm. 655*).

**"Not depart the court without leave"** means not depart from the term of the court at which he was recognized to appear. *State v. Baker, 50 Me. 56.*

**Not Exactly.**—An insolvent was to have the benefit of the Act, 1 & 2 V. ch. 110, though (§ 93) a debt was specified in his schedule "not exactly," if error was without any culpable negligence, fraud, or evil intention. *Hoyles v. Blore, 14 M. & W. 387.*

**Not Exceeding.**—"Not exceeding eighty acres" in a homestead law, see *EXCEED, 7 Am. & Eng. Encyc. of Law 113.*

By a Massachusetts statute, a town or city is authorized to "appropriate money for suitable buildings or rooms," and for "the foundation of a library a sum not exceeding one dollar for each of its ratable polls." The words "not exceeding" in that sentence do not necessarily qualify and limit the whole clause. On the contrary, it was held that they restrict the latter provision only. *Dearborn v. Brookline, 97 Mass. 469.*

**"Not Known or Used Before the Application" in Patent Laws.**—"What, then, is the true meaning of the words 'not known or used before the application?' They cannot mean that the thing invented was not known or used by the inventor himself, for that would be to prohibit him from the only means of obtaining a patent . . . The words, then, to have any rational interpretation must mean not known or used by others before the application . . . We think, then, the true meaning must be not known or used by the public before the application." *STORY, J., in Pennock v. Dialogue, 2 Pet. (U. S.) 18.* See also *PATENT LAWS.*

**Not Less.**—Where time is to be computed as "not less" than a given number of days, that means clear days. *Chambers v. Smith, 12 M. & W. 2;*



**NOTARY PUBLIC**—(See also **ACKNOWLEDGMENTS**; **AFFIDAVIT**; **BILLS AND NOTES**; **DEED OF CONVEYANCE**; **DEMAND**; **DEPOSITION**; **PROTEST**).

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*Re* Railway Sleepers Co., 29 Ch. D. 204; *Re* Miller's Dale Co., 31 Ch. D. 211.

The phrase "clear days" means that the time is to be reckoned exclusive of both the first and last days." *Liffin v. Pitcher*, 1 Dowl., N. S. 767. See R. S. C., Ord. 64, R. 12.

"The words 'not less than fifty dollars,' and 'not less than one hundred,' may well be construed as 'fifty dollars, and no less,' and 'one hundred dollars and no less;' and it appears to me that it ought to be so construed." *ARMOUR, C. J.*, construing the Canada Temperance act in *Reg. v. Smith*, 16 Ont. 454.

"Not More Than" in Penal Statute.—The Rev. Stats. of Massachusetts enumerated all cases of malicious mischief, and fixed the penalty in each case; and further provided that, for all offences of a like kind, not particularly described, the punishment should be imprisonment in the state prison for a term not exceeding five years, etc. A subsequent statute provided that the punishment in the cases of malicious mischief, not enumerated in the Revised Statutes, should be imprisonment, etc., "not more than thirty days." *Held*, these negative words, in a subsequent statute, do limit and restrain the operation of the Revised Statutes as to all cases within such statute, as effectually as any words of repeal could do. *Britton v. Com.*, 1 Cush. (Mass.) 302.

**Not Otherwise Hereinafter Provided for.**—See 9 Am. & Eng. Encyc. of Law 360.

**Not Settled.**—A devise of lands, "not

settled," or "out of settlement," or "not by him formerly settled or thereby disposed of," will pass an unsettled reversion in fee, of lands of which a lessor estate or interest is in settlement. 1 Jarm. 654, 655.

"Not to be Paid by Us," etc.—The words "but not to be paid by us in any event within one year from date," added to the endorsement of a non-negotiable note, do not waive due presentment, but merely postpone the time of payment by the endorsee. *Hart v. Eastman*, 7 Minn. 74.

"Not to be Performed Within a Year."—See **STATUTE OF FRAUDS**, 8 Am. & Eng. Encyc. of Law 85.

**Not to be.**—An agreement "not to be performed within the space of one year from the making thereof" means one which, you can see from its terms, *cannot* be so performed. *Peter v. Compton*, *Skinner* 353; 1 Sm. L. C. 359; *Boydell v. Drummond*, 11 East 142; *Souch v. Strawbridge*, 2 C. B. 808; *McGregor v. McGregor*, 21 Q. B. D. 424. The last case shows that *Davey v. Shannon*, 4 Ex. D. 81, was not well decided. See further *McManus v. Cooke*, 35 Ch. D. 681; s. c., 35 W. R. 754; 51 J. P. 708.

**Not to My Knowledge.**—Where a proper requisition on title is made on a question of fact, "an answer by the seller's solicitor, 'not to his knowledge,' is not satisfactory; he should apply to his client for information before he answers the enquiry, and, if necessary, search amongst the title deeds." *Sug. V. & P.* 416.

**I. DEFINITION—GENERAL CHARACTER.**—An officer who publicly attests deeds or other writings to make them authentic in another country. Also an officer who confirms and attests the truth of writings to render them available as evidence.<sup>1</sup>

The office is one of great antiquity, having originated under the early Roman jurisprudence, notaries being first known as *Tabelliones forenses*. The offices of *scriba*, *exceptor* and *notarius* existed previous to the *tabellio*, but were of a different character, though they somewhat approached it. The powers and duties of the *tabelliones* were very similar to those of the notaries of the present day.<sup>2</sup> In *England* the office of notary existed before the Conquest, and is frequently referred to in history. The general nature of the office has come down from that time, changed only as the character of the age has made it requisite.<sup>3</sup>

A notary is a public officer, and the act of one who is such *de facto* though not *de jure* cannot be collaterally assailed.<sup>4</sup> Upon his death or resignation his records pass, rather by usage than by law, to his successor, and such successor does not usually fill his unexpired term, but holds office for the usual term from the time of his appointment.<sup>5</sup>

**Not Worth the Expense.**—"Where a Scotch lease (of mines) gave liberty to determine if the minerals became 'not worth the expense of working,' and they became so through a fall in the market price, the lessees were held entitled to determine." MacS. 244, n. 4, citing *Shotts Co. v. Deas*, 8 Sess. Ca. (4th series), 530. See also *Jones v. Shears*, 7 C. & P. 346; *Newton v. Nock*, 43 L. T. 197.

1. Anderson's Law Dict., Notary; *Kirksey v. Bates*, 7 Port. (Ala.) 531; s. c., 31 Am. Dec. 722. See also *Bouvier's Law Dict.*, Notary.

Another definition is "an officer appointed to draw up and attest deeds and contracts and to perform other and similar functions." Notary Public, *American Encyc. (Appleton's)*, vol. 12.

2. Proffatt on Notaries, § 1, 6; Colquhoun, *Roman Law*, § 86; 2 *Burge's Colonial Law* 200; *Dig. Lib.* 48, tit. 19; 3 *Burn's Eccl. Law* 2.

3. Proffatt on Notaries, § 6, *et seq.*; *Burke's Office and Practice of a Notary* 6.

Thus, in Shakespeare's "Merchant of Venice," Art I, Sc. 3, we find the notary referred to as a very common officer where the veteran Shylock insists, "Go with me to a notary and seal me there your single bond."

Notaries public exist in every country of Europe, and their powers and

duties are prescribed by the respective laws thereof and by the civil and mercantile law. All official acts done by them which fall within the rules of law-merchant are respected under the law of nations.

4. *Kunmengeiser v. Juncker*, 28 La. Ann. 678; *Bullene v. Garrison*, 1 Wash. Ter. 587.

Therefore a deposition or acknowledgment taken by a *de facto* notary cannot be suppressed on the ground that such notary had not qualified as required by law. *Keeney v. Leas*, 14 Iowa 464; *Hamilton v. Pitcher*, 53 Mo. 334.

A notary public is not a magistrate within the meaning of a policy of insurance requiring proof of loss to be accompanied by a certificate of a magistrate nearest the place of fire. *Cayon v. Dwelling-house Ins. Co.*, 68 Wis. 510.

Where, as in *Georgia*, notaries public are appointed for four years, the act of a notary who, after that time, attests an affidavit in good faith, is that of an officer *de facto*. *Smith v. Meador*, 74 Ga. 416.

5. *Kelley v. Gilly*, 5 La. Ann. 534; *State v. Percy*, 5 La. Ann. 282; *Guzman v. Walker*, 11 La. Ann. 693.

Where the plaintiff held a commission as notary public in the parish of Orleans when an act was passed affecting

As a rule, the duties of a notary public are *ministerial* and not *judicial*,<sup>1</sup> though not always; for example, in taking an acknowledgment to a deed he acts in a *judicial* character in determining when a person representing himself to be or represented by some one else to be the grantor named in the conveyance, is actually the grantor.<sup>2</sup>

When a notary's term of office has expired and by ceasing to perform a notary's duties he ceases to be a *de facto* officer, he becomes *functus officio*, and all acts performed by him are of no more force than those of a private citizen;<sup>3</sup> therefore he may not then alter or amend his certificate.

**II. WHO ELIGIBLE.**—It is required that the notary be a citizen of the State in which he is to act, and also that he be a person of good moral character. In some States a certain length of residence is required before one can qualify.<sup>4</sup> It seems that it is not necessary that one be of the age of twenty-one in order to be eligible to the office.<sup>5</sup> The principal question which has arisen in this connection is, whether members of the female sex can be

the office of every notary in the parish and providing that the governor should appoint not less than forty nor more than sixty notaries for the same, and forty-eight notaries were thereupon appointed, it was held that the plaintiff was *functus officio*, although no one had been appointed specially to take his records. *Cragg v. Westmore*, 13 La. Ann. 344. See also *Halliday v. McDougal*, 20 Wend. (N. Y.) 81, 264.

In *Louisiana*, however, the fact that one is a notary public does not entitle him to any property in, or control over, the records of a deceased notary. *State v. Laresche*, 24 La. Ann. 148.

When a person appointed a notary public for the parish of Orleans ceases to be such, La. Stat. 1857, ch. 85, § 3, makes it the duty of the governor to designate by order, under the seal of the State, the notary to whose custody the records of the former notary shall be consigned; and courts are bound to presume, when a notary of the parish of Orleans certifies that he has in his custody the record of a former notary of the parish, that the governor has properly discharged his official duty, and has designated him (the notary) as the custodian thereof. *Ledoux v. Jamieson*, 18 La. An. 130.

1. *Lynch v. Livingstone*, 8 Barb. (N. Y.) 463; s. c., 6 N. Y. 422; *National Bank v. Conway*, 1 Hughes (U. S.) 37; 41 Alb. L. J. 245.

2. *Wasson v. Connor*, 54 Miss. 351.

3. *McKellar v. Peck*, 39 Tex. 381;

*Bernier v. Becker*, 37 Ohio St. 72; *Bours v. Zachariah*, 11 Cal. 281. Though he may do so at any time during his term of office. *Chicago etc. R. Co. v. Lewis*, 53 Iowa 101.

But in the case of *Bours v. Zachariah*, 11 Cal. 281, it is said that he may not amend his certificate of acknowledgment after making delivery and return. See also *post*, sub. tit. TO TAKE ACKNOWLEDGMENTS, 8 Am. & Eng. Encyc. of Law 2.

4. *Proffatt on Notaries*, § 13.

In *New York* no bond is required, and appointments are made very indiscriminately; a large proportion of the members of the bar are notaries. In *Maryland*, the applicant must have had a residence of two years in that State. So in *Pennsylvania*, with the additional qualification of one year's residence in the city or county, and it is almost the universal requisite that a bond varying in amount from \$500 to \$2,000 be taken. See *Proffatt on Notaries*, § 13, where the laws relative to this matter in every State are given in detail.

Where a constitution or statute declares that certain disqualifications shall render a person ineligible to an office, he must get rid of his disqualification before he is appointed or elected. But if the law merely forbids him to hold or enjoy the office, it is sufficient if he qualifies himself before he is sworn. *Com. v. Pylz*, 18 Pa. St. 519.

5. In the case of *United States v. Bixby*, 10 Biss. (U. S.) 520, it is said

allowed to qualify as notaries. In *Massachusetts*, they are not so eligible, and the same opinion is held in most of the other States.<sup>1</sup>

**III. APPOINTMENT—1. In England.**—In *England* notaries are appointed by the "court of faculties," which is called a court, "although it holdeth no plea of controversie."<sup>2</sup>

that there is nothing in the constitution or statutes of Indiana making minors ineligible to the office of notary public, such office not being a county office within the meaning of the constitution, wherein it is provided that none but electors shall hold county offices. See also *People v. Dean*, 3 Wend. (N. Y.) 438.

1. In the Opinion of the Justices, 150 Mass. 586, it was said that the statute of Massachusetts which authorizes the appointment of women who are attorneys at law, as special commissioners to administer oaths, to take depositions and acknowledgment of deeds, and that the statute which permits these special commissioners, in addition, to administer all oaths which may be administered by the justice of the peace, and to issue summons for witnesses—interpreted with reference to the history and nature of the office, and the long-continued and constant practice of the government here, and the usage elsewhere—cannot be considered as showing any intention by the legislature that women should be appointed as notaries public.

*In re* House Bill 116 (Col.), 21 Pac. Rep. 473, it was held that the constitution of Colorado prohibiting the election or appointment "to any civil or military office in the State," of any person except a qualified elector, and providing that no person shall be eligible to a county office unless he be a qualified elector, women cannot be appointed notaries public. See also *In re* Notaries Public, 9 Col. 628.

In *National Bank v. Conway*, 1 Hughes (U. S.) 37; s. c., 41 Alb. L. J. 244, is found a strong argument in favor of the eligibility of women to the office of notary public in *New York*. In the course of the argument it is said "the performance of the duties of a notary public are ministerial and not judicial. An acknowledgment may be taken by a relative who could not act judicially because of the relationship." *Lynch v. Livingstone*, 6 N. Y. 422; *National Bank v. Conway*, 1 Hughes (U. S.) 37. Compare *Reed v. New-comblers* (Vt. 1890), 19 Atl. R. p. 367.

"So every member is interested as one of the beneficiaries in the trust. if not in fact a grantee or grantor in the deed. *National etc. Co. v. Conway*, 1 Hughes (U. S.) 37. A married or single woman may be appointed by rule of court as arbitrator under a statute authorizing a submission "to any person or persons." *Evans v. Ives*, 1 Luz. Leg. Reg. 461, the court in this case citing *Kyd on Awards*, p. 70, where it was said that an unmarried woman may be arbitrator and where the case of *Duchess of Suffolk*, 8 E. 41; s. c., 1 Br. 37, is cited as authority.

"The term 'person,' unless restricted, includes in its natural meaning a woman. *Matter of Hall*, 50 Conn. 131; s. c., 47 Am. Rep. 626.

"In the Opinion of the Justices, 115 Mass. 602, the court said: 'The common law of England, which was our law upon the subject, permitted a woman to fill any legal office of an administrative character, and the duties attached to which were such that a woman was competent to perform them.'

"Again, ministerial offices may be granted to any person, and even to women, if they are capable of performing them properly." *Chitty's Prerog. of the Crown* §4. In *Alabama*, by act of 1887, women are made eligible to the office.

2. Proffatt on Notaries, § 11; Brooke's Office and Practice of a Notary 6, 9.

By 18 & 19 Vict., ch. 42, ambassadors and British diplomatic and consular agents in foreign countries and places, are enabled to do abroad all such notarial acts as public notaries may do in the United Kingdom of Great Britain and Ireland.

The Master of the Faculties, in exercising the discretion given to him by 3 & 4 Wm. IV, ch. 70, § 2, in the appointment of notaries public, will, while paying due regard to vested interests, above all things, consider the convenience and accommodation of the merchants, shipowners, and bankers carrying on business in the town where it is proposed to appoint additional notaries. Increase of population alone, unless accompanied by an increase of shipping

2. **In America.**—In nearly every State of the Union, notaries public are appointed by the executive, sometimes without the necessity of the appointment being approved by the senate.<sup>1</sup> In some States certain public officers are constituted notaries by virtue of their office.<sup>2</sup> The length of time for which they are appointed is regulated by statute and varies in the different States. An official bond is always required varying in amount from five hundred to two thousand dollars.<sup>3</sup>

**IV. JURISDICTION.**—Notaries have a local jurisdiction in the State. As a general rule they can only exercise their functions in the county or district for which they are commissioned; but in some places they are authorized to act with full official powers throughout the State so long as they reside in the place for which they were appointed.<sup>4</sup> Courts will take judicial notice of

and mercantile business, is no sufficient ground for the appointment of additional notaries. *Graham v. Smart*, 9 Jur., N. S. 387.

**Apprenticeship and Articles.**—A party bound apprentice for the term of seven years, who, during the whole of that term, acted as a banker's clerk daily till five o'clock in the evening, and after that hour went to the notary and presented bills of exchange, and prepared protests, was not actually employed by the public notary during the whole period of seven years, within 41 Geo. III, ch. 79, § 7, and consequently he was not entitled to act as a notary; and the court refused a *mandamus* to the Scriveners' Company to admit such a party to the freedom of the company, in order that he might be admitted to practice as a notary. *Rex v. Scriveners' Company*, 10 B. & C. 511.

1. Proffatt on Notaries, § 12, where the usages and statutes of every State are collected.

In *Texas* it seems that the appointment must be ratified by the senate. *Brown v. State*, 43 Tex. 349, 478. So also in *New York*.

2. For example, in *Mississippi* it is enacted that "all justices of the peace in this State, mayors of incorporated cities and the clerks of the circuit and chancery courts, shall be notaries public by virtue of their office."

The authority of a notary, who is lawfully such by virtue of his holding some other office, is fully as ample to authenticate conveyances for the purpose of registration as if he were notary by direct appointment. *Wilson v. Simpson*, 68 Tex. 306.

3. Proffatt on Notaries, § 13.

In *Alabama* there are two classes of notaries whom the governor is authorized to appoint, viz: those having justice's jurisdiction, who hold for three years only; and others who hold for three years and until their successor qualifies. *Cary v. State*, 76 Ala. 78.

The term of office of a notary, appointed before La. Const. 1845, was limited to four years after it went into effect. *State v. Pecry*, 5 La. Ann. 282. Compare *Guzman v. Walker*, 11 La. Ann. 693.

The clause in the bond of a notary public that he will "well and truly perform and discharge the duties of a notary public according to law," embraces every act which he is authorized or required by law to do in virtue of his office. *Fogarty v. Finley*, 10 Cal. 239; s. c., 70 Am. Dec. 714.

4. The office of notary public is recognized either in the constitution or by statute in every State.

In *Arizona*, *Connecticut*, *Indiana*, *Maryland*, *Michigan*, *Minnesota*, *New York*, *Oregon*, *South Carolina*, *Vermont*, *Washington* and *Wisconsin*, he may act throughout the State, and is not confined to his own county. In *Indiana*, while they are authorized to act throughout the State, they cannot be compelled to act outside of the county. In *New York*, a notary public for either of the counties of Kings, Queens, Richmond, Westchester, Putnam, Suffolk, Rockland, Orange, Dutchess or the city and county of New York, may take acknowledgments and exercise any of the functions of his office in any of these counties, by procuring from the clerk of his county a certified copy of his appointment and

the official character of a notary of the State and of his jurisdiction.<sup>1</sup>

In several of the States notaries are invested with judicial powers and have concurrent jurisdiction in civil and, in some few instances, criminal matters with justices of the peace.<sup>2</sup>

**V. NOTARIAL SEAL—WHEN REQUISITE.**<sup>3</sup>—Judicial notice is taken of the seal of a notary public as an officer recognized by the commercial world:<sup>4</sup> although the general rule as to a seal outside

filing the same with his autograph signature in the clerk's office of any of the other of said counties. *Ex parte Booth*, 11 Abb. N. Cas. (N. Y.) 145; *Produce Bank v. Baldwin*, 49 How. Pr. (N. Y.) 277; *Mutual L. Ins. Co. v. Corey* (Supreme Ct.), 7 N. Y. Supp. 939.

In the States of *Alabama, Illinois, Kansas, Kentucky, Montana, Nebraska, Ohio, Pennsylvania, Tennessee, West Virginia* and *Wyoming*, he is confined to his own county or locality named in his commission. In such cases a protest must be by the notary of the county in which the place of payment is fixed. *Neely v. Morris*, 2 Head (Tenn.) 596; s. c., 75 Am. Dec. 753. In the remaining States, the matter of jurisdiction is not mentioned in the statutes, except in *Missouri*, where a notary public can act only in the county for which he was appointed and in which he resides. *Silver v. Kansas City etc. R. Co.* 21 Mo. App. 5. The authority of a foreign notary will be presumed to be limited to the county of his appointment. *Silver v. Kansas City etc. R. Co.*, 21 Mo. App. 5. See Proffatt on Notaries, § 22, *et seq.*, where the statute of every State relative to notaries public are collected. See also *Maxwell v. Hartmann*, 50 Wis. 660; *Governor v. Gordon*, 15 Ala. 72; *Hill v. Bacon*, 43 Ill. 477; *Wood v. American L. Ins. etc. Co.*, 7 How. (Miss.) 609; *Smith v. Meadow*, 74 Ga. 416; *Woods v. Polhemus*, 8 Ind. 60; *Mutual L. Ins. Co. v. Corey* (Supreme Ct.), 7 N. Y. Supp. 939.

Under the statute of New York, providing that notaries public of the State may administer oaths, make proof of acknowledgments, etc., in all cases in which the same may now be taken by commissioners of deeds, a notary may, within his county, take acknowledgment and proof of deeds, etc., though the county be one in which there is no commissioner of deeds. *People v. Hascall*, 18 How. Pr. (N. Y.) 118.

1. *Rowland v. Brown*, 15 Iowa 679.

Therefore, where the *jurat to an affidavit* was signed "C. B. S., Notary Public," and neither the signature nor the jurat indicated for what county the notary was authorized to act or did act. it was held that the jurat was nevertheless sufficient. *Stoddard v. Sloan*, 65 Iowa 680.

But the signature to a *certificate of acknowledgment* must show the county for which the notary was appointed, which must be that one in which the certificate purports to have been taken; the name of a county being deemed a part of the official signature of the notary. The fact that the name of the county appears on the seal is not sufficient, that not being a matter required to be shown by the seal. *Willard v. Cramer*, 36 Iowa 22.

2. Notaries public appointed by the governor "to have and exercise the same jurisdiction as justices of the peace" are considered to have no authority in *Alabama* to issue original attachments, returnable to the city or circuit courts, that being a special power conferred upon justices; the notary, however, may issue attachments returnable before himself. *Vann v. Adams*, 71 Ala. 475; *Rice v. Watts*, 71 Ala. 593; *Griffin v. Appleby*, 69 Ala. 409; *Carroll v. State*, 58 Ala. 396.

See also *Jackson v. Bain*, 74 Ala. 328; *Wilcox v. Mitchell*, 4 How. (Miss.) 272; *Dennistown v. Potts*, 26 Miss. 13; *Georgia Ice Co. v. Porter*, 70 Ga. 637.

The statute recognizing justices of the peace as notaries, does not necessarily abrogate the office of notary. *Gilreland v. Drake*, 36 Tex. 676.

By special statutory authority, a notary public in the State of Georgia may take an affidavit to hold to bail; and he need not affix his seal merely because he is a notary, since only notarial acts require a seal. *Jowers v. Blandy*, 58 Ga. 379.

3. See SEAL.

4. *Greenleaf on Evid.*, § 5; 4 Minor's

the State or country of the officer using it is that it must be proven before it can be accepted as the seal it purports to be. It seems, therefore, that the signature of the notary to an instrument going to a foreign country, must be authenticated in some other official manner, which is usually done by the consul or other representative in that country.<sup>1</sup> But in the case of a protest made upon the nonacceptance or nonpayment of a commercial paper, the notarial seal is always sufficient of itself.<sup>2</sup>

The requisites of a notarial seal are determined by the law of

Insts. (2nd ed.); Yeaton v. Fry, 5 Cranch (U. S.) 335.

It is evidence also, *prima facie*, that the officer is properly commissioned by the executive. Brown v. Philadelphia Bank, 6 S. & R. (Pa.) 484.

1. Hutchison v. Mannington, 6 Ves. (Eng.) 823; 2 Bouv. Law Dict.; Schneider v. Cochrane, 9 La. Ann. 235; s. c., 4 Am. Dec. 204.

**Notary.**—The seal of a notary attached to a document he is authorized to execute, is received, by force of commercial usage or positive law, as sufficient evidence of his official character; but it is not the highest evidence, and the record of his appointment is receivable to prove that character. Hence, where a deposition was taken in another State by a notary public, who neglected to affix his notarial seal to his certificate, but his official character was proved by a certificate of the secretary of the State, annexed to his certificate, the deposition was held to be admissible. Ashcraft v. Chapman, 38 Conn. 230.

The court will judicially notice the seal on a notarial certificate, verifying an affidavit sworn before a magistrate abroad. Cole v. Sherard, 11 Exch. 482.

Where it is necessary to produce a notarial certificate, a court of equity will dispense with an affidavit verifying the notary's handwriting. Hayward v. Stephens, 15 L. T., N. S. 173; 36 L. J., Ch. 135.

Where a power of attorney has been executed before a notary public in a British colony, an affidavit verifying the notarial signature is not necessary under 15 & 16 Vict., ch. 86, § 22. *In re Goff*, 12 Jur., N. S. 595; 14 L. T., N. S. 727.

Upon a trial for engaging in the slave trade by carrying two blacks from a port in Africa to Brazil, the defendant alleged that the blacks whom he received on board had free papers,

purporting to show that they had been manumitted. The court held that it was evidence of the genuineness of the manumission papers, that they were tested and sealed by persons purporting to be Portuguese notaries public on that coast, and who had acted as such in other business; that they were on the kind of paper and under the stamp used in the public offices; were lodged with the proper authorities in Brazil; and the Portuguese consul there certified to the notaries being regular officers of his government, and that the American consul in Brazil obtained and sent to this country all these papers with translations. United States v. Libby, 1 Woodb. & M. (U. S.) 221.

2. Brewster v. Arnold, 1 Wis. 268; Schneider v. Cochrane, 9 La. Ann. 235; s. c., 41 Am. Dec. 204; Crowley v. Barry, 4 Gill (Md.) 194.

Under the law-merchant, a notarial protest is not required to be made in the presence of witnesses, or to be signed by them. The act of the notary, certified by his signature and official seal, is sufficient. Bradford v. Cooper, 1 La. Ann. 325.

Thus it is said in Orr v. Lacy, 4 McLean (U. S.) 343, the notarial seal proves itself in all countries where the law-merchant prevails; it is only necessary that it shall conform to the law of the place where the notary acts. An impression upon paper is as good as upon wax or any other tenacious substance.

Also in Pierce v. Indseth, 106 U. S. 546, it is said judicial notice is taken of the seal of a notary public from any part of the world if impressed upon paper or wax. Such seal authenticates an act of protest, and entitles it to full faith and credit. This case was where a certificate was offered in evidence which had been made in Norway, and which had impressed upon the paper a seal purporting to be that of a notary public in Norway.

the locality from which the official derives his authority; or, if there be no law prescribing what the seal shall be, then by the rules of common law.<sup>1</sup>

In the absence of statutory provision, an official seal is the impression on the paper directly or on wax or wafer attached thereto; hence the seal impressed upon a document by a notary public signifies authentication of his official character. It is a seal and not its composition or characters or words and devices which raises the presumption of official character of which courts take judicial notice.<sup>2</sup> The statutes of nearly every State, however, prescribe accurately what shall constitute the notarial seal and how it shall be used.<sup>3</sup>

1. *Orr v. Lacy*, 4 McLean (U. S.) 343; *Pierce v. Indseth*, 106 U. S. 546; *In re Phillips*, 14 Nat. Bankr. Reg. 219; 3 Month. West. Jur. 457.

2. *Bac. Alar. Obligation* (c.); *Warren v. Lynch*, 5 Johns. (N. Y.) 239; 1 Minor's Inst. 536; 4 Id. 19.

Accordingly where a notarial seal affixed to a jurat contained the words "notarial seal Lucas Co., Ohio," the name of the notary being omitted, it was considered sufficient. *In re Phillips*, 14 Nat. Bankr. Reg. 219.

It seems that the notarial seal should be legible. *Donegan v. Wood*, 49 Ala. 242; s. c., 20 Am. Rep. 275; *Todd v. Neal*, 49 Ala. 266.

An impression in ink, in the form of a notarial seal, stamped on the paper, is a sufficient seal to authenticate the certificate of marine protest to which it is attached. *The Gallego*, 30 Fed. Rep. 271.

Where the copy of a record of the condemnation of property insured, was offered in evidence without the seal of the notary who made the copy, there being merely flourishes of the pen on the margin of each page, it was held that no proof being given that the notary had a seal, the evidence must be rejected. *Talcott v. Delaware Ins. Co.*, 2 Wash. (U. S.) 449.

**Official Character.**—The court will take judicial notice of the official character of a notary public, and of the county for which he is appointed to act. *Rowland v. Brown*, 75 Iowa 679.

The statute of *Nebraska* requires that a notary public shall have the seal containing the words "Notarial seal," the name of the county, and "Nebraska;" and in addition, at his option, his name or the initial letters of his name. It was held that the seal need not have on it the name or initials, un-

less the notary so chooses, the statute being permissive only. *Weeping Water v. Reed*, 21 Neb. 261.

In *Iowa* the form and character of the seal is accurately prescribed by statute, and it is required to be fixed to all certificates by the notary; the absence of such seal will invalidate certificate. The courts of the State do not take judicial notice of the statutes of other States, but in the absence of all proof presume them to be the same as its own; therefore, where the certificate of a notary was attached to a deposition coming from Michigan and with no seal affixed, it was held that this deposition must be suppressed. *Stephens v. Williams*, 46 Iowa 54.

And a defect in the impression is not sufficiently supplied by writing. *Gage v. Dubuque etc. R. Co.*, 11 Iowa 310.

Each clerk of the county in and for which the notary is appointed, may certify to the fact of his appointment, but cannot certify to the genuineness of the notary's signature, which can only be evidenced by the proper notarial seal. *Stephens v. Williams*, 46 Iowa 54.

3. It is generally provided that an impression stamped on paper by the notary's die, is a sufficient seal. *Connolly v. Goodwin*, 5 Cal. 220; *Bank of Manchester v. Slason*, 13 Vt. 334.

In *Indiana* the notarial seal need not contain the name of the county. *Lange v. State*, 956 Ind. 114. Compare, however, *Muncie Nat. Bank v. Brown*, 112 Ind. 474.

One seal to the certificate of a notary is sufficient, although it is placed in the middle of the page, between the two parts of the certificate. *Olcott v. Tioga R. Co.*, 27 N. Y. 546; 40 Barb. (N. Y.) 179; s. c., 84 Am. Dec. 298.

In *Louisiana* a notary is not re-



As to when it is necessary that a notary affix his seal to his certificate, the rule is not well fixed. It seems, however, that in all cases in which he exercises authority derived from the law-merchant or from international law, his certificate, in order to be received as evidence, should be authenticated by his official seal as well as by his signature.<sup>1</sup>

As to an authority which he exercises under various State statutes, the rule has been laid down that while it is preferable that the seal be used, still the want of it may be supplied by proper proof of his official character and signature.<sup>2</sup>

In *Illinois* it is said that his signature is sufficient, provided the

quired to have a particular style of seal to give authenticity to his copies. *Flemming v. Richardson*, 13 La. Ann.

414.

1. *Rindskoff v. Malone*, 9 Iowa 540; s. c., 74 Am. Dec. 367; *Orr v. Lacy*, 4 McLean, 9 U. S. 343; *Pierce v. Indseeth*, 106 U. S. 346; *Schneider v. Cochrane*, 9 La. Ann. 235; s. c., 41 Am. Dec. 204; *Brewster v. Arnold*, 1 Wis. 268; *Pape v. Wright*, 116 Ind. 502.

A notary's protest is inadmissible in evidence unless his seal be affixed; though it is allowable for him to affix the seal when this objection is made. *Rindskoff v. Malone*, 9 Iowa 540; s. c., 74 Am. Dec. 367; *Tunis v. Withrow*, 10 Iowa 305; s. c., 77 Am. Dec. 117.

But this rule is not universally accepted. Thus, it is held in *Palmer v. Whitney*, 121 Ind. 58, that the signature of the notary public to the notice of protest of a bill or note, is sufficient without his attestation by his seal of office, because in so doing he does not act officially, but only as agent of the latter.

In *Kentucky*, it is held that the official signature of a notary is all that is required to the protest to make it valid. *Tyler v. Bank of Kentucky*, 7 T. B. Mon. (Ky.) 555; *Bank of Kentucky v. Pursley*, 3 T. B. Mon. (Ky.) 238; *Huffaker v. National Bank*, 12 Bush (Ky.) 287.

Also, in *Missouri* it is held that a notary's certificate purporting to be executed under his hand and official signature is valid, although the seal be not mentioned. *Dale v. Wright*, 57 Mo. 110.

In *West Virginia*, the want of the notarial seal does not prevent a notary's certificate of demand and notice of non payment of note from being received in evidence. *Second Nat. Bank v. Chancellor*, 9 W. Va. 69.

The acknowledgment of a deed by a notary public of another State without a seal or certificate of his appointment, will be altogether unavailable. *Booth v. Cook*, 20 Ill. 129; *Thielman v. Burg*, 77 Ill. 293.

2. *Mills v. Dunlap*, 3 Cal. 94.

Thus, where the written statement required by the statute was entered on a mortgage of personal property, and was verified before a notary public duly authorized to administer oaths, but the certificate was not authenticated by the notarial seal affixed, it was held, that such verification was sufficient without authentication by seal. *Ashley v. Wright*, 19 Ohio St. 291.

Under Rev. Stat. of Ill., 1874, conferring upon notaries authority to administer oaths, the *jurat* to an affidavit sworn to before a notary need not be authenticated by his official seal.

*Schæfer v. Kienzer*, 123 Ill. 430.

In *Texas*, it is held that no notarial act is valid unless the seal of office of the notary is affixed. The seal of the county court will not supply its place. *McKellar v. Peck*, 39 Tex. 381.

Where a chattel mortgage purports to have been acknowledged before a notary, but the certificate is not authenticated by a notarial seal, the filing of the instrument is held to be no notice to subsequent purchasers or mortgagees in good faith; under general statutes of Minn. 1878, which require mortgages in order to constitute such notice, to be acknowledged before some officer authorized to take the acknowledgment of deeds, in ch. 26 requiring that each notary shall provide himself with an official seal with which he shall authenticate his official acts. *Thompson v. Scheid*, 39 Minn. 104; *DeGraw v. King*, 28 Minn. 118; *Colman v. Goodnow*, 36 Minn. 9.

certificate is to be used only in the county in which he is authorized to act; but if to be used elsewhere the seal is necessary.<sup>1</sup>

Another rule is stated that the affixing of the notarial seal is not essential to the validity of the notary's acts except in cases where it is required by some rule of common law or statute; in all other cases its want may be supplied by other evidence.<sup>2</sup>

**VI. NOTARIAL FUNCTIONS UNDER THE LAW-MERCHANT.**—The law-merchant is a system of law which does not rest exclusively upon the positive institutions and local customs of any particular country, but consists of stated principles of equity and usages of trade, which general convenience and the common sense of justice have established to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world.<sup>3</sup>

It is practically the general body of commercial usages in matters relative to commerce.<sup>4</sup> Blackstone designates it the custom of merchants, and ranks it under the head of particular customs of England, which go to make up the great body of the common law: this principle, however, may be well doubted,<sup>5</sup> since its character is not local, nor is this obligation confined to a particular district, and it cannot therefore with propriety be considered a custom in the technical sense.<sup>6</sup> These usages, being general and extensive, partake of the character of rules and principles of law, in matters of fact, as do usages which are local and special. They constitute a part of the general law of the land, and their existence therefore, cannot be proven by witnesses, but the judges are bound to take official notice of them; and this application is not

1. *Stout v. Slattery*, 12 Ill. 162. See also *Thielman v. Burg*, 73 Ill. 293.

2. The only difference relates to the proof of his authority. *Stout v. Slattery*, 12 Ill. 162. See also *Dunn v. Adams*, 1 Ala. 527; s. c., 35 Am. Dec. 42.

In *Georgia*, it is held that when a notary takes an affidavit under a special statutory authority, he need not affix a seal merely because he is a notary. Only notarial acts require a seal. *Jowers v. Blandy*, 58 Ga. 379.

In *Michigan*, the notary's seal is essential to a notarial act to establish a plat and to prove the existence of a highway. *Grand Rapids v. Hastings*, 36 Mich. 122.

In *Indiana*, official acts of a notary public must be authenticated by his official seal; a scrawl is not sufficient. *Hinckley v. O'Farrel*, 4 Blackf. (Ind.) 185; *Dumont v. M'Cracken*, 6 Blackf. (Ind.) 356.

Where a deposition is taken by a notary public, but his seal is not attached to his certificate, but there is a certificate by the clerk of the county under seal, reciting that his official acts

are entitled to credit, and that his signature is genuine, it is properly received. *Pape v. Wright*, 116 Ind. 502.

In *Maine* the statute of 1821, ch. 101, requires all copies furnished by the notary to be under his hand and seal; but it does not require that the record itself should be under seal, or that the clerk of the court should affix a seal to his copies thereof. *Homes v. Smith*, 16 Me. 181; s. c., 33 Am. Dec. 650.

3. 3 Kent's Com. 2.

As to the law of nations, see *INTERNATIONAL LAW*, 11 Am. & Eng. Encyc. of Law 431. See also *The Scotia*, 14 Wall. (U. S.) 170; *Vattel's Law of Nations*, § 3, note (1); *Bouvier's Law Dict.*, *International Law*.

4. 2 *Bouvier's Law Dict.*, *Law merchant*. Customs of law-merchant are a part of the law of nations. *Jewell v. Center*, 25 Ala. 498; *Reed v. Wilson*, 41 N. J. L. 29; *Bank of Columbia v. Fitzhugh*, 1 Har. & G. (Md.) 239; *Branch v. Burnley*, 1 Call (Va.) 147; *Goldsmith v. Sawyer*, 46 Cal. 209.

5. 1 Blackstone's Com. (Chitty) 75.

6. 1 Stephen's Com. 54.

confined to merchants, but extends to all parties in any mercantile transaction.<sup>1</sup>

While the several functions which devolve upon a notary public at common law are mostly left to be determined and applied by the courts, there are various statutes which provide for numerous other duties, and in some instances declare what shall be deemed commercial paper and provide the manner in which it shall be protested.<sup>2</sup>

*Inland* bills of exchange and promissory notes are not commercial paper within the usages of the law-merchant, and it is therefore no part of a notary's duty under the common law to protest them, and his certificate to that effect is not evidence of dishonor;<sup>3</sup> nor, except as it may be required by transactions under the law merchant, does the common law authorize a notary to administer

1. Bouvier's Law Dict., Law-merchant.

The commercial law appertains more directly to those branches which relate to the rights, property and relations of persons engaged in commerce, and the subjects with which it deals even as administered in any one country, or dispersed throughout the globe; but the terms "law-merchant" and "commercial law" are often apparently used as meaning the same thing.

2. The creation of the office of notary public by statute authorizes the officer to act in the form prescribed by the common law, as it is impossible for him to use the seal required by the legislature; the right to perform notarial acts having also been recognized by several subsequent statutes. The requisites of the seal prescribed by the act of 1803 must be regarded as obsolete by the omission to declare what are the arms of the States. *Kirksey v. Bates*, 7 Port. (Ala.) 529.

The certificate in the protest of a notary, setting forth the demand and refusal of an inland bill and notice, to the drawer and endorsers, is made evident by statute, yet it is not conclusive; and it is competent for the party to show such a state of facts as prove that the certificate is untrue. *Bank of Mobile v. Marston*, 7 Ala. 108.

The courts of the State as organized in 1870 would not recognize as valid the official act of a notary public in New Orleans in 1862, who assumed to act under the authority of the Confederate government. When notice and protest of a bill of exchange is sent through the postoffices as authorized by our statute, it must be sent by the

mail regularly established by the laws of the United States, which are judicially known to have been suspended in Louisiana prior to Feb. 1, 1862.

No authority is given by statute to a notary public to certify a fact in regard to a bill of exchange independent of the protest. *Whitman v. Farmers' Bank*, 8 Port. (Ala.) 258.

Until the contrary is shown, the presumption is that in a sister State a notary public has no other authority than that which is derived from the common law. *Chandler v. Hanna*, 73 Ala. 390.

A notary in protesting a note for non-payment in New York is not bound to give notice to the endorsers. *Morgan v. Van Ingen*, 2 Johns. (N. Y.) 204; *Bank of Rochester v. Gray*, 2 Hill (N. Y.) 227.

It is no part of official duty of a notary to give notice to prior endorsers of a note when he protests it for nonpayment; and if he promise the holder, but omit to do so, such promise will not enure to the benefit of a prior endorser. *Morgan v. Van Ingen*, 2 Johns. (N. Y.) 204.

The Kentucky law of 1864, intended to alter the law-merchant as to notice of protest, is so indefinite in its mandatory clause that judicial construction was necessary to enable notaries to know their legal duties thereunder. Accordingly, where an indorser was released by a notary's mailing a notice according to custom, and his and the bank officers' construction of the law, the notary was not liable. *Neal v. Taylor*, 9 Bush (Ky.) 380.

3. At common law, the protest of a notary public is not evidence of the notice of the dishonor of an inland bill of

oaths or affirmations.<sup>1</sup> All those acts sanctioned by the local authority which a notary public, in common with other officers, may perform are not within the powers which he exercises by virtue of the law of nations. It is under this law that the notary exercises the most important of his duties, that of protesting foreign bills of exchange—his duties concerning which are treated elsewhere.

**1. As to Commercial Paper.**—The duties of a notary public in regard to commercial paper are of an official character, and a due administration of his powers, in this regard, is required by substantially the same rules<sup>2</sup> of responsibility that govern in other official transactions.<sup>3</sup>

exchange, although it might contain averment that notice was given. It is by statute alone that such evidence is admissible. *Rives v. Parmley*, 18 Ala. 256.

A protest is not required on inland bills or promissory notes unless by a local law or usage; and such protest is not of itself evidence of demand, non-payment or notice. *Bond v. Bragg*, 17 Ill. 69; *MacAllister v. Smith*, 17 Ill. 328; s. c., 65 Am. Dec. 651; *Choteau v. Jones*, 11 Ill. 300; s. c., 50 Am. Dec. 460. See also, as confirming the text, *Swayze v. Britton*, 17 Kan. 625; *Bowling v. Arthur*, 34 Miss. 41; *Union Bank v. Humphreys*, 48 Me. 172; *Vandewater v. Williamson*, 13 Phila. (Pa.) 140.

**1.** *Hill v. Norris*, 2 Ala. 640, where it is said that independent of any statutory regulation extending the power of a notary public, his certificate is only evidence of such acts as he does under *lex mercatoria*. See also *Chandler v. Hanna*, 73 Ala. 390; *Jenks v. Jenks*, 47 Tex. 221.

A marine protest is considered merely a voluntary affidavit, for a notary public has no authority to take such protest under the *lex mercatoria*; a notary's duty relates only to commercial transactions which occur in one country and which are to be proved in another, or in which foreigners are interested; it is founded on the comity of nations. *Patterson v. Maryland Ins. Co.*, 3 Harr. & J. (Md.) 71; s. c., 5 Am. Dec. 419.

**2.** PROTEST, Am. & Eng. Encyc. See also DUNAND, BILLS AND NOTES.

**3.** By accepting the office and entering upon the discharge of its duties, a notary public contracts with those who employ him that he will perform such duty with integrity, diligence and skill, and a party employing a notary is not

obliged to determine upon the validity or legality of his acts. *Fogarty v. Finlay*, 10 Cal. 239.

It is well settled in this State, that a bank receiving commercial paper as agent for collection, properly discharges its duty, in case of nonpayment, by placing the paper in the hands of a notary public, to be proceeded with in such manner as to charge the parties to it and receive the rights of the owner; and that the bank is not liable for the failure of the notary public to discharge his duty; in such case, the notary public is the subagent of the holder, and is responsible directly to him. *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648; s. c., 40 Am. Dec. 83; *Agricultural Bank v. Commercial Bank*, 7 Smed. & M. (Miss.) 592.

Every Intendment is to be in favor of the performance of his duty by a notary who certifies to the protest of negotiable paper for nonpayment. *McAndrew v. Radway*, 34 N. Y. 511.

The authority of a notary to demand payment of a bill and give the requisite notices, is to be inferred from the fact that the bill was in his possession. *Burbank v. Beach*, 15 Barb. (N. Y.) 326; *Succession of Tete*, 7 La. Ann. 95.

A notary public is an officer appointed by public authority, and parties have a right to assume, in the absence of notice to the contrary, that he is a fit and proper agent for the discharge of the duties of that office. A note sent for collection to a bank located in a town at considerable distance from the residence of the maker, may properly be delivered to a notary public, at the place where the maker resides, for presentment and protest, and if so delivered in due season, that will be a good defence for the bank, in an action

The requisites of a presentment or demand for acceptance or payment, also of a protest and notice of protest are set forth elsewhere.<sup>1</sup> Proof of the dishonor and of protest for nonpayment are made by the notary's certificate of protest.<sup>2</sup>

(a) *Due Diligence Required.*—In the discharge of all his duties, but particularly as regards commercial paper, a notary is required to exercise due diligence. It is a part of the exercise of due diligence to resort to all proper sources of information within his reach to obtain what information is necessary for the proper exercise of his duties.<sup>3</sup>

against it for the loss of the debt occasioned by the premature presentment and protest of the note and notice to endorsers and the insolvency of the maker. *Stacey v. Dane Co. Bank*, 12 Miss. 629.

In *Mississippi*, a notary public is a public officer and becomes the agent of the holder of negotiable paper entrusted to him for demand and protest, and is alone liable to the holder for any failure or negligence in the discharge of his official duties, even though the paper is entrusted to him without the knowledge or authority of the holder by a bank to which it has been sent for the purpose of collection. *Britton v. Niccolls*, 14 Otto (U. S.) 757.

Notarial protests of foreign notaries are received in evidence as making proof of themselves, and bills drawn from one State on another are regarded as foreign bills to that extent; but beyond this, the acts of foreign notaries or notaries of other States, are not admissible in evidence without proof of the signatures and capacity as notaries. Notice to parties sought to be charged as drawers or endorsers of bills must be proved, like all other facts; and the Louisiana statute of 1827, which makes the certificate of notice by notaries in Louisiana competent evidence of such notice, has no effect beyond such instruments executed within that State, and by officers whose acts are thus clothed by law with the authority of authentic evidence. *Schneider v. Cochrane*, 9 La. Ann. 235; s. c., 61 Am. Dec. 204.

In order to charge an endorser of a bill of exchange, drawn in this and payable in another State, it is not required that the notary should attach to the protest a certificate of protest, except for the purpose of recovering statutory damages; notice of demand and nonpayment is sufficient to charge the

endorser. *Estep v. Cecil*, 6 Ohio St. 536; *Case v. Heffner*, 10 Ohio 180; *McMurchey v. Robinson*, 10 Ohio 496.

1. See DEMAND, 5 Am. & Eng. Encyc. of Law 528<sup>20</sup>; BILLS AND NOTES, 2 Am. & Eng. Encyc. of Law 365, 465. See also NOTICE; PROTEST.

2. The notarial certificate of protest is sufficient proof of the dishonor of a foreign bill. *Williamson v. Turner*, 2 Bay (S. Car.) 410, 411; s. c., 1 Am. Dec. 652, S. P. elsewhere; *Bryden v. Taylor*, 2 Har. & J. (Md.) 396, 399; s. c., 3 Am. Dec. 554; *Nicholls v. Webb*, 8 Wheat. (U. S.) 326, 333; *Townslley v. Sumrall*, 2 Pet. (U. S.) 170, 179; *Lonsdale v. Brown*, 4 Wash. (U. S.) 86; *Chanoine v. Fowler*, 3 Wend. (N. Y.) 173; *Bank of Kentucky v. Pursley*, 3 T. B. Mon. (Ky.) 238; *Johnson v. Cocks*, 12 Ark. 672.

The minutes of proceedings of a foreign notary public are held records by courtesy of nations; and a copy, under the hand and notarial seal of the notary, is sufficient evidence of the protest of a foreign bill of exchange for nonacceptance. *Bryden v. Taylor*, 2 Har. & J. (Md.) 396; s. c., 3 Am. Dec. 554.

The fact that a notary's certificate of presentment and protest of a draft for nonpayment was not dated at the time of protest, does not render it incompetent to prove such presentment and dishonor. *Chatham Bank v. Allison*, 15 Iowa 357.

Where a notary's clerk testified that he had no recollection of giving a certain notice, but from seeing his endorsement to that effect was satisfied in his own mind that he had done so, this evidence was held competent and sufficient to prove notice. *Worley v. Waldran*, 3 Sneed (Tenn.) 548; *Cole v. Jessup*, 9 Barb. (N. Y.) 395.

3. *Marston v. Bank of Mobile*, 10

It is a general rule that due diligence is the exercise of the same degree of care usually observed by prudent business men in relation to their own immediate interests.<sup>1</sup>

Whether or not the notary has used the proper diligence, is a mixed question of law and fact, and the facts once having been ascertained, is a question of law purely.<sup>2</sup>

**VII. POWERS AND DUTIES UNDER UNITED STATES LAWS—In United States Courts.**—By authority of several acts of congress to that effect, United States courts and officials accept as valid the acts of notaries public in administering oaths and taking acknowledgments which are authorized to be taken by justices of the peace;<sup>3</sup> also all acts in taking testimony, including deposi-

Ala. 284; *Whitridge v. Rider*, 22 Md. 548. In this case it appeared that the notary, having ascertained from proper persons that the residence of an endorser was in Baltimore county, but failing to obtain from them information of his actual or nearest postoffice, neglected to apply to the makers of the note, although he knew them and their place of business was within convenient reach, on the ground of their presumed interest not to give him correct information; but subsequently directed his notice to the endorser at Baltimore city and placed it in a postoffice there. The court held, that the notary in neglecting to apply to the makers for the information sought, failed in his duty, and did not exercise sufficient diligence to charge the endorser. See also *Requa v. Collins*, 51 N. Y. 144; *Edwards on Bills and Notes* (2nd ed.) 386, 399.

1. When the maker's name to a note is illegible, the notary in making protest must make a reasonable effort to ascertain the name. If he neglects such duty or misdescribes a name whereby an endorser is misled, the protest will not be available as to such party. *McGeorge v. Chapman*, 45 N. J. L. 395; *Davey v. Jones*, 42 N. J. L. 28; s. c., 36 Am. Rep. 505.

A written notice to the endorser addressed to him properly and put into the postoffice in due season, amounts to due diligence, even though the letter should never be received. *Washington Banking Co. v. King*, 14 N. J. L. 45; *Ferris v. Saxton*, 4 N. J. L. 1. See also *Woodruff v. Daggett*, 20 N. J. L. 526.

Where the maker of a promissory note resided in Baltimore, enquiry for him by the notary at the postoffice, exchange, and court house was consid-

ered not sufficient. Efforts should have been made, said the court, to learn if he had a residence in the city; the city directory might have been examined and the demand made upon him or left at his place of abode. *Tate v. Sullivan*, 30 Md. 464; s. c., 96 Am. Dec. 597. See also *Howland v. Adrain*, 30 N. J. L. 41.

Where the notary made enquiry at the bank where the paper was payable and receives information from the cashier as to the residence of the endorser, upon the faith of which he addressed the notice of protest, the jury are justified in finding that he had used due diligence. *Herbert v. Servin*, 41 N. J. L. 225.

2. *Oxnard v. Varnum*, 111 Pa. St. 193; s. c., 56 Am. Rep. 255; *DEMAND*, 5 Am. & Eng. Encyc. of Law 528<sup>m</sup>; *Berg v. Abbot*, 83 Pa. St. 177; s. c., 2 Am. Rep. 158; *Wheeler v. Field*, 6 Met. (Mass.) 290; *Grafton Bank v. Cox*, 13 Gray (Mass.) 503; *Wyman v. Adams*, 12 Cush. (Mass.) 210; *Walker v. Stetson*, 14 Ohio St. 89; s. c., 84 Am. Dec. 362.

What constitutes reasonable notice to an endorser, depends upon the location and occupation of the respective parties, and is not to be judged of by the court. *London v. Howard*, 2 Hayw. (N. Car.) 332; *Yancey v. Littlejohn*, 2 Hawks (N. Car.) 525.

3. Rev. Stat. U. S., § 1778. Under the act of September, 1860, providing that certain oaths, affirmations or acknowledgments may be taken before any notary public, and that "when certified under the hand and official seal of such notary they shall have the same force and effect as if made before justices of the peace, etc."—it was held that the officer need not state in his certificate that he was a notary public and

tions, which may be done by commissioners of the United States circuit court,<sup>1</sup> and affidavits required to be made under the mining laws.<sup>2</sup> And in all cases where the witness lives more than one hundred miles from the place of trial, or is about to go out of the United States or the district in which the case is to be tried, or is bound on a sea voyage, his deposition may be taken before a notary public to be used in any civil cause pending in any district or circuit court in the United States.<sup>3</sup> Notaries are also authorized to administer the oath required by the laws of the United States to be taken by directors of national banks.<sup>4</sup>

*Proceedings in Bankruptcy.*—Notaries public have authority to swear bankrupts as to their schedules;<sup>5</sup> to take acknowledgments of creditors to powers of attorney in bankruptcy proceedings,<sup>6</sup> and to perform other acts in connection with proceedings in the bankrupt laws.<sup>7</sup>

that such certificate was given under his hand and seal; that if a notary signs his name with the words "notary public" thereunder and his seal contains his name and the words "notary public" it is a sufficient indication of his official character. *Goodyear v. Hullihen*, 2 Hughes (U. S.) 402; 3 Fish. Pat. Cas. 251. See also *United States v. Rhodes*, 30 Fed. Rep. 432.

Under the act of 1790 a notary public is a proper official before whom the oaths of persons claiming exemption from military duty under the act of March, 1863, may be taken. *United States v. Sonachall*, 4 Biss. (U. S.) 425.

1. Rev. Stat. U. S., § 1778. Notaries public are proper officers before whom to take verification of bills and answers and affidavits in support of or to oppose motions for injunctions, the notarial acts in such cases being acts in relation to evidence within the meaning of the act of Congress of July 29th, 1854. *Blake Crusher Co. v. Ward*, 1 Am. L. T., N. S. (U. S.) 423.

Although under § 2, ch. 159 of the laws of 1854, notaries public had power to administer oaths in the United States circuit courts, such power is now gone by virtue of § 5596, Rev. Stat. 1878. *Buerk v. Imhaeuser*, 14 Blatchf. (U. S.) 19; s. c., 10 Pat. Off. Gaz. 907.

2. U. S. Rev. Stat., § 2335.

In the case *United States v. John D. Hall*, in which Hall as deputy surveyor of mineral lands had sworn to his official statement before a notary public, it was held that where an oath is required by the United States statute such oath can be administered only by an officer of the United States, except

where, by special statute it is authorized to be taken by a notary public; therefore, a notary public being a State officer cannot administer oaths to United States officials except where the statute specifically states that an oath may be so made before a State officer. *United States v. Hall*, 131 U. S. 50.

3. Rev. Stat. U. S., §§ 863, 864. Depositions in admiralty cases may properly be taken before a notary public. The United States statutes providing for thus taking depositions is to be construed, and the certificate of the notary, if required to show that the witness was duly cautioned as the statute requires. *Phelps v. Steamship City*, 1 Wash. Ter. 615. See also *DEPOSITIONS*, 5 Am. & Eng. Encyc. of Law; *Cortes Co. v. Tannhauser*, 18 Fed. Rep. 667; *Dinsmore v. Maroney*, 4 Blatchf. (U. S.) 416; *Bischoffsheim v. Baltzer*, 10 Fed. Rep. 1.

4. *United States v. Neale*, 14 Fed. Rep. 767. Compare *United States v. Hall*, 131 U. S. 50.

5. *In re Bailey*, 15 Nat. Bankr. Reg. 48.

6. *In re McDuffee*, 14 Nat. Bankr. Reg. 336; *In re Butterfield*, 14 Nat. Bankr. Reg. 147. But a notary public is not authorized to take a creditor's acknowledgment to a power of attorney to note for assignee under general order No. 34 in Bankruptcy. *In re Higgins*, 8 Ben. (U. S.) 100.

The provision for the acknowledgment before a register or United States commissioner is not in exclusion of other methods of proof.

7. Thus the certificate of a notary public in Liverpool of the authority of

**VIII. POWERS AND DUTIES IN THE STATES.**—Besides the powers which are conferred upon them by the law-merchant and the acts of congress, notaries in the several States possess by virtue of statutes, a certain authority in other matters. In the absence of proof to the contrary, the courts of a State will presume that the notaries of other States have the same power as those of their own.<sup>1</sup>

**1. To Take Acknowledgments.**—A notary is authorized by statute in every State to take acknowledgments of deeds, conveyances, etc. His power in this respect is concurrent with that of other officers, and is governed by the same rules.<sup>2</sup>

The evidence of the fact that a deed or other paper was acknowledged before him, is generally by his notarial certificate, executed in such form as is provided for such cases. This certificate is presumed to be correct and cannot be attacked collaterally, and can only be impeached by a direct proceeding instituted for that purpose, by showing that the notarial statements it contains are untrue; to establish which, the proof must be clear and satisfactory. The presumption in such case of the regularity of official acts applies in all its force.<sup>3</sup>

English assignees in bankruptcy, is sufficient to enable them to be admitted as defendants in a suit against bankrupts in this country. *Wilson v. Stewart*, 1 Cranch (C. C.) 128.

Notaries public have not, under the act of Congress of Sept. 16th, 1850, nor the act of July 20th, 1854, the judicial power to take legal proof of claim by deposition or otherwise against the estate of a bankrupt under the Bankrupt act. *In re Strauss*, 2 Nat. Bankr. Reg. 48.

A petition in involuntary bankruptcy was verified before a notary public, proceedings instituted, and an adjudication of bankruptcy made by default. Upon petition by a creditor to vacate the adjudication because the petition was verified before a notary, it was held that the verification before a notary public was irregular, but as the question of proper verification was one of practice and not jurisdiction and the verification had been recognized as proper and an order of adjudication entered, it was too late for the debtor or any creditor to raise the question. *In re Getchell*, 8 Ben. (U. S.) 256. See also, *In re Nebe*, 11 Nat. Bankr. Reg. 289.

1. *Pinkham v. Cockell*, 77 Mich. 265; *Paige v. Price*, 78 N. Car. 10; *Silver v. Kansas City etc. R. Co.*, 21 Mo. App. 5; *Conolly v. Riley*, 25 Md. 402.

*Compare*, however, *Keefer v. Mason*, 36 Ill. 408, where it is maintained that the court will not presume, in the absence of proof, that a notary of another State has any authority except that which belongs to him by virtue of the general law-merchant, authority, for example, to administer oaths.

**2. ACKNOWLEDGMENTS**, 1 Am. & Eng. Encyc. of Law 144, 147.

Under *McClell. Dig. Fla.*, § 3, p. 792, empowering notaries public to take the acknowledgment of deeds and other instruments for record, it is held that a notary public can take proof by subscribing witnesses of the execution of a mortgage of real estate for record. *Edwards v. Thom* (Fla. 1889), 5 So. Rep. 707.

**3. ACKNOWLEDGMENTS**, 1 Am. & Eng. Encyc. of Law 147; *Addis v. Graham*, 88 Mo. 197; *Webb v. Webb*, 87 Mo. 540.

A mere preponderance of testimony, *i. e.*, by a majority of witnesses, is not sufficient to overthrow the certificate in the absence of fraud, mistake or collusion. *Strauch v. Hathaway*, 101 Ill. 11; *s. c.*, 40 Am. Rep. 193; *Burson v. Andes*, 83 Va. 445; *Kocourex v. Marak*, 54 Tex. 201; *s. c.*, 38 Am. Rep. 623; *Harkins v. Forsythe*, 11 Leigh (Va.) 274; *Pereau v. Frederick*, 17 Neb. 117; *Watson v. Watson*, 118 Ill. 56.

**Amending the Certificate.**—In the



Where an acknowledgment is taken by a notary in one State to be used in another, some proof of his official character is generally required, and in some States this rule applies as to different counties in the same State in which the acknowledgment is made; but usually the notary's certificate and seal will entitle the instrument to be received in any county of his own State without further authentication.<sup>1</sup>

As to the requisites of the certificate by the notary, see ACKNOWLEDGMENTS.<sup>2</sup>

**2. To Take Affidavits.**—Authority is given in most of the States to notaries to administer oaths and to take affidavits; but this authority is one derived from statute law and did not belong to the office originally; therefore courts do not take judicial notice of the fact that notaries are authorized to take affidavits outside of the jurisdiction of those courts.<sup>3</sup>

If an affidavit is taken out of the jurisdiction of the court, it

case of *Bours et al. v. Zachariah*, 11 Cal. 281, it was held that the certificate of acknowledgment of a notary public to a deed is not an act *in pais* which he may exercise by virtue of his office, at any time while in office. That he derives his power to take and certify acknowledgments to deeds from the statute; he acts as under a special commission for that particular case, being clothed with limited statutory power to take the acknowledgment and certify it as a part of the same transaction. After taking the acknowledgment and making and delivering the return, his functions cease, and he is discharged from all further authority and cannot alter or amend his certificate. Compare *Chicago etc. R. Co. v. Lewis*, 53 Iowa 101.

1. The notary's capacity to take acknowledgments, being entirely founded upon statute law and not upon the law-merchant, he has no authority in this respect beyond his own State. See *Johnson v. McGehee*, 1 Ala. 186.

A certificate of acknowledgment taken in one county of New York and properly authenticated by seal, etc., is admissible all over the State. *People v. Hascall*, 18 How. Pr. (N. Y.) 118; *Utica etc. R. Co. v. Stewart*, 33 How. Pr. (N. Y.) 312.

Where a notary public takes the acknowledgment of a deed outside his own county, and signs as notary only, and at the end of the certificate of acknowledgment, he cannot be regarded as a subscribing witness. *Mutual L. Ins. Co. v. Corey* (Supr. Ct.), 7 N. Y. Supp. 939.

2. 1 Am. & Eng. Encyc. of Law 147, *et seq.*

3. *Keefer v. Mason*, 36 Ill. 408. Where the court has to say: "Power to administer oaths is not one of the incidents of the office of notary public under the general law-merchant, nor was it, as far as we can ascertain, under the Roman law, of which this office is derived. If that power is annexed to the office, it is so by virtue of positive enactment, and we cannot presume its existence in the absence of all proof or ground for presumption." See also *Paige v. Price*, 78 N. Car. 10.

It is not usual for notaries to have this power in other countries; they do not exercise it in *Canada*—for example, there are "commissioners of affidavits" appointed for that purpose. See *Proffatt on Notaries*, § 50.

An affidavit made out of the State verifying the return of the service of summons in pursuance of the regulation of the Code, § 74, may be made before any officer authorized to take depositions, and by § 341 a notary public is so authorized. *Fitch v. Campen*, 31 Ohio St. 646.

An affidavit to be used within the State where it is taken, may be executed before a notary public in every State of the Union. When it is made in the United States, but out of the State where it is to be used, an affidavit may be made before a notary public for use. In *Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Kansas, Kentucky, Louisiana, New Mexico, Massachusetts*.

cannot be recognized unless the authority and official character of the officer are authenticated.<sup>1</sup>

The legal presumption of the regularity of acts done by a *de facto* officer, applies to the performance by the notary of his duties in taking affidavits; <sup>2</sup> and his authority cannot be questioned collaterally.<sup>3</sup>

He should, however, sign his name to the certificate; and it seems generally, that the certificate should also state his official character and be authenticated by his notarial seal.<sup>4</sup> The power to take affidavits includes the power to administer the oath in cases where it is requisite.<sup>5</sup>

An affidavit is defined to be a voluntary oath reduced to writ-

*Michigan, Missouri, Montana, Nevada, Maryland, Ohio, South Carolina, Tennessee, Texas, Utah and Wisconsin.* See POWERS AND DUTIES OF NOTARIES, par. 4, note 31.

**Oath.**—In *Ohio*, in an arbitration under the statute, the oath to the witnesses must be administered by a judge or justice of the peace; therefore, perjury cannot be assigned on the testimony of a witness in such case where the oath was administered by a notary, although the general language of the statute empowered notaries to administer oaths in all cases required or authorized by law. *State v. Jackson*, 36 Ohio St. 281.

A notary public in another State will be presumed to have authority to administer oaths, in the absence of proof that he has no such authority. *Pinkham v. Cockell*, 77 Mich. 265.

1. *Behn v. Young*, 21 Ga. 207. Thus it was held in *England*, that when an affidavit is made before a notary abroad, the signature of the notary must be verified before the affidavit can be admitted. The verification is generally required to be by the consul or other representative. *In re Davis' Trusts*, L. R., 8 Eq. 98; *Lyle v. Ellwood*, L. R., 15 Eq. 67. See also *Haggard v. Iniff*, 31 Eng. L. & Eq. 202.

As a notary public, under existing Massachusetts statutes, has the same authority as a justice of the peace to administer oaths, the certificate of entry made for the breach of a condition of a mortgage which the statute requires to be made before a justice of the peace may be made before a notary public. *Murphy v. Murphy*, 145 Mass. 224.

But a notary public has no authority to administer an oath, such as is re-

quired by the act of congress, to a deputy surveyor of the United States, and to take and certify his affidavit in regard to the manner in which he had fulfilled a contract for surveying, to be used in procuring pay for such services. *United States v. Hall*, 131 U. S. 50. Compare *United States v. Neale*, 14 Fed. Rep. 767.

The authority of a notary public to administer oaths extends to the verification of statements of witnesses which the parties to a cause have stipulated may be sworn to before the notary, for the purpose of being used as evidence in the cause. *Crone v. Angell*, 14 Mich. 340.

2. *Conolly v. Riley*, 25 Md. 402. In the case of *Johnson v. Cocks*, 12 Ark. 672, it appeared that the transcript of the register of one notary was authenticated by another acting for him in his absence. Under a statute of Louisiana providing for such authentication, it was held, that upon proof of the law allowing this substitution being made, the presumption of law as to persons who act in official stations would apply here.

3. For example, where the question was whether a woman before whom an affidavit was taken, was qualified for the office, it was held, that the sufficiency of the affidavit could not for that reason be enquired into collaterally. See also *Findley v. Thorn*, 1 How. Pr. (N. Y.) 76.

4. *People v. White*, 24 Wend. (N. Y.) 520; *People v. Dean*, 3 Wend. (N. Y.) 438; *Lambert v. People*, 76 N. Y. 220; s. c., 32 Am. Rep. 293.

5. As to the use of the seal, see *ante* subtit. NOTARIAL SEAL. See also *Tunis v. Withrow*, 10 Iowa 305; s. c., 77 Am. Dec. 117.

ing and taken before some officer who has authority to administer and certify the same.<sup>1</sup> The distinction between an affidavit and a deposition should be well observed; it has been thus set forth: "A deposition is a distinct expression, embracing all written evidence verified by oath, and thus includes affidavits;" but in legal language a distinction is maintained in the courts of law and chancery between depositions and affidavits. A deposition is evidence given by a witness under interrogatories, oral or written, and usually written down by an official person; while an affidavit is a mere voluntary act of the party making the oath, and generally is taken without the cognizance of him against whom it is to be used.<sup>2</sup>

As to the character and requisites of the notary's certificate, see AFFIDAVITS.<sup>3</sup>

**3. To Take Depositions.**—Notaries also have power in common with other officers to take depositions; generally by virtue of their office.<sup>4</sup>

This power carries with it the power to issue subpoenas for witnesses, but it seems that it does not confer the power to compel their attendance or to compel them to answer interrogatories by punishing them for contempt of court; the power to do this must be specially conferred by statute.<sup>5</sup> Nor does the fact that

1. *Shelton v. Berry*, 19 Tex. 154; 8 c., 70 Am. Dec. 326; AFFIDAVITS, 1 Am. & Eng. Encyc. of Law 307.

2. *Stimpson v. Brooks*, 3 Blatchf. (U. S.) 456; Proffatt on Notaries, § 51; Cal. Code Civ. Proc., § 2003.

In the case of *Conolly v. Riley*, 25 Md. 402, it appeared that the affidavit to a bill for injunction was made before a notary public of the District of Columbia in respect to whose legal competency to administer the oath, there was no evidence on either side. The court held that the certificate of the administration of the oath and the authentication of it by the notarial seal, were facts from which it might be presumed that these acts were done in the regular exercise of powers conferred by the laws of the district. Also, that in the absence of proof of the statutory qualifications of the notary to administer the oath, it would, according to the practice of this State, be supported by the presumption that he had the same power under the laws of the district as that class of officers have under the laws of this State.

3. 1 Am. & Eng. Encyc. of Law 310, 311.

4. In more than two-thirds of the States, notaries exercise this power by virtue of their position; in the others it

is conferred by statute. Proffatt on Notaries, §§ 20, 70.

As to the general duties of officers taking depositions, see DEPOSITIONS, 5 Am. & Eng. Encyc. of Law 588, 617.

5. In *Kansas* it is held that the notary may punish, as for contempt of court, a witness refusing to attend or to answer. *In re Abelles*, 12 Kan. 451; in that case a party appeared before the notary, but refused to be examined, thereupon he was committed to the custody of the sheriff as keeper of the common jail for contempt; was then brought up on *habeas corpus*, and it was decided that such commitment was legal. This power, in *Kansas*, is not expressly conferred by statute, but is incidental to the authority conferred on the officer to take depositions. The same power is given to notaries in *Nebraska*. *Dogge v. State*, 21 Neb. 272.

This same question has arisen in *Missouri* on three separate occasions. In *Ex parte McKee* it was held that the notary, by virtue of his authority to take depositions, might commit witnesses for refusing to answer interrogatories other than those it was his personal privilege to refuse to answer. In *Ex parte Mallinkrodt*, it was held that a notary public had no power to

he is authorized to take depositions empower him to decide legal questions: for example, as to whether a witness be competent or not.<sup>1</sup>

As to the requisites and character of the authenticating certificate by the notary, see DEPOSITIONS.<sup>2</sup>

**4. Relative to Negotiable Paper.**—By legislation, in many of the States, inland bills of exchange and promissory notes are made commercial paper; in some instances, to the full extent of the common law, while in others only certain things are required to be officially performed in order to fix the liabilities of parties to these instruments, the duties of the notary in relation to them being prescribed by statute.<sup>3</sup> It follows, that, whenever the rules of the common law are changed by legislative enactment, the proper exercise of the notarial functions, in such cases, is controlled accordingly.<sup>4</sup> Thus where a protest is required to charge

commit a witness for refusing to produce books and papers under a *subpœna duces tecum*; this decision not only seems to be opposed to that in *Ex parte McKee*, but is also inconsistent with *Ex parte Munford*, decided later, where it was held that in a pending suit a notary public has power to enforce the attendance of witnesses, and may compel them by imprisonment to answer any questions not violated by personal privilege. See also *Ex parte Kreiger*, 7 Mo. App. 367, 370.

The code of California gives special power to notaries to enforce obedience to their *subpœnas*. Cal. Code of Civ. Proc., § 2031. But it was held in *Lezinsky v. Contra Costa Co.*, 72 Cal. 510, that the superior court in which an action is pending had no power under §§ 1986 and 1991 of the Code, to punish a person for contempt because he had refused to obey a *subpœna* issued by a notary public, before whom his deposition was to have been taken. See generally *United States v. Anonymous*, 21 Fed. Rep. 771.

1. *Carpenter v. Dame*, 10 Ind. 125; *Proffatt on Notaries*, § 70.

2. 5 Am. & Eng. Encyc. of Law 617, 618.

3. It is not necessary, since the enactment of ch. 141, Laws of 1855, that a notary public should specify in his certificate of mailing notice of protest, the reputed place of residence of the party notified or the postoffice nearest thereto. *Treadwell v. Hoffman*, 5 Daly (N. Y.) 207. To charge endorsers of a promissory note, demand may be made by the agent of the holder instead of by the notary. *Merchants'*

*Bank v. Spicer*, 6 Wend. (N. Y.) 443; *Baer v. Leppert*, 12 Hun (N. Y.) 516.

The presentment may be made by any person, and the possession of the note is sufficient authority. *Sussex Bank v. Baldwin*, 17 N. J. L. 487. A notary in whose hands a negotiable note is placed for demand and protest, must inform the holder with promptness, if he does not give notice of dishonor; and if he undertakes to give notice, he must do so in such a manner as to make it effectual in law. *Mars-ton v. Bank of Mobile*, 10 Ala. 284.

A notary public is not justified in protesting a note from hearsay information from his clerk. *Williamson v. Turner*, 2 Bay (S. Car.) 410.

4. The power of a notary public to make protest of a promissory note is plainly recognized in this State, by the act of 1833 (*Hutchinson's Digest*, p. 868); and in case of the protest of such paper, the duty is clearly enjoined on him to give such notice or notices as are necessary and requisite to charge all the parties sought to be made liable, and who are by law entitled to notice. Where a notary public undertakes to give notice to an endorser on a promissory note, and charges and receives compensation therefor from the holder, and upon his failure to do so, he is liable for the damages occasioned by his neglect. *Bowling v. Arthur*, 34 Miss. 41.

The protest of a promissory note is governed by the law in force when it falls due, not when it is made. *Levering v. Washington*, 3 Minn. 323.

In *Kansas*, a notary public cannot, as a notary public, or as a public offi-

endorsers on an inland bill or promissory note, but the holder is left to take his own course as to presentation and demand, if this be made by the notary, which is usual, as a matter of convenience, he acts in this respect as the agent of the holder, and not in an official capacity.<sup>1</sup>

As to the character of the notary's duties in regard to such paper, see *BILLS AND NOTES*, 2 Am. & Eng. Encyc. of Law 365; *DEMAND*, 5 Am. & Eng. Encyc. of Law 528; *NOTICE*; *PROTEST*.

cer, give notice of the non payment of a promissory note; but if he gives any such notice, he does so merely as the agent of the holder of the note, or as the agent of the person employing him for that purpose. *Bank of Lindsborg v. Ober*, 31 Kan. 599.

The statute in *Tennessee* changes the rule of the common law, and it is the official duty of a notary public to give notice of protest for nonpayment of a promissory note. The act is that of a public officer under his official oath, and not as the mere agent of the holder of the paper. A failure to discharge his duty is a breach of his bond. *Wheeler v. State*, 9 Heisk. (Tenn.) 393; *White v. German Nat. Bank*, 9 Heisk. (Tenn.) 475; *Barr v. Marsh*, 9 Yerg. (Tenn.) 255.

1. The relation which exists between a notary and the holder of a negotiable note, with regard to the protest of the note and notice to the endorsers, is that of principal and agent, and no more strict performance of duty is required of the former than is indicated by the uniform practice of the place where the note was protested. *Park v. Lowrie*, 6 W. & S. (Pa.) 507; *Vandewater v. Williams*, 13 Phila. (Pa.) 140.

Where a bank placed a note left for collection at the bank in the hands of a notary public, he will be regarded as the agent of the bank for whose omission or mistake the bank is liable. *Thompson v. Bank of the State*, 3 Hill (S. Car.) 77.

A bank which assumes the duty of a collecting agent, is absolutely liable for any negligence or default of a notary or correspondent, as well as its own immediate servants, in relation to it. *Davey v. Jones*, 42 N. J. L. 28.

A notary public appointed by a bank to do its notarial business by the year, and giving bond to the bank for the faithful performance of his duties, is an agent and officer of the bank; and the bank is responsible for his failure to give notice to an endorser of a note left

with it for collection, whereby such endorser was discharged. *Gerhardt v. Boatman's Sav. Inst.*, 38 Mo. 60.

The relation existing between a notary and the holder of commercial paper, with regard to the protest thereof, and notice to the drawer or endorser, is that of principal and agent; and a son of the holder of such paper, if he be a notary public, may act as the agent of his father in his notarial capacity. *Fason v. Isbell*, 42 Ala. 456.

A notary public does not incur any responsibility to the holder of a promissory note in consequence of his neglect to present the same to the maker and demand payment, unless the latter's place of residence is communicated to him. *Vandewater v. Williamson*, 6 W. N. C. (Pa.) 350.

The bank at which a bill or note is made payable or left for collection, although having no interest in it, and also a notary public having it as agent of the owner, for the purpose of making demand and protest, are to be regarded as holders, within the meaning of the rule requiring notice to be personal or to be sent through the mail. But, if the notice in such case is put into the postoffice, and it is shown to have been actually received in due season, it would seem to be sufficient. *Manchester Bank v. Fellows*, 8 Fost. (N. H.) 302.

The owner of a domestic note left it with a bank for collection, and if not collected to fix the liability of an endorser. It not having been paid at maturity, the bank, according to a general usage of the place, handed it to a reputable notary for presentment and protest. *Held*, that the notary was the subagent of the owner, and the bank is not answerable for a default of a notary in making presentment for payment, whereby the liability of the endorser was released. *Bank of Gallipolis v. Butler*, 41 Ohio St. 519.

It is no part of the official duty of a notary public to demand payment of

**IX. AUTHORITY OF DEPUTY TO ACT.**—While, in general, the notary must make the demand for acceptance or payment and perform his other duties *personally*,<sup>1</sup> yet it is sufficient if the protest conform to the law of the place where it is made;<sup>2</sup> hence, where the law authorizes the appointment of deputy notaries and provides that they may act in the place of their principal in certain cases, their acts in such cases may be received as valid and bind-

a note placed in his hands for protest. In making such demand he acts simply as the agent of the holder, and if the holder fails to furnish him information as to where the maker can be found, he cannot be charged with negligence in failing to find him. *Vandewater v. Williamson*, 13 Phila. (Pa.) 140.

Demand and notice, or something equivalent thereto, are essential to the endorsee's right of recovery. *Disborough v. Vanness*, 8 N. J. L. 231.

1. *Todd v. Neal*, 49 Ala. 266; *Sacridor v. Brown*, 3 McLean (U. S.) 481; *Wallace v. Gwin*, 15 La. An. 223; s. c., 35 Am. Dec. 202; *Ellis v. Commercial Bank*, 40 Ind. 63; *Donegan v. Wood*, 49 Ala. 242; s. c., 20 Am. Rep. 275; *Cribbs v. Adams*, 13 Gray (Mass.) 597; *Smith v. Gibbs*, 2 Smed. & M. (Miss.) 479; *Carmichael v. Bank of Pennsylvania*, 4 How. (Miss.) 567; *Ellis v. Commercial Bank*, 7 How. (Miss.) 294; s. c., 40 Am. Dec. 63; *Warnick v. Crane*, 4 Den. (N. Y.) 460; *Onondaga Co. Bank v. Bates*, 3 Hill (N. Y.) 53; *Sheldon v. Benham*, 4 Hill (N. Y.) 129; s. c., 40 Am. Dec. 271; *Hunt v. Maybee*, 7 N. Y. 266; *Gawtry v. Doane*, 51 N. Y. 84. See also *DEPUTY*, 5 Am. & Eng. Encyc. of Law 639.

It cannot be done by another, even though such other be a notary, as notaries are public officers and as such cannot act as partners. *Commercial Bank v. Barksdale*, 36 Mo. 563.

Hence, where the protest states that the notary *caused* the bill to be presented, it is insufficient. *Onondaga Co. Bank v. Bates*, 3 Hill (N. Y.) 53; *Warnick v. Crane*, 4 Den. (N. Y.) 460. Also in *Sacridor v. Brown*, 3 McLean (U. S.) 481, it is said that a demand for payment of a foreign bill of exchange and protest for nonpayment by the *clerk* of the notary is of no effect, the notary who acts under oath being clearly the only one who can make the protest.

The certificate of a notary is not evidence of the facts certified, when it appears that he did not perform the service. Demand of payment and notice of protest may, however, be proved by

the clerk who did it for him. *Hunt v. Maybee*, 7 N. Y. 266.

A certificate of protest signed by a notary, but founded upon a presentment and demand made by his clerk, is void. *Gawtry v. Doane*, 51 N. Y. 85.

2. *Tickner v. Roberts*, 11 La. Ann. 14; s. c., 30 Am. Dec. 706; *McClane v. Fitch*, 7 B. Mon. (Ky.) 599; *Ellis v. Commercial Bank*, 7 How. (Miss.) 294; s. c., 40 Am. Dec. 63; *Bank of Rochester v. Gray*, 2 Hill (N. Y.) 227; *Raymond v. Holmes*, 11 Tex. 54; *Rothschild v. Currie*, 1 Q. B. 43. See also *Dupre v. Richard*, 11 Rob. (La.) 495; s. c., 43 Am. Dec. 217, note.

As a general rule a foreign bill must be presented for payment by the notary in person and not by the deputy; but it is otherwise when the law of the place where the bill is payable, authorizes the employment of the deputy and requires that the protest be certified by him by whom the demand was made. *Carter v. Union Bank*, 7 Humph. (Tenn.) 548; s. c., 46 Am. Dec. 89; *Union Bank v. Foulkes*, 2 Sneed (Tenn.) 558; *Whitehead v. Jones*, 2 McLean (U. S.) 28.

A protest signed by a notary, which certifies that the presentation was made by his deputy, is *prima facie* evidence that the presentation and protest have been made according to the law and usage of the place where made. *Bank of Kentucky v. Garey*, 6 B. Mon. (Ky.) 630.

A bill drawn in one State on a person in another being regarded as a foreign bill, that protest of such bill must be made according to the law of the place where they are made payable. *Thompson v. Commercial Bank*, 3 Coldw. (Tenn.) 46.

A notice bearing the signature of the notary, though the body of it is in the handwriting of his clerk, is good, and the court will not presume that it was signed in blank. *Browning v. Andrews*, 3 McLean (U. S.) 576; *S. P. Kock v. Bringier*, 19 La. Ann. 183; *Dwight v. Richardson*, 12 Smed. & M. (Miss.) 325.

ing.<sup>1</sup> And where such clearly appears to be the local usage, a presentment or similar act made by the notary's clerk would not be rejected on that ground.<sup>2</sup>

**X. NOTARIAL CAPACITY AFFECTED BY INTEREST.**—There is sometimes a restriction imposed by statute upon a notary's capacity to act in certain cases on account of the relationship which he sustains to the party interested or by the fact that he himself is interested otherwise. The rule seems to be that his capacity in regard to the taking of affidavits and acknowledgments, these being purely ministerial acts, is not at all affected by the fact that he is interested in any way;<sup>3</sup> but in other cases, particularly in the taking of depositions and in making protests upon the nonpayment or nonacceptance of notes, the fact that he is interested either personally or by reason of his relationship to the parties, disqualifies

1. For example, in *New Orleans* notaries public, being authorized by law to appoint deputy notaries, and it being their duty to keep a record of the protests in which all acts done by them in relation to protests and giving notice of protest are required to be entered, it is the rule that upon proof of the death of the notary public an original entry in his handwriting made at the time, in such record, is competent evidence to prove the facts of demand, protest and notice under the law of New York. *Fassin v. Hubbard*, 61 Barb. (N. Y.) 548. See also *Manouvrier v. Marvel*, 15 La. Ann. 396. Also in *Louisiana* a protest by a notary after presentment by his deputy is authorized; and a certificate of protest by the notary showing that payment was demanded by his deputy is valid. *Lee v. Buford*, 4 Metc. (Ky.) 7.

2. *Chenowith v. Chamberlain*, 6 B. Mon. (Ky.) 61; *Bank of Kentucky v. Garey*, 6 B. Mon. (Ky.) 629; *Abrams v. Ervin*, 9 Iowa 87; *Kemp v. Porter*, 7 Ala. 138; *Hope v. Sawyer*, 14 Ill. 254; *Gibbons v. Gentry*, 20 Mo. 468; *Muller v. Boggs*, 25 Cal. 175; *McCraren v. McGuire*, 23 Miss. 100.

If the law of the place where the bill is payable sanctions the demand by the clerk of the notary, and the making out and signing the protest by the notary himself, it will be regarded as a valid protest. *McClane v. Fitch*, 4 B. Mon. (Ky.) 600.

Where the presentment and demand of payment of a bill of exchange, payable in Louisiana, were made by a deputy of the notary, and in the protest it was so stated, in an action in Missis-

sippi upon the bill, the presentation and demand were held sufficient under the statute of Louisiana of 1844. *Chew v. Read*, 11 Smed. & M. (Miss.) 182.

3. *Reavis v. Cowell*, 56 Cal. 588; *Lynch v. Livingston*, 6 N. Y. 422; *Kuhland v. Sedgwick*, 17 Cal. 123. Compare, however, *Collins v. Stewart*, 16 Neb. 52; *Taylor v. Hatch*, 12 Johns. (N. Y.) 340; *King v. Wallace*, 3 T. R. (Eng.) 403.

Thus, where a notary public was an employee of a bank in which a member of the firm desiring an attachment was also an employee and stockholder, it was considered that this fact shown, created such a relation between the two as to make it improper for the notary to issue the attachment or to render the writ usually issued void. *Georgia Ice Co. v. Porter*, 70 Ga. 637.

In the case of *National Bank v. Conway*, 1 Hughes (U. S.) 37, it was held that a notary is not incompetent to acknowledge and certify a deed of trust by reason of his interest as one of the beneficiaries in the trust, such acknowledgment being merely a ministerial duty.

But in *Texas* the rule has been stated to be that one who identifies himself with a transaction evidenced by written instrument, by placing his name on the face thereof, as agent for one of the parties thereto, is disqualified to act as a notary public in taking the acknowledgment of any of the parties. *Sample v. Irwin*, 45 Tex. 567; *Brown v. Moore*, 38 Tex. 645.

That the attorney of a party who is also a notary public may take the affidavit to a pleading in the cause is, as a

him from acting.<sup>1</sup> The rule has also been laid down that a notary cannot certify or record as matters of fact things which, as being hearsay, he could not testify to as a witness.<sup>2</sup> A notary certainly cannot take an acknowledgment of a deed to himself or for his own use.<sup>3</sup>

**XI. NOTARIAL ACTS AS EVIDENCE.**—All the acts of a notary as such, must be authenticated by his accompanying certificate, and such certificate is evidence of facts stated therein wherever (*i. e.*, within his jurisdiction) produced, provided it be executed in proper form;<sup>4</sup> but it must be remembered that it is evidence

general rule denied. *Taylor v. Hatch*, 12 Johns. (N. Y.) 340; *Den v. Geiger*, 9 N. J. L. 225. But if he only be *counsel* in the cause and not the attorney of record, it seems that he is not disqualified. *Willard v. Judd*, 15 Johns. (N. Y.) 531; *People v. Spalding*, 2 Paige (N. Y.) 326.

In the case of *Kuhland v. Sedgwick*, 17 Cal. 123, it was held that the attorney of the plaintiff, being a notary public, may take an affidavit verifying the complaint; and in *Minnesota* in the case of *Young v. Young*, 1 Minn. 190, that the attorney of record, though a notary public, could take an affidavit of the service of summons. See also *Proffatt on Notaries*, § 55.

1. Where a notary public because of the relation he holds towards one of the parties is not competent to make a protest, his protest in such case would not charge the endorser. Thus, where the holder is a bank, a protest by a notary who is a stockholder in the bank is incompetent evidence to bind the endorser. *Herkimer Co. Bank v. Cox*, 21 Wend. (N. Y.) 119; s. c., 34 Am. Dec. 220; *Bank v. Porter*, 2 Watts (Pa.) 141.

The statute of Vermont of 1880, providing that no person shall act in a judicial capacity in any cause or matter wherein "he is related to the other party within the fourth degree of consanguinity or affinity," a notary public is not rendered incompetent to take a deposition in the cause by the fact that the plaintiff is his second cousin, the degree is a relationship being reckoned according to the *civil* and not the *canon* law. *Reed v. Newcomb* (Vt. 1890), 19 A. 367.

In *Collins v. Stewart*, 16 Neb. 53, it is said, "If a deposition must be taken before an entirely disinterested party, one having no motive to color the evidence, how much more important that the

person before whom an *ex parte* affidavit is taken shall be free from interest and bias." The court should have stricken the affidavit.

2. *Adams v. Wright*, 14 Wis. 408; *Herkimer Co. Bank v. Cox*, 21 Wend. (N. Y.) 119; s. c., 34 Am. Dec. 220.

3. *Groesbeck v. Seeley*, 13 Mich. 329; *Beaman v. Whitney*, 20 Me. 413.

4. 1 *Greenleaf Ev.*, § 5, *Hutchens v. Mannington*, 6 Ves. (Eng.) 825; *Browne v. Philadelphia Bank*, 6 S. & R. (Pa.) 484. See also *Townsend v. Sumrall*, 2 Pet. (U. S.) 178; *Porter v. Judson*, 1 Gray (Mass.) 175; *Wright v. Barnum*, 2 Esp. (Eng.) 700; *Lloyd v. McGarr*, 3 Pa. St. 474; *Schorr v. Woodlief*, 23 La. Ann. 473. See also *Proffatt on Notaries*, § 136.

In the case of *Donegan v. Wood*, 49 Ala. 242; s. c., 20 Am. Rep. 275, the court refused to recognize as valid the official acts of a notary public in making protest in New Orleans in February, 1862, who was appointed by the Confederate States.

In *Mississippi*, by the statute of 1833, a certificate of protest by a notary is not evidence unless verified by oath. *Dorsey v. Merritt*, 6 How. (Miss.) 390.

But the oath need not be made at the time of making up the record. *Fleming v. Fulton*, 6 How. (Miss.) 473.

Pennsylvania act of 1815—authorizing the notarial acts of notaries public to be given in evidence—is not obligatory in the circuit courts of the United States. *Craig v. Browne*, 3 Wash. (U. S.) 503.

A certificate made by a notary public that he had given the parties to the bill notice of its dishonor, must be made at the time, and as a part of the protest. Such a certificate, made four and a half years after the date of the protest, is not proof of notice. *Boggs v. Branch Bank*, 10 Ala. 970.

A notarial copy of an agreement is



only of such acts as it is the notary's duty to certify—not of extraneous matters.<sup>1</sup>

Therefore, in considering the effect of a notary's acts as evidence, it must be borne in mind what are his powers and duties with regard to the subject matter. Hence, independently of statute, a notary's certificate of the protest of a promissory note is no evidence of that fact since it is no part of his duty under the law-merchant to protest such notes.<sup>2</sup> So also of inland bills of exchange;<sup>3</sup> of the acknowledgment of the release of a debt or

not admissible in evidence, where the original is in the hands of the agent of the party producing the copy. *Donath v. Insurance Co.*, 4 Yeates (Pa.) 275.

Sustaining the rule as to the admissibility of the notary's certificate in case of protest as evidence, are many cases. See *Ticonic Bank v. Stackpole*, 41 Me. 302; s. c., 66 Am. Dec. 246; *Loud v. Merrill*, 45 Me. 516; *Orono Bank v. Wood*, 45 Me. 26; *Pattee v. McCrillis*, 53 Me. 410. *Shanklin v. Cooper*, 8 Blackf. (Ind.) 41; *Schoneman v. Fegley*, 7 Pa. St. 433; *Coleman v. Smith*, 26 Pa. St. 255; *Starr v. Sanford*, 45 Pa. St. 193; *Union Bank v. Middlebrook*, 33 Conn. 95; *Moore v. Hardcastle*, 11 Md. 486; *Pierson v. Boyd*, 2 Duer (N. Y.) 33; *Hastings v. Barrington*, 4 Whart. (Pa.) 487; *Walker v. Bank of Augusta*, 3 Ga. 486; *Wetherall v. Garrett*, 28 Md. 450; *Smith v. McManus*, 7 Yerg. (Tenn.) 477; s. c., 27 Am. Dec. 519; *Seneca Co. Bank v. Neass*, 5 Den. (N. Y.) 329; *Draper v. Clemens*, 4 Mo. 52; *Moore v. Missouri Bank*, 6 Mo. 379; *Sharpe v. Drew*, 9 Ind. 281; *Brandon v. Loftus*, 4 How. (U. S.) 127; *Bliss v. Paine*, 11 Mich. 92; *Barber v. Ketchum*, 7 Hill (N. Y.) 444; *Bank of Kentucky v. Goodale*, 20 La. Ann. 50; *Bank at Decatur v. Hodges*, 9 Ala. 631; *Fisher v. State Bank*, 7 Blackf. (Ind.) 610; *Maxwell v. Hartmann*, 50 Wis. 660; *Turner v. Rogers*, 8 Ind. 139; *Pyron v. Butler*, 27 Tex. 271; *Robinson v. Johnson*, 1 Mo. 434.

And it is not necessary that the certificate should appear to have been a transcript from some record or register of what took place at the time of sending notice. *Starr v. Sanford*, 45 Pa. Stat. 193. *Compare Randall v. Smith*, 34 Barb. (N. Y.) 452; *Sullivan v. Deadman*, 19 Ark. 484; *Bank of Mobile v. King*, 9 Ala. 279.

1. *Schmidt v. Drouet*, 42 La. Ann. —, s. c., 8 So. Rep. 396; *Drum v. Bradfute*, 18 La. Ann. 680; *O'Connell*

*v. Walker*, 1 Port. (Ala.) 263; *Dutchess Co. Bank v. Ibbotson*, 5 Den. (N. Y.) 110. Thus where the protest of a notary public stated that the notice was given to the agent of the party of the protest of his paper, this is not sufficient evidence of such agency, and the agency must be proved *aliunde* before the protest can be received as evidence of notice. *Drum v. Bradfute*, 18 La. Ann. 680; *O'Connell v. Walker*, 1 Port. (Ala.) 267; *Castles v. McMath*, 1 Ala. 326; *Proffatt on Notaries*, § 140; *Turner v. Rodgers*, 8 Ind. 139; *Dumont v. Pope*, 7 Blackf. (Ind.) 367; *Bradshaw v. Hedge*, 10 Iowa 402. But it is presumptive evidence. *Bell v. Lent*, 24 Wend. (N. Y.) 230.

Where a notary states, in the protest, that he notified the endorsers by addressing notices to them at a place named, proof is requisite that they resided at that place. *Turner v. Rogers*, 8 Ind. 139.

2. *Nicholls v. Webb*, 8 Wheat. (U. S.) 326; *White v. Englehard*, 2 Smed. & M. (Miss.) 38; *Schmidt v. Drouet*, 42 La. An. —; s. c., 8 So. Rep. 396.

Therefore a protest by a foreign notary, is not evidence of demand and notice, in an action against endorsers of a promissory note. *Schoneman v. Fegley*, 7 Pa. St. 433; *Coleman v. Smith*, 26 Pa. St. 255.

The statute of Mississippi making notarial certificates evidence of demand and notice in such cases is held not to apply to notaries out of the State. *White v. Englehart*, 2 Smed. & M. (Miss.) 38.

In the case of *Williamson v. Patterson* the protest of a deceased notary, his handwriting being proved, was held inadmissible to prove a demand and notice by the holder of a promissory note. *Williamson v. Patterson*, 2 McCord (S. Car.) 132.

3. *Kaskaskia Bridge Co. v. Shannon*, 6 Ill. 15. See also *Real Estate Bank v. Bizzel*, 4 Ark. 189; *Bond v. Bragg*, 17

unliquidated demand,<sup>1</sup> or of a contract in a foreign country,<sup>2</sup> or of a certificate of incorporation,<sup>3</sup> or of certificates in other and similar cases.<sup>4</sup>

The admissibility of such acts as evidence is not affected by the fact that the notary has no remembrance of them.<sup>5</sup> It is said that the presentment of a bill or note and the giving of notice to endorsers cannot be proved by showing that a notarial certificate stating those facts once existed and has been lost or destroyed;<sup>6</sup> but this principle may well be doubted.<sup>7</sup>

After his death the books, records and memoranda of a notary public, proved to have been regularly kept, are admissible in evidence to prove the facts stated therein.<sup>8</sup>

Ill. 69; *McAllister v. Smith*, 17 Ill. 328; s. c., 65 Am. Dec. 651; *Bernard v. Barry*, 1 G. Greene (Iowa) 388; *Carter v. Burley*, 9 N. H. 558; *Kirtland v. Wanzner*, 2 Duer (N. Y.) 278.

1. *Hill v. Norris*, 2 Ala. 640.

2. *Hitchcock v. Cloutier*, 7 Vt. 22, where it was held that a contract in the Province of Canada, acknowledged before a notary, does not become a contract of record so that *assumpsit* may be maintained thereon.

3. *State v. Lee*, 21 Ohio St. 662.

4. Thus where a man enters into a covenant to transact business in a foreign country, a notarial certificate of his being a citizen of the United States, etc., such as is usually obtained by persons going abroad, is not evidence for him of his having made preparations for leaving the United States. *Foster v. Davis*, 1 Litt. (Ky.) 71.

A statement in a protest of a bill for nonacceptance, that the reason given by the drawee for nonacceptance was, that he had no effects of the drawer, is no evidence of the want of effects. *Dumont v. Pope*, 7 Blackf. (Ind.) 367.

The code of California provides that service of process by a sheriff may be proved by his certificate; but service by any other must be shown by his affidavit. Therefore a notary's mere certificate of service of a summons is insufficient to prove such service. *Co. Yolo v. Knight*, 71 Cal. 431.

Where a statute requires tax deeds to be acknowledged before the county clerk, a certificate of acknowledgment before a notary public is worthless. *Dunlap v. Henry*, 76 Mo. 106.

A notarial protest is evidence only of the facts therein recited; and where it merely states that the notice was mailed to the endorser's address, at a certain place, it will not be presumed that the

endorser resided in that place. *Bradshaw v. Hedge*, 10 Iowa 402.

5. *Sherer v. Easton Bank*, 33 Pa. St. 134; *Span v. Baltzell*, 1 Fla. 301; s. c., 46 Am. Dec. 346.

The protest of a notary public under seal is evidence of notice of nonpayment to the endorser of a promissory note. If the notary has derived his information merely from a clerk, the jury are to judge whether notice has been given or not. *Stewart v. Allison*, 6 S. & R. (Pa.) 324; s. c., 9 Am. Dec. 433; *Browne v. Philadelphia Bank*, 6 S. & R. (Pa.) 484; *Spegall v. Perkins*, 2 Root (Conn.) 274.

6. *Dutchess Co. Bank v. Ibbotson*, 5 Den. (N. Y.) 110.

7. *LOST PAPERS*, 13 Am. & Eng. Encyc. of Law 1059.

Thus a duplicate protest of a bill may be given in evidence without producing the original bill, if it be shown that the bill was lost after protest. *Usher v. Guther*, 2 Har. & M. (Md.) 457; *Chase v. Taylor*, 4 Har. & J. (Md.) 54.

If the act of a mortgage be partially destroyed by fire, owing to the burning of the office of the notary who was custodian thereof, but the original document is sufficiently preserved so that its purport and extent are easily comprehended, words used by a notary in his certificate explaining how certain defects occurred will not so change its character from that of an authentic document to that of an act under private signature that the judge cannot issue executory process thereon. *Marrero v. Barker*, 23 La. Ann. 302.

8. They were held admissible to prove a demand of payment and notice of nonpayment of promissory note. *Nicholls v. Webb*, 8 Wheat. (U. S.) 326.

In some cases the notary may testify as a witness concerning facts connected with the protest, even though no mention of such matter is made in the protest.<sup>1</sup>

Where a notary public's certificate shows that he has mailed notice of protest, a prepayment of postage and the performance of similar minor details, as required by postoffice regulations, will be presumed.<sup>2</sup>

See also 1 Greenleaf Ev., § 115; Austin v. Wilson, 24 Vt. 630; Homes v. Smith, 16 Me. 181; s. c., 33 Am. Dec. 650; Butler v. Wright, 2 Wend. (N. Y.) 369; Welsh v. Barrett, 15 Mass. 380; Brewster v. Doane, 2 Hill (N. Y.) 537; Proffatt on Notaries, § 154. Compare, however, Wilbur v. Selden, 6 Cow. (N. Y.) 162.

The written memoranda of deceased notary public stating the time and manner of demand and notice of protest are admissible in evidence to prove such facts. Bodley v. Scarborough, 5 How. (Miss.) 729; Barnard v. Planter's Bank, 4 How. (Miss.) 98; Bank v. Cooper, 1 Harr. (Del.) 10; Ogden v. Glidewell, 5 How. (Miss.) 179.

Entries by a notary, made in his books in the ordinary course of his business, are evidence of demand and notice; but the notary must be called, if living; and the mere certificate of a notary of a protest is not sufficient evidence. Hatfield v. Perry, 4 Harr. (Del.) 463.

A memorandum *without* date, on the back of a protest by the notary, thus, "Notices of the written protest put in the postoffice at Jackson, addressed to" (naming the individuals), is inadmissible as evidence to prove the notice. Hager v. M'Means, 9 Yerg. (Tenn.) 278.

Where a notary is dead, a sworn copy of the protest taken from his record of notarial protest together with the original protest is abundant evidence of presentment and refusal. Halliday v. McDougal, 20 Wend. (N. Y.) 81.

A memorandum, in the margin of a notary public's book, opposite the entry of the protest of a note of "the endorser duly notified in writing," was held to be good evidence to go to a jury, of notice to the endorser, the notary being dead, and it having been his custom so to record such acts. Bell v. Perkins, Peck (Tenn.) 261; s. c., 14 Am. Dec. 745; S. P. M'Neil v. Elam, Peck (Tenn.) 268.

It is not essential that the entire record of the notary should be made at the very moment of the transaction;

but it is sufficient if done within a few days, in the ordinary course of business. Austin v. Wilson, 24 Vt. 630.

1. WITNESSES, Am. & Eng. Encyc. of Law; EVIDENCE, vol. 7, p. 43; Union Bank v. Stone, 50 Me. 595; Miller v. Hackley, 5 Johns. (N. Y.) 375; s. c., 4 Am. Dec. 372; Lloyd v. McGarr, 3 Pa. St. 474; Schoneman v. Fegley, 14 Pa. St. 376; Walworth v. Seaver, 30 Vt. 728; Craig v. Shallcross, 10 S. & R. (Pa.) 377.

A notary may testify as to his usual course of proceedings and his customary habits of business. Union Bank v. Stone, 50 Me. 595; Miller v. Hackley, 5 Johns. (N. Y.) 375; s. c., 4 Am. Dec. 372.

Likewise service of notice of the dishonor of a note may be proved, by calling the notary himself to prove it. Adams v. Wright, 14 Wis. 408; Terbell v. Jones, 15 Wis. 253.

In an action on notes against an endorser, the defendant denied that certain collateral bonds were tendered to the maker at the time the notes were presented for payment, as required by an agreement endorsed on said notes. In such case the notary who had protested the notes could testify to facts connected with the tender, although no mention was made of it in the protest. Butler v. Murison, 18 La. Ann. 363.

But he cannot be allowed to increase his legal fees for those acts which he does in his official capacity, by testimony as to the value of extra services. Hawford v. Adler, 12 La. Ann. 241.

Testimony of a notary, that it appeared from entries in his register that a certain note was presented and dishonored, and notice sent by mail to certain parties, was held admissible. Bliss v. Paine, 11 Mich. 92; Loud v. Merrill, 45 Me. 516.

The statements of persons, to whom the notary was referred, are competent, not as proof of the facts stated, but on the question of diligence of the notary in making enquiry. Adams v. Leland, 5 Bosw. (N. Y.) 411.

2. Brooks v. Day, 11 Iowa 46; Lloyd

1. **Effect of Such Evidence.**—The certificate or the records of a notary are conclusive evidence as to himself and sureties,<sup>1</sup> but in all other cases they are only *prima facie* evidence subject to be rebutted either by evidence establishing contrary facts or by proof of malpractice in office, etc.<sup>2</sup>

**XII. LIABILITY FOR NEGLIGENCE OR MISCONDUCT IN OFFICE.**—For negligence or misconduct, occurring in the line of official duty, and causing loss or damages to the parties employing them, liability attaches to notaries public in like manner as to other officers, under similar conditions.<sup>3</sup> And where the notary certifies

*v. McGarr*, 3 Pa. St. 474; *Ketchum v. Barber*, 4 Hill (N. Y.) 224. See also *Walworth v. Seaver*, 30 Vt. 728; s. c., 73 Am. Dec. 332; *Schoneman v. Fegley*, 14 Pa. St. 376; *Rogers v. Jackson*, 19 Wend. (N. Y.) 383.

1. *Garthwaite v. Seip*, 23 La. Ann. 218; *McKellar v. Peck*, 39 Tex. 381; *Mathews v. Boland*, 5 Rob. (La.) 200; *Peet v. Daugherty*, 7 Rob. (La.) 85. See also *Schmidt v. Drouet*, 42 La. Ann. —; s. c., 8 So. Rep. 396; *Wright v. Bundy*, 11 Ind. 398; *Stone v. Montgomery*, 35 Miss. 83. Yet it has been held that a notary may be called to explain or contradict his own protest. *Craig v. Shallcross*, 10 S. & R. (Pa.) 377; *Parry v. Almond*, 12 S. & R. (Pa.) 284.

2. That the certificate of a notary, in his protest, that he had given notice to the endorser of the nonpayment of a note, is *prima facie* evidence only of that fact, and may be contradicted by other evidence is established by many cases. See *Booker v. Lowry*, 1 Ala. 399; *Curry v. Bank of Mobile*, 8 Port. 1 Ala. 360; *Rives v. Parmley*, 18 Ala. 256; *Union Bank v. Middlebrook*, 33 Conn. 95; *McFarland v. Pico*, 8 Cal. 626; *Dickerson v. Turner*, 12 Ind. 223; *Sather v. Rodgers*, 10 Iowa 231; *Harmon v. Hicks*, 1 Duv. (Ky.) 322; *New Orleans etc. Co. v. McKelvey*, 2 La. Ann. 359; *Union Bank v. Jones*, 4 La. Ann. 222; *Louisiana State Bank v. Dumartrait*, 4 La. Ann. 483; *Lathrop v. Lawson*, 5 La. Ann. 241; s. c., 52 Am. Dec. 585; *Pattee v. McCrillis*, 53 Me. 410; *Whiteford v. Burckmyer*, 1 Gill (Md.) 127; s. c., 39 Am. Dec. 640; *Graham v. Sangston*, 1 Md. 59; *Nailor v. Bowie*, 3 Md. 251; *Ricketts v. Pendleton*, 14 Md. 320; *Kern v. Von Phul*, 7 Minn. 426; *Rushworth v. Moore*, 36 N. H. 188; *Simpson v. White*, 40 N. H. 540; *McKnight v. Lewis*, 5 Barb. (N. Y.) 681; *Bank of Com. v. Mudgett*, 45 Barb. (N. Y.) 663; *Union Bank v.*

*Gregory*, 46 Barb. (N. Y.) 98; *Gawtry v. Doane*, 48 Barb. (N. Y.) 148; *Lansing v. Coley*, 13 Abb. Pr. (N. Y.) 272; *Gordon v. Price*, 10 Ired. (N. Car.) 385; *Elliott v. White*, 6 Jones (N. Car.) 98; *Jenks v. Doylestown Bank*, 14 W. & S. (Pa.) 505; *Briton v. Doylestown Bank*, 5 W. & S. (Pa.) 87; *Baumgardner v. Reeves*, 35 Pa. St. 250; *Goladay v. Bank of the Union*, 2 Head (Tenn.) 57; *Worley v. Waldran*, 3 Sneed (Tenn.) 548; *Nelson v. Fottrell*, 7 Leigh (Va.) 179; *Central Bank v. St. Johns*, 17 Wis. 157.

*Compare* the case of *Sullivan v. Deadman*, 19 Ark. 484, where the court held that the certificate of the notary, who protests a bill of exchange for nonpayment, that he has given notice thereof to the drawer, is not sufficient to charge the drawer with notice. There must be actual proof of notice according to the law-merchant, or of facts which excuse the want of notice. Also *compare Bank of Mobile v. King*, 9 Ala. 279.

The certificate of a notary, of demand, protest, and notices, verified by oath, according to the statute in Mississippi, is not conclusive, but may be impeached by proof of particular or general acts of malpractice in office, and in making up his records. *Wood v. American L. Ins. & Trust Co.*, 7 How. (Miss.) 609. See *Seltzer v. Fuller*, 6 Smed. & M. (Miss.) 185.

Where an endorser denies, by affidavit, according to his "knowledge, information, recollection, and belief," the receipt of notice, it is sufficient, under the statute, to destroy the presumption arising from a notarial certificate of the fact. *Barker v. Cassidy*, 16 Barb. (N. Y.) 177.

3. A notary public, having jurisdiction of a justice of the peace, before whom is pending a garnishment in aid of a judgment rendered by him, acts outside of his official duty in collecting

that he performed any act which the law includes within the purview of his official duties, knowing such material statements to be false, it is a breach of the conditions in his bond which renders the notary and his sureties liable to the party sustaining damages thereby.<sup>1</sup> So, in verifying an acknowledgment of a deed or mortgage, if the grantor did not, in fact, execute the instrument and in consequence the title or security fails, the party

from the garnishee, prior to judgment against him, the amount admitted in his answer to be due by him to the defendant; and in the absence of statutory provisions, the collection would impose no liability on the sureties on the official bond of such notary. But where the notary falsely represents and pretends to the garnishee that he had rendered judgment against him, and thereby pretends that he has the authority to receive the money, and, under such representations and pretences collects the money, such notary, being a bonded officer, and having authority under the statute to collect from the garnishee on rendering a judgment against him, in collecting the money, commits a wrongful act under the color of his office, which renders him and his sureties liable under the statute, in a suit brought against them by the defendant in the original judgment on which the garnishment is founded, for the restitution of the money and interest thereon. *Mason v. Crabtree*, 71 Ala. 479.

A notary who falsely certified an acknowledgment to a forged satisfaction piece, of a chattel mortgage, is liable to the party injured for all damages sustained, although there was no provision of law authorizing the filing of such an instrument. *Lesser v. Wunder*, 9 Daly (N. Y.) 70.

A notary will not be held individually responsible for paying the price of sale deposited by the purchaser to the ostensible owner and vendor, in absence of proper instructions accepted by him to pay it otherwise. La. Code, art. 2088, making a mandate incomplete until accepted by the mandatory. *McCoy v. Weber*, 38 La. Ann. 418.

The provisions of sections 2520, and 2505 of La. Rev. Stat., declaring the consequences of breaches of official duty by a notary, are declared to be both consistent and operative. Therefore an offending notary may be fined under the first mentioned section and suspended from office under the other. *State v. Laresche*, 28 La. Ann.

*In general* the holder of a bill is authorized to give full credence to a notary's certificate of demand and notice, and may look to the notary to repair any injury resulting from its falsity. *Bank of Mobile v. Marston*, 7 Ala. 108. *S. P. Fogarty v. Finlay*, 10 Cal. 239; *Bowling v. Arthur*, 34 Miss. 41; *Belle-mire v. Bank of United States*, 1 Miles, (Pa.) 173.

1. Under Iowa Code, § 1064, making liable any officer who "knowingly misstates" a fact in a certificate, it is held that a notary could not be held liable for simply negligently misstating. *Scot-ten v. Fegan*, 62 Iowa 236.

A notary officially certifying as true what he knows to be false, may be prosecuted for a misdemeanor, under La. act of June 7, 1806. *Succession of Tete*, 7 La. Ann. 95.

The sureties on the official bond of a notary public are liable for any loss or damage caused by his affixing his notarial paraph to any mortgage note which he knew to be forged; and any one injured by his act has a right of action on the bond against his sureties. *Rochereau v. Jones*, 29 La. Ann. 82.

Where a notary public, in taking and certifying an acknowledgment to a mortgage, neglected to state in his certificate that the party acknowledging the same was known to him or was identified by the testimony of the witness examined by him for that purpose, such notary was guilty of gross and culpable negligence, and is responsible to the party injured for the damages resulting from such negligence.

Such neglect on the part of the notary is not excused by the fact that the certificate was a printed one with blanks which had been partially filled by the attorney of the grantee. For, if the notary read the certificate before signing it, the omission must have been known to him; if he did not read it, he is equally guilty of negligence.

A notary holds himself out to the world as a person competent to perform the business of his office by accepting the office, and entering upon the dis-

injured may look to the officer for redress.<sup>1</sup> And, where the notary certifies to personal knowledge of the grantor, and the party is a stranger, the officer gives such assurance at his peril, and may be held to answer for all damages resulting from the fact that the party proved to be an impostor.<sup>2</sup>

In such case, it is held to be the duty of the notary to call witnesses to prove the identity of the person desiring the certificate, and a failure to employ such precaution, constitutes gross negligence of the officer.<sup>3</sup> In like manner, the notary is responsible for neglecting to give notice of protest of negotiable paper, or for making a false certificate of the same, from which failure or mis-

charge of the duties he contracts with those who employ him that he will perform such duties with integrity, diligence and skill. A party in employing such a notary is not obliged to determine upon the validity or legality of his acts. *Fogarty v. Finley*, 10 Cal. 239; s. c., 70 Am. Dec. 714.

The holder of a bill is authorized to give full credence to the notary's certificate of demand and notice, and may look to the notary to repair any injury resulting from its falsity. *Bank of Mobile v. Marston*, 7 Ala. 108; *Fogarty v. Finley*, 10 Cal. 239; s. c., 70 Am. Dec. 714; *Bowling v. Arthur*, 34 Miss. 41; *Belmire v. Bank of U. S.*, 1 Miles (Pa.) 173.

It is not the official duty of a notary in *Louisiana* to receive money to erase mortgages, and a vendor of real estate that is charged with a general mortgage, who deposits with the notary, passing the title, valuable securities as a guarantee that he will procure the erasure of the same, incurs the risk of the deposit, and must stand the loss if the notary embezzles the securities. *Saloy v. Hibernia Nat. Bank*, 39 La. Ann. 90.

1. Recovery may be had on a notary's bond for his misfeasance in knowingly certifying the acknowledgment of a mortgagor who has not appeared before him or without reading it; and his liability cannot be made to depend upon whether the mortgagee might have redeemed a prior mortgage, and so reduced the damages. *People v. Colby*, 39 Mich. 456.

The sureties on the official bond of a notary public are liable for any loss or damage caused by his affixing his notarial paraph to any mortgage note which he knew to be forged. And any one injured by his act has a right of action on the bond against his sure-

ties. 1877, *Rochereau v. Jones*, 29 La. Ann. 82.

2. **Assuming Personal Knowledge of a Grantor.**—When the notary, in certifying to "personal knowledge," assumes it, he does so at his own risk. The law warns him, when he has not such actual personal knowledge of his own, to resort to certain precautions to prevent imposition. The very lowest of these observances is proof by two witnesses, who possess such knowledge of the identity of the grantor. *State v. Meyer*, 2 Mo. App. 413.

3. A notary public, who, in taking acknowledgment of deed, certifies that he is personally acquainted with the grantor when he is not, is liable, if the person acknowledging is an impostor, to all the damages which may be caused by his certificate. It is not a defence that he believed the certificate was true. His official duty is, where he has not personal knowledge of the identity, to ascertain it by credible witnesses who are known to him. *State v. Meyer*, 2 Mo. App. 413.

**May Swear Grantor in His Own Behalf.**—The petitioner appeared before a notary public to acknowledge the execution of a deed signed by one Bouchard as grantor. The notary having no personal knowledge of the petitioner, administered to him an oath, as a witness in his own behalf, for the purpose of determining whether he was the person who had signed the deed, and the petitioner testified that he was Bouchard, the person named in and who executed the deed. The petitioner having been committed by a magistrate to answer a charge of perjury in having falsely testified, sought a discharge on *habeas corpus*. It was held that the notary had the power to administer the oath to the petitioner, as a witness in his own behalf, and his testimony being

conduct the endorser is discharged;<sup>1</sup> or for failing to file a mortgage which he had drawn up and agreed to have recorded, where by reason of his neglect the party lost his security, from another mortgage having obtained priority on the record.<sup>2</sup> But, in all cases, the negligence complained of must be gross and palpable, or the act in question malicious or corrupt, and even then a party who sustains no loss therefrom has no right of recovery against the notary;<sup>3</sup> and a reasonable excuse for failing

material and false, he is not entitled to a discharge on *habeas corpus*. *Ex parte Carpenter*, 64 Cal. 267.

1. The failure of a notary public to give notice of protest of a promissory note is a breach of his official bond. *Tewis v. Randall*, 6 Cal. 632; s. c., 65 Am. Dec. 547.

A notary who employs another to make presentment of a foreign bill of exchange instead of doing it personally, and makes the protest and gives the notice of nonpayment in his own name, thereby failing to charge the endorser, is guilty of misconduct, which makes him liable, in *New York*, under the Revised Statutes 284, to the party injured for the damages sustained. *Commercial Bank v. Varnum*, 3 Lans. (N. Y.) 86.

**Security Given Upon False Assurance of Payment of the Note.**—Where the endorser of a negotiable note, after its protest for nonpayment, upon the note being shown him by the maker, with the false assurance that it was paid, delivered up to the latter a security which he held for his indemnity, the fact that such a security existed when the note was protested will not excuse the neglect of the notary to give notice of the dishonor to the endorser, nor relieve the notary in an action against him for damages. *Marston v. Bank of Mobile*, 10 Ala. 284.

2. Negligence of an attorney who was also a notary public, in failing to record a mortgage by filing it with the recorder within the time agreed upon, under a contract made by him "to deliver the mortgage to the recorder for record, and to cause the same to be recorded within ten days," is ground for a cause of action against him for damages incurred. The fact that the certificate of acknowledgment did not contain his seal as notary, when it was a part of his duty on his employment to draw up the mortgage and procure its acknowledgment, is no defence on the ground that

the mortgage, if it had been recorded would have been void. Such defence would be bad for another reason. He agreed to "cause the mortgage to be recorded," therefore it was his duty to annex his seal. *Stott v. Harrison*, 73 Ind. 17.

In a suit against the succession and the surety of a notary, to hold them liable on account of the latter's failure to register, reasonably, an act of mortgage, another act having been in the meantime recorded, cannot be sustained, when it is not alleged that the property has proved insufficient to pay the claims, or that the drawer of the note and the succession of the notary are insolvent; that the debt has not been paid, in whole or in part, and that injury has been suffered. It is not until such facts are alleged and proved, and the dereliction of duty by the notary is established, that damages like those claimed, can be recovered. *Dwyer v. Woulfe*, 40 La. Ann. 46.

3. Dereliction of duty must be wilful, where notary acts judicially, to render him liable. Therefore, for defectively taking and certifying a married woman's acknowledgment, that being a judicial act, the notary is not liable unless he acted maliciously or corruptly. *Henderson v. Smith*, 26 W. Va. 829; s. c., 53 Am. Rep. 139.

The liability of an officer for making a false certificate of acknowledgment is fixed by statute, and, to become liable therefor under the statute, he must make the false certificate, not only negligently, but "knowingly." *Scotten v. Fegan*, 62 Iowa 236.

The certificate of a notary of the acknowledgment of a deed or mortgage is a judicial and not a ministerial act; therefore, where an action is brought against a notary for a false certificate of acknowledgment, the presumption is that the defendant, acting in his judicial capacity, did so on reasonable information, and discharged his full duty. The burden is upon plaintiff to prove

to perform the act required may exonerate the officer from liability;<sup>1</sup> and the same is true where the party is himself at fault.<sup>2</sup>

To enable the plaintiff to maintain his action, the failure by

a clear and intentional dereliction of duty. *Com. v. Haines*, 97 Pa. St. 228; s. c., 39 Am. Rep. 805.

The negligence of a notary public in making his certificate of acknowledgment to a chattel mortgage, by reason of which the lien of the mortgage was lost, will not entitle a mortgagee to recover damages against him, when the property intended to be secured by the mortgage was wholly valueless. *McAllister v. Clement*, 75 Cal. 182.

Although a notary who gives defective notice is not liable to the holder, where the latter sustained no loss, or need not sustain any with ordinary attention to his case against the endorser, if the holder comes to trial in his action against the endorser without any intimation that the notice will be questioned, he may be deemed to be entitled to rest on the notice; and if defeated on that ground, his recovery against the notary may be sustained. *Franklin v. Smith*, 21 Wend. (N. Y.) 624.

The official act of taking and certifying the acknowledgment and privy examination of a married woman to a deed, whether done by a court, justice or notary, is in the nature of a judicial act; and therefore the officer is not liable in damages for such act, however imperfectly he may perform it, unless he acted from malicious, impure or corrupt motives. Where a notary takes and certifies the acknowledgment and privy examination of a married woman, but omits from the certificate the words, "declared she had willingly executed the same and does not wish to retract it," the certificate is fatally defective; yet, as it is not alleged in the declaration, or proved that the notary acted maliciously or corruptly, he is not liable in damages to the person injured for the loss occasioned by such invalid certificate. *Henderson v. Smith*, 26 W. Va. 829; s. c., 53 Am. Rep. 139.

1. An instrument not under seal, is not the character of security which is required to be given by the statute by notaries public. If such an instrument be considered as a good contract at common law, yet, as it is payable to the State, and not assigned to the plaintiff, the latter has no right of

action in his own name. *Castelee v. Cornwall*, 5 Cal. 419.

A forged B's name to a mortgage given to C, and, appearing before a notary, personated B, and acknowledged the instrument. The notary appended the usual certificate of acknowledgment, and C thereupon paid over to A the amount for which the pretended mortgage from B was given. Subsequently, on discovering the fraud, C sued the notary for having issued a false certificate of acknowledgment. On the trial, C showed that A had personated B, and then called the defendant, who testified: "I do not know B. The paper was undoubtedly signed before me. I don't remember that I did or did not take any precaution to identify the person making the acknowledgment, but I know I must have been satisfied at the time." *Held*, that under these circumstances, a nonsuit was rightly awarded. *Com. v. Haines*, 97 Pa. St. 228; s. c., 39 Am. Rep. 805.

**Need Not Make a Second Demand.—**

Where due demand upon the promisor had been made by a bank with which a note had been left for collection, *held*, that the notary, by whom the note was protested, was not liable for negligence in not making further demand. *Warren Bank v. Parker*, 8 Gray (Mass.) 221.

2. Therefore a party cannot recover from a notary public for having neglected to protest a note legally, when, by his own laches, he has put it out of his power to subrogate the notary to his rights as they existed at the date of protest. *Emmerling v. Graham*, 14 La. Ann. 390. *Compare Franklin v. Smith*, 21 Wend. (N. Y.) 624, where it was held that recovery could not be had against a notary for negligent omission to give notice of protest to an endorser where the holder could but would not resort to other grounds for fixing the endorser's liability. See also 1 *Sutherland on Damages* 154.

It is provided by the California Civil Code, that whenever a person has, by his own declaration or act, intentionally and deliberately led another to believe a particular thing true, and to act on such belief, he cannot, in any litigation arising out of such declaration or act,



the notary to perform his duty in the premises must have been the direct or proximate cause of the loss or damages sustained.<sup>1</sup> Where a notary acts as agent of a bank which has assumed the responsibility of collecting negotiable paper, the bank is primarily liable to the party injured by a failure of the notary to perform his duties in regard to protest and notice of dishonor.<sup>2</sup> Assuming without authority to act as a notary public may be punished as a usurpation of the office;<sup>3</sup> and where an action lies against the sureties of a notary, the statute of limitations as to them commences to run from the date of the default, and not from the

be permitted to falsify it. Therefore, where a person executing a mortgage has been introduced to a notary by the mortgagee's agent, and the notary sees the person so introduced execute the mortgage by signing it with the name given him by the mortgagee's agent, who witnesses the signature, the mortgagee cannot, on discovering that the mortgage was not executed by the owner of the land, sue the notary's sureties for his alleged negligence in taking and certifying to the acknowledgment of the pretended owner. *Overacre v. Blake*, 82 Cal. 77.

1. A went to a notary public and falsely representing himself to be B, executed a deed in B's name, and the notary took his acknowledgment, certifying that B was known to him, etc. A took the deed to a savings bond, and, on the strength of his representation and the bank's examination of the record procured money on a mortgage. The bank sued on the notary's bond. It was held that the action was *not* maintainable, the notary's negligence not being the proximate cause of the bank's loss. *Oakland Sav. Bank v. Murfey*, 68 Cal. 455. See also *People v. Butler*, 74 Mich. 643.

In the case of *People v. Butler*, 74 Mich. 643, a notary public applied to the attorney who was agent of plaintiff's intestate, and also acting as agent in the loaning of money of intestate, for a loan for his brother-in-law, A, on the latter's farm; the notary and the agent went together and examined the farm. They procured abstracts, and a day was fixed on which the parties should meet. On the day named the notary took the mortgage and the note, which the agent had prepared, to his house, where he claimed that A, his brother-in-law, was, and afterwards brought it back to the agent, with the names of the brother-in-law and his wife signed to it, and also a certificate of

acknowledgment by the notary. Upon his representation that he was authorized to receive the money, the agent paid it over to him and received in return the note and mortgage, which proved to be forgeries. Upon an action against the notary and his sheriff, it was held that the false certificate was *the proximate cause* of the loss, and that the surety on the notary's bond for the faithful discharge of his duties was therefore liable.

2. A bank receiving negotiable paper for collection undertakes that the necessary means shall be taken to charge the drawer, endorser or other parties, upon the default or refusal to pay or accept, and is liable for the neglect of the notary employed by it to purchase them, to give notice. *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Walker v. Bank of New York*, 9 N. Y. 582; *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Ayrault v. Pacific Bank*, 47 N. Y. 570; s. c., 6 Rob. (N. Y.) 337; s. c., 7 Am. Rep. 489.

This liability of the bank may be varied by express contract or general usage, but not by the practice of single banks adopted for their own convenience for the transaction of business. *Ayrault v. Pacific Bank*, 47 N. Y. 570; s. c., 7 Am. Rep. 489.

3. On the trial for falsely assuming and pretending to be a notary public, against one appointed by the governor, without the advice and consent of the senate, it was held to be error for the judge to instruct the jury "that if the defendant acted as a notary and was not legally entitled to do so, they should find him guilty unless he had reasonable ground to believe that he was entitled to exercise the functions of the office," the guilt or innocence of the accused depended upon his "belief, intent or honesty of purpose," and not on the reasonableness of such belief. *Brown v. State*, 43 Tex. 349.

time of its discovery by the plaintiffs.<sup>1</sup> So, in a similar action, the admissions of the notary, made since the right of action accrued, are not evidence against the defendants as sureties upon the notary's official bond.<sup>2</sup>

Where a notary is directed to protest a bill on the wrong day, he is not presumed to be a lawyer who is to revise or reverse the decision of his employer as to the character of the bill, and cannot be held liable for following his instructions.<sup>3</sup>

**1. Measure of Damages.**—In an action against a notary for failing to give notice of the dishonor of a paper according to his undertaking, the measure of damages must be the injury sustained by the neglect, in estimating which the solvency of the party to whom notice should have been given is a material element.<sup>4</sup>

**NOTES**—(See also **BILLS AND NOTES**; **SALES**; **MEMORANDUM**.)—A brief statement in writing; a memorandum.<sup>5</sup>

The certificate of a notary public as to the protest of a bill or note is not admissible against a defendant in a criminal case, as he is entitled to be confronted with the witnesses against him. *State v. Reidel*, 26 Iowa 430.

**1.** Thus, where a notary public fails to give to the endorser of a negotiable note the notice requisite to charge him, the statute of limitations of six years commences to run in favor of the sureties on his official bond from the date of the default, and not from the time of its discovery, or the ascertainment of the damage by the injured party. *Governor v. Gordon*, 15 Ala. 72.

In an action against a notary public and his sureties for damages sustained by reason of a false and fraudulent certificate of acknowledgment to a mortgage taken by the notary, it was alleged that the falsity of the fraudulent certificate was not discovered until a time stated, which was within the statute of limitations—*held*, that the cause of action accrued at the time of the making of the false certificate; and that on the face of the petition the action is barred. *Bartlett v. Bullens*, 23 Kan. 606.

**2. Admissions of Notary Not Evidence Against the Sureties.**—In an action against the surety on the official bond of the notary for breach of official duty, admissions of the notary subsequent to the act complained of, are not evidence against the surety. *Wheeler v. State*, 9 Heisk. (Tenn.) 393; *White v. German National Bank*, 9 Heisk. (Tenn.) 475; *Snell v. Allen*, 1 Swan (Tenn.) 208; *McNichol v. Philips*, 2

*Swan* (Tenn.) 384; *Young v. Hare*, 11 Humph. (Tenn.) 303.

**3.** *Commercial Bank v. Varnum*, 49 N. Y. 269.

**4.** *Bank of Mobile v. Marston*, 7 Ala. 108.

Where a mortgage debt has been lost by the negligence of a notary, the measure of damages is the amount of the debt and interest secured by the mortgage. *Fogarty v. Finlay*, 10 Cal. 239; s. c., 70 Am. Dec. 714.

**5.** *Anderson's Law Dict.*; *Clason v. Bailey*, 14 Johns. (N. Y.) 492.

**Note.**—"Note or memorandum in writing," § 17, Stat. of Frauds. For the numerous cases on this phrase, see *Add. C.* 172; *Rosc. N. P.* 475; *Benj.* 185-218; *Blackb.* 44-65. A telegram is within the phrase. *Godwin v. Francis*, L. R., 5 C. P. 295. See also **STATUTE OF FRAUDS**, 8 Am. & Eng. Encyc. of Law 710.

**Notes of Evidence.**—"Full notes of evidence" (§ 76 (7), 43 Vict., ch. 5, Canada) may be well taken in short-hand. *Riel v. The Queen*, 10 App. Ca. 675.

**Notes of Hand.**—See **HAND**, 9 Am. & Eng. Encyc. of Law 262.

**"Note Its Contents" or "Noted Its Contents."**—In the correspondence of merchants: "The terms note or noted its contents are used apparently in the first place as an acknowledgment of having perused the letter of their correspondent, and that the communications of the letter are understood and considered. The words are in their nature distributive, and are to be applied to the several subjects of the letter about to be answered. And in relation to the duties growing out of

these several subjects, they may, and often do, imply obligations; but we do not think they necessarily, *en proprio vigore*, import a promise which may be enforced at law. And it may perhaps be generally said, that when these words imply obligation, such obligations would exist by force of the law-merchant without the use of the words." *Wildes v. Fessenden*, 4 Met. (Mass.) 18.

"Notes" and "References."—In the New York act of April 9th, 1850, relating to the State law reports, "the word note has many significations. Among the fifteen definitions given of it by Webster, the greatest lexicographer of the English language that has yet appeared, the twelfth is this: 'Annotation; commentary; as the notes in Scott's Bible; to write notes on Homer.' This is the definition insisted on by the defendant's counsel, but which, for the reasons already assigned, I hold to be inadmissible. The third definition given by Dr. Webster is this: 'A short remark; a passage or explanation in the margin of a book;' and his fourth definition is this: 'A minute, memorandum, or short writing intended to assist the memory.' These are all the definitions which it is pertinent to notice, and the two last mentioned furnish, in my opinion, the proper guide in determining the scope of the word note in the statute."

In accordance with this, it was held that the term comprised the summary of points decided by the court, which immediately follows the title in each case, the foot notes and the arguments of counsel; but not the abstracts of the pleadings and statements of facts which form the basis of the decisions reported.

*Little v. Gould*, 2 Blatchf. (U. S.) 180. And see also *Little v. Gould*, 2 Blatchf. (U. S.) 362.

"Notes Used for Circulation."—Only negotiable promissory notes payable in money are subject to taxation as "notes used for circulation." *Hollister v. Zion's etc. Institution*, 111 U. S. 62.

**Bank Notes.**—See MONEY.

**Bought and Sold Note.**—See BROKERS, 2 Am. & Eng. Encyc. of Law 591; and STATUTE OF FRAUDS, 8 Am. & Eng. Encyc. of Law 714, n.

**Judge's Notes.**—See JUDGE, 12 Am. & Eng. Encyc. of Law 32, n. 2.

**Lost Notes.**—See LOST PAPERS, 13 Am. & Eng. Encyc. of Law 1059.

**Distinguished from Agreement.**—"The only difference between an 'agreement' and the 'note' of an agreement is, that in the one instance a formal agreement is meant, and in the other, something not so particular in form and technical accuracy, but still containing the essentials of the agreement." Per COCKBURN, C. J., *Williams v. Lake*, 29 L. J., Q. B. 3.

**Promissory Note.**—See also BILLS AND NOTES.

Where a statute providing that for purposes of taxation, bonds, notes, etc., shall be deemed personal property, a promissory note is excluded, though it bears no interest. *Hamersley v. Franey*, 39 Conn. 176.

**Lost Promissory Note.**—See 13 Am. & Eng. Encyc. of Law 1145.

**Raised Note.**—A negotiable promissory note increased in the amount called for on the face by fraudulent alteration. And, Law Dict. See also ALTERATION OF INSTRUMENTS, 1 Am. & Eng. Encyc. of Law 497.

**NOTICE**—(See ADVERSE POSSESSION; APPEAL; ARBITRATION AND AWARD; ASSIGNMENT; ATTACHMENT; BILLS AND NOTES; CARRIERS OF GOODS; DEMAND; DEPOSITIONS; FRAUDULENT CONVEYANCES; GUARANTY; HIGHWAYS; JUDICIAL NOTICE; JUDICIAL SALES; LANDLORD AND TENANT; LIS PENDENS; MOTIONS; MUNICIPAL CORPORATIONS; NEW TRIAL; PARTNERSHIP; RECORDING ACTS; SERVICE OF PROCESS; SPECIFIC PERFORMANCE; TRIAL).

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equivalent in its legal effects to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge.<sup>1</sup>

1. *Cleveland Woolen Mills v. Sibert*, 594; *Pringle v. Phillips*, 5 Sandf. (N. 81 Ala. 140, quoting 2 Pom. Eq. Jur., Y.) 157; *Wile v. Southbury*, 43 Conn.

53; *Cain v. Cox*, 23 W. Va. 504; *United States v. Foote*, 13 Blatchf. (U. S.) 420.

**Statutory Notice—Must be Written.**—"The rule is well settled, that where a notice is required or authorized by statute, in any legal proceeding, it means written notice." *Pearson v. Lovejoy*, 53 Barb. (N. Y.) 407; *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. (N. Y.) 107; *Miner v. Clark*, 15 Wend. (N. Y.) 429; *Lane v. Cary*, 19 Barb. (N. Y.) 539; *Matter of Cooper*, 15 Johns. (N. Y.) 533; *McEwen v. Montgomery Mut. Ins. Co.*, 5 Hill (N. Y.) 104; *People v. Croton Aqueduct Board*, 26 Barb. (N. Y.) 240; s. c., 6 Abb. Pr. (N. Y.) 56; *Rex v. Surry*, 5 B. & Ald. (Eng.) 539. *Compare Lee v. Bowman*, 55 Mo. 400.

"The statute required notice to be served in writing, and the court held the notice insufficient because it was not signed, but said that it was not prepared to hold that in certain cases the want of a signature might not be cured by service in person." *Eaton v. Manitowoc Co.*, 42 Wis. 317.

The act of Rhode Island (Digest of 1822, p. 246, § 3) provides "that no guardian shall be appointed or removed under this act, unless all persons interested shall have had reasonable notice in writing, signed by the clerk, and served by the town sergeant or constable, that he, she, or they may appear to object to the same." *Held*, that a notice by reading the order of the court is not a "notice in writing," in the sense of the statute, and that the appointment of a guardian, with such notice only, was a nullity. *Hart v. Gray*, 3 Sumn. (U. S.) 339.

A city ordinance, which requires the city council, before laying out a drain across private property, to "give notice in writing to the several owners" of the property, appointing a time and place for hearing all parties interested, and to post two or more copies of such notice at public places in the city, is complied with, by serving notice upon all known owners personally or at their usual places of abode, and publicly posting two copies thereof, and therein describing the premises as a passageway, without adding that they are private property. *Hildreth v. Lowell*, 11 Gray (Mass.) 345.

**Must be Actual.**—*Knapp v. Bailey*, 79 Me. 195; *Com. v. Martin*, 130 Mass. 465; *Winter v. Mannen*, 81 Ky. 123; *Ender v. Williams*, 1 Metc. (Ky.) 351.

**Must be Personal.**—"It is competent for the legislature to prescribe the mode and manner of giving notice, where they require as a condition precedent to the doing of an act that notice shall be given . . . In the absence of any such legislative provision [as to the manner of giving the notice] whenever the legislature requires notice to be given, it must be personal notice." *McDermott v. Board of Police*, 25 Barb. (N. Y.) 635; *Rathbun v. Acker*, 18 Barb. (N. Y.) 393; *St. Louis v. Goebel*, 32 Mo. 295; *People v. Lockport etc. R. Co.*, 13 Hun (N. Y.) 211.

**Must be Reasonable.**—Where a statute gives a summary remedy by motion, and is silent with respect to the notice to be given to the defendant, he is entitled to reasonable notice. And to support a judgment in such case it must appear affirmatively that such notice was given; and it is not sufficient that the record finds that the parties came by their attorneys. *Brown v. Wheeler*, 3 Ala. 287.

"Notice, in legal proceedings, means a written notice." *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. (N. Y.) 107; *Miner v. Clark*, 15 Wend. (N. Y.) 429; *Lane v. Cary*, 19 Barb. (N. Y.) 539; *Pearson v. Lovejoy*, 53 Barb. (N. Y.) 407; *Fry v. Bennett*, 7 Abb. Pr. (N. Y.) 352.

"The word 'notified' is generally, if not universally, used as importing a notice given by some person, whose duty it was to give it, in some manner prescribed, and to some person entitled to receive it, or to be notified." *Potwine's Appeal*, 31 Conn. 381.

**Due Notice.**—"The term 'due notice' is not susceptible of a fixed definition, and must be construed in each case by its circumstances." *Lawrence v. Bowman*, 1 McAll. (U. S.) 419.

Under a law requiring notice to be given in certain cases to the obligors in an execution bond, if such notice is so explicit as to render mistake impossible, it will be sustained, though liable to technical objections. *Alexander v. Brown*, 1 Pet. (U. S.) 683.

1. **Actual Notice.**—Notice is actual when one either has knowledge of a fact, or is conscious of having the means of knowledge, although he may not use them.<sup>1</sup> Actual notice may be divided into express and implied.

2. **Express notice** embraces not only what may fairly be called knowledge, from the fact that it is derived from the highest evidence to be communicated by the human senses; but also that which is communicated by direct and positive information, either written or oral, from persons who are personally cognizant of the fact communicated.<sup>2</sup>

3. **Implied Notice.**—The implication of notice arises when the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him, by the exercise of due diligence, to a knowledge of the principal fact.<sup>3</sup>

1. *Speck v. Riggis*, 40 Mo. 405; *Maupin v. Emmons*, 47 Mo. 304; *Vaughn v. Tracy*, 22 Mo. 417; *Lemay v. Poupenez*, 35 Mo. 71; *Roberts v. Moseley*, 64 Mo. 507; *Musick v. Barney*, 49 Mo. 458; *Masterson v. West End R. Co.*, 5 Mo. App. 64; *Porter v. Sevey*, 43 Me. 519; *Hull v. Noble*, 40 Me. 459; *Wilson v. Miller*, 16 Iowa 111; *Musgrove v. Bouter*, 5 Oreg. 313; *Curtis v. Mundy*, 3 Met. (Mass.) 405; *Williamson v. Brown*, 15 N. Y. 359; *Brinkman v. Jones*, 44 Wis. 498; *May v. Chapman*, 16 Mees. & W. 361.

**Restricted Meaning.**—Many of the courts have given a much narrower construction of the meaning of actual notice. In *Lamb v. Pierce*, 113 Mass. 72, it was held in construing a statute requiring "actual notice" that this was equivalent to actual knowledge of the fact itself, and that knowledge of facts sufficient to lead one to the principal fact was not enough. To the same effect are *Pomroy v. Stevens*, 11 Met. (Mass.) 244; *Parker v. Osgood*, 3 Allen (Mass.) 487; *Dooley v. Wolcott*, 4 Allen (Mass.) 406; *Sibley v. Leffingwell*, 8 Allen (Mass.) 584; *White v. Foster*, 102 Mass. 375; *Crassen v. Swoveland*, 22 Ind. 428; *Jordan v. Pollock*, 14 Ga. 145; *Van Metre v. Mitchell*, 2 Wall. Jr. (C. C.) 317.

**Such Notice as Makes Subsequent Action Fraudulent.**—It has been held in a number of cases that in order to constitute actual notice, the party to be charged shall have such information as would render any subsequent action, on his part, in contravention of the interest disclosed, fraudulent. *Dey v. Dunham*, 2 Johns. Ch. (N. Y.) 182; *Jackson v. Van Valkenburgh*, 8 Cow. (N. Y.) 260;

*M'Mechan v. Griffing*, 3 Pick. (Mass.) 149; s. c., 15 Am. Dec. 198; *Porter v. Sevey*, 43 Me. 519; *Loughridge v. Bowland*, 52 Miss. 546; *Lord v. Doyle*, 1 Cliff. (U. S.) 458; *Hine v. Doid*, 2 Atk. (Eng.) 275; *Jolland v. Stainbridge*, 3 Ves. (Eng.) 478.

**Distinction Between Notice and Knowledge.**—To constitute actual knowledge there must be direct and positive information of the fact itself, but a knowledge of such facts as will lead upon enquiry to actual knowledge is sufficient to constitute actual notice. *Cleveland Woolen Mills v. Sibert*, 81 Ala. 140; *Brinkman v. Jones*, 44 Wis. 498.

Actual notice, as applicable to conveyances, does not necessarily mean actual knowledge; the notice may be implied, and from indirect or circumstantial evidence. The doctrine of actual notice implied from circumstances supports the rule that if one has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further enquiries, and enquiry is avoided, the party is chargeable with notice of the facts, which by ordinary diligence he would have ascertained. *Knapp v. Bailey*, 79 Me. 195.

There is a difference between want of knowledge and the want of notice. *Clopton, J.*, in *Cleveland Woolen Mills v. Sibert* (Ala.), 1 So. Rep. 773, citing 2 Pom. Eq. Jur., § 594, on the subject of notice.

2. *Wade on Notice* (2nd ed.), p. 5.

3. "The doctrine of actual notice implied by circumstances (actual notice in the second degree) necessarily involves the rule that a purchaser before buying should clear up the doubts which apparently hang upon the title, by making

4. **Constructive notice**, properly so called, is the knowledge which the courts impute to a person upon a presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted, either from a duty to know, imposed by the law, or from his knowing something which ought to have put him upon further enquiry, or from his wilfully abstaining from enquiry to avoid notice.<sup>1</sup>

due enquiry and investigation. If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further enquiries, and he avoids the enquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained. He has no right to shut his eyes against the light before him. He does a wrong not to heed the 'signs and signals' seen by him. It may be well concluded that he is avoiding notice of that which he in reality believes or knows. Actual notice of facts which to the mind of a prudent man indicate notice is proof of notice." *Knapp v. Bailey*, 79 Me. 195.

1. *Espin v. Pemberton*, 3 De G. & J. (Eng.) 547.

"Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted." *Plumb v. Flintt*, 2 Anstr. (Eng.) 432; *Kennedy v. Green*, 3 My. & K. (Eng.) 699; *Hiern v. Mill*, 13 Ves. (Eng.) 121; *Nelson v. Allen*, 1 Yerg. (Tenn.) 367; *Townsend v. Little*, 109 U. S. 504.

One who purchases land from an administrator, and takes a deed made by the administrator in that capacity, is chargeable with notice of the trust. *Rafferty v. Mallory*, 3 Biss. (U. S.) 362.

Notice that a person claims an interest, as heir in land which has been devised to another, on the ground that the will is invalid, is no notice that such person also claims an interest in the land under such will. *Bates v. Gillett* (Ill.), 24 N. E. 611.

"Constructive notice is a legal inference from established facts, and when the facts are not controverted, or the alleged defect or infirmity appears on the face of the instrument, and is a matter of ocular inspection, the question is one for the court . . . The rights of a purchaser are not to be affected by constructive notice, unless it clearly appear that the enquiry suggested by the facts disclosed at the time

of the purchase would, if fairly pursued, result in the discovery of the defect existing, but hidden at the time. There must appear to be, in the nature of the case, such a connection between the facts discovered and the further facts to be discovered, that the former may be said to furnish a clue, a reasonable and natural clue, to the latter." *Birdsall v. Russell*, 29 N. Y. 249; *Page v. Waring*, 76 N. Y. 463; *Clafin v. Lenheim*, 66 N. Y. 306. See also *Williamson v. Brown*, 15 N. Y. 354; *Cambridge Valley Bank v. Delano*, 48 N. Y. 326; *Booth v. Barnum*, 9 Conn. 286; s. c., 23 Am. Dec. 339; *French v. Loyal Land Co.*, 5 Leigh (Va.) 627.

**Two Kinds of Constructive Notice.**—In *Griffith v. Griffith*, Hoff. Ch. (N. Y.) 153, it is said that "constructive notice is of two kinds—that which arises upon testimony and that which results from a record." Instances of the latter are the contents of all public records which are declared to be notice to all persons. The former embraces those cases in which notice arises from facts not in themselves conclusive, but may be so construed by the law according to peculiar circumstances.

**The principle of the doctrine of constructive notice** is that when a person is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an enquiry into the facts is a moral duty, and diligence an act of duty. Hence he proceeds at his peril when he omits to enquire, and is chargeable with a knowledge of all the facts that by a proper enquiry he might have ascertained. This neglect is followed by all the consequences of bad faith, and he loses the protection to which his ignorance, had it not proceeded from neglect, would have entitled him. *Pringle v. Phillips*, 5 Sandf. (N. Y.) 157.

**When the Doctrine is Applied.**—The principle of constructive notice is always resorted to in order to prevent the person having it from doing an act to the injury of another, and does not apply



(a) **DISTINCTION BETWEEN IMPLIED AND CONSTRUCTIVE NOTICE.**—The distinction between implied and constructive notice is, that implied notice is always a question of fact and may be rebutted, while constructive notice is a question of law which *cannot* be rebutted.<sup>1</sup>

**II. WHAT WILL CHARGE WITH NOTICE.**—Whatever puts a party upon enquiry amounts, in judgment of law, to notice, provided the enquiry becomes a duty, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding.<sup>2</sup>

where the question is, whether one was barred by his assent to a fraud practiced on him. *Spencer v. Spencer*, 3 Jones Eq. (N. Car.) 404.

"Constructive notice is resorted to from the necessity of finding a ground of preference between equities otherwise equal, but cannot be applied in support of a charge of direct personal fraud." *Wilde v. Gibson*, 1 H. L. Cas. (Eng.) 605; 12 Jur. 527, reversing s. c., *sub. nom.* *Gibson v. D'Este*, 2 G. & Coll. (Eng.) 542; 8 Jur. 94. See also *Gill v. Hardin*, 48 Ark. 412; *Groton Sav. Bank v. Batty*, 30 N. J. Eq. 131.

The law of constructive notice can never be so applied as to relieve a party from responsibility for actual misstatements and frauds. *Converse v. Blumrich*, 14 Mich. 109; s. c., 90 Am. Dec. 230.

1. *Drey v. Doyle*, 99 Mo. 459.

2. *Lodge v. Simonton*, 2 P. & W. (Pa.) 439; s. c., 23 Am. Dec. 36; *Webb v. Robbins*, 77 Ala. 176; *Center v. Planters' etc. Bank*, 22 Ala. 743; *Hoyt etc. Mfg. Co. v. Turner*, 84 Ala. 523; *Boggs v. Price*, 64 Ala. 514; *Tompkins v. Henderson*, 83 Ala. 391; *Kyle v. Ward*, 81 Ala. 120; *Le Grand v. Eufaula Nat. Bank*, 81 Ala. 123; *Brewer v. Browne*, 68 Ala. 210; *McGehee v. Gindrat*, 20 Ala. 95; *Mobile etc. R. Co. v. Felrath*, 67 Ala. 189; *Hodges v. Coleman*, 76 Ala. 103; *Wiley v. Knight*, 27 Ala. 336; *Ringgold v. Waggoner*, 14 Ark. 69; *Bolles v. Chauncey*, 8 Conn. 389; *Sigourney v. Munn*, 7 Conn. 325; *Booth v. Barnum*, 9 Conn. 286; s. c., 23 Am. Dec. 339; *Peters v. Goodrich*, 3 Conn. 146; *Boswell v. Goodwin*, 31 Conn. 84; s. c., 81 Am. Dec. 169; *Filmore v. Reithman*, 6 Colo. 120; *Bradford v. Carpenter*, 13 Colo. 30; *Galland v. Jackman*, 26 Cal. 79; s. c., 85 Am. Dec. 172; *Wright v. Ross*, 36 Cal. 414; *Gress v. Evans*, 1 Dak. Ter. 387; *Foster v. Ambler*, 24 Fla. 519; *Matthews v.*

*Poythress*, 4 Ga. 287; *Planters' Rice Mill Co. v. Olmstead*, 78 Ga. 586; *Heaton v. Prather*, 84 Ill. 330; *Hewitt v. Clark*, 91 Ill. 605; *Ætna L. Ins. Co. v. Ford*, 89 Ill. 252; *Lumbard v. Abbey*, 73 Ill. 178; *Chicago v. Witt*, 75 Ill. 214; *Chicago etc. R. Co. v. Kennedy*, 70 Ill. 350; *Erickson v. Rafferty*, 79 Ill. 209; *Stokes v. Riley*, 121 Ill. 166; *Doyle v. Teas*, 5 Ill. 202; *Shepardson v. Stevens*, 71 Ill. 646; *Hankinson v. Barbour*, 29 Ill. 80; *Redden v. Miller*, 95 Ill. 336; *Hunter v. Stoneburner*, 92 Ill. 75; *Russell v. Ranson*, 76 Ill. 167; *Watt v. Scofield*, 76 Ill. 261; *Morrison v. Kelly*, 22 Ill. 610; s. c., 74 Am. Dec. 169; *Cox v. Milner*, 23 Ill. 476; *Indiana etc. R. Co. v. McBroom*, 114 Ind. 108; s. c., 33 Am. & Eng. R. Cas. 90; *Wilson v. Hunter*, 30 Ind. 466; *Case v. Bumstead*, 24 Ind. 429; *Moreland v. Lemasters*, 4 Blackf. (Ind.) 383; *Wallace v. Furber*, 62 Ind. 103; *Wilson v. Hunter*, 30 Ind. 466; *Clark v. Holland*, 72 Iowa 34; *Coleman v. Reel*, 75 Iowa 304; *Leas v. Garverich*, 77 Iowa 275; *Wilson v. Miller*, 16 Iowa 111; *Hull v. Noble*, 40 Me. 459; *Jacob Dold Packing Co. v. Ober* (Md.), 18 Atl. Rep. 34; *Ringgold v. Bryan*, 3 Md. Ch. 488; *Stockett v. Taylor*, 3 Md. Ch. 537; *Price v. McDonald*, 1 Md. 403; s. c., 54 Am. Dec. 661; *Hardy v. Summers*, 10 Gill & J. (Md.) 324; s. c., 32 Am. Dec. 167; *Baynard v. Norris*, 5 Gill (Md.) 483; s. c., 46 Am. Dec. 647; *Baxter v. Sewell*, 3 Md. 334; *Michigan Mut. L. Ins. Co. v. Conant*, 40 Mich. 530; *Allen v. Cadwell*, 55 Mich. 8; *Atty. Gen. v. Smith*, 31 Mich. 359; *James v. Brown*, 11 Mich. 25; *Wilcox v. Hill*, 11 Mich. 256; *Hanover F. Ins. Co. v. Ames*, 39 Minn. 150; *Morrison v. March*, 4 Minn. 422; *Plant v. Shryock*, 62 Miss. 821; *Parker v. Foy*, 43 Miss. 260; s. c., 55 Am. Rep. 484; *McLeod v. First Nat. Bank*, 42 Miss. 99; *Loughridge v. Bowland*, 52 Miss. 546; *Rollins v. Callender*,

Freem. Ch. (Miss.) 295; Meler v. Blume, 80 Mo. 179; Bartlett v. Glasscock, 4 Mo. 62; May v. Hauks, Phill. Eq. (N. Car.) 310; Blackwood v. Jones, 4 Jones Eq. (N. Car.) 54; Pearson v. Daniel, 2 Dev. & B. Eq. (N. Car.) 360; Bunting v. Ricks, 2 Dev. & B. Eq. (N. Car.) 130; s. c., 32 Am. Dec. 699; Warren v. Swett, 31 N. H. 332; Dow v. Sayward, 14 N. H. 9; Parker v. Connor, 93 N. Y. 118; s. c., 45 Am. Rep. 178; Ellis v. Horeman, 90 N. Y. 466; Williamson v. Brown, 15 N. Y. 354; Howard Ins. Co. v. Halsey, 4 Sandf. (N. Y.) 578; Kellogg v. Smith, 26 N. Y. 18; Tuttle v. Jackson, 6 Wend. (N. Y.) 213; s. c., 21 Am. Dec. 306; Grimstone v. Carter, 3 Paige (N. Y.) 421; s. c., 24 Am. Dec. 230; Jackson v. Post, 15 Wend. (N. Y.) 588; Reed v. Gannon, 50 N. Y. 345; Fassett v. Smith, 23 N. Y. 252; Brown v. Taber, 5 Wend. (N. Y.) 566; Anderson v. Nicholas, 28 N. Y. 600; Schutt v. Large, 6 Barb. (N. Y.) 382; Reynolds v. Darling, 42 Barb. (N. Y.) 423; Butler v. Viele, 44 Barb. (N. Y.) 68; Merithew v. Andrews, 44 Barb. (N. Y.) 207; Lamont v. Cheshire, 65 N. Y. 30; Pendleton v. Fay, 2 Paige (N. Y.) 202; Hawley v. Cramer, 4 Cow. (N. Y.) 717; Swarthout v. Curtis, 5 N. Y. 301; Jackson v. Cadwell, 1 Cow. (N. Y.) 622; Baker v. Bliss, 39 N. Y. 70; Pitney v. Leonard, 1 Paige (N. Y.) 461; Bradlee v. Whitney, 108 Pa. St. 362; Mulliken v. Graham, 72 Pa. St. 484; Barnes v. McClinton, 3 P. & W. (Pa.) 67; s. c., 23 Am. Dec. 62; Hill v. Epley, 31 Pa. St. 331; Sergeant v. Ingersoll, 15 Pa. St. 343; Butcher v. Yocum, 61 Pa. St. 168; s. c., 100 Am. Dec. 625; Wilson v. McCullough, 23 Pa. St. 440; s. c., 62 Am. Dec. 347; Knouff v. Thompson, 16 Pa. St. 357; Jacques v. Weeks, 7 Watts (Pa.) 267; Epley v. Witherow, 7 Watts (Pa.) 167; Maul v. Rider, 59 Pa. St. 167; Reeves v. Sims, 10 S. Car. 308; Gibbs v. Cobb, 7 Rich. Eq. (S. Car.) 54; Payne v. Abercrombie, 10 Heisk. (Tenn.) 161; Wethered v. Boon, 17 Tex. 143; Powell v. Haley, 28 Tex. 52; Mayfield v. Averitt, 11 Tex. 140; Hart v. McDade, 61 Tex. 209; Bacon v. O'Connor, 25 Tex. 213; Rorer Iron Co. v. Trout, 83 Va. 397; Morgan v. Fisher, 82 Va. 417; Robinson v. Crenshaw, 84 Va. 348; Graff v. Castleman, 5 Rand. (Va.) 207; s. c., 16 Am. Dec. 741; Town of Woodbury v. Bruce, 59 Vt. 624; Blarsdell v. Stevens, 16 Vt. 179; Stafford v. Ballou, 17 Vt. 329; M'Daniels v. Flower Brook Mfg. Co., 22 Vt. 274; Stevens v. Good-

enough, 26 Vt. 676; Fidelity Ins. etc. Co. v. Shenandoah Valley R. Co., 32 W. Va. 244; Lamont v. Stimson, 5 Wis. 447; Parker v. Kane, 4 Wis. 16; s. c., 65 Am. Dec. 283; De Witt v. Perkins, 22 Wis. 473; Helms v. Chadbourne, 45 Wis. 60; Hamlin v. Wright, 26 Wis. 50; Brown v. Peck, 2 Wis. 261; Oliver v. Piatt, 3 How. (U. S.) 333; Hinde v. Vattler, 1 McLean (U. S.) 110; Tardy v. Morgan, 3 McLean (U. S.) 358; Godfrey v. Beardsley, 2 McLean (U. S.) 412; Carr v. Hilton, 1 Curt. (U. S.) 390; United States v. Sturgess, 1 Paine (U. S.) 525; Lowry v. Commercial & Farmers' Bank, 3 Am. L. J. 111, Almy v. Wilbur, 2 Woodb. & M. (U. S.) 371; Leavenworth Co. v. Chicago etc. R. Co., 18 Fed. Rep. 209; s. c., 12 Am. & Eng. R. Cas. 354; Peirce v. United States, Ct. of Cl. 270; Flagg v. Mann, 2 Sumn. (U. S.) 486; Hoxie v. Carr, 1 Sumn. (U. S.) 173; Dueber Watch Case Mfg. Co. v. Dalzell, 38 Fed. Rep. 597; Trask v. Jacksonville etc. R. Co., 124 U. S. 515; Duncan v. Mobile etc. R. Co., 3 Woods (U. S.) 567; Whitbread v. Jordan, 1 G. & Coll. (Eng.) 303; Kennedy v. Green, 3 My. & K. (Eng.) 699; Smith v. Low, 1 Atk. (Eng.) 490; Jones v. Smith, 1 Harr. (Eng.) 43; s. c., 11 L. J., N. S., Ch. 33; 6 Jur. 8; aff'd 1 Ph. 244; 12 L. J., N. S., Ch. 381.

**Suspicious Circumstances.**—A sale of property under circumstances in themselves suspicious, such as for a very inadequate price, will be held sufficient to charge a party with notice. *Singer v. Jacobs*, 3 McCrary (U. S.) 638; *Runkle v. Gaylord*, 1 Nev. 123; *Hoyt v. Hoyt*, 8 Bosw. (N. Y.) 511; *Beadles v. Miller*, 9 Bush (Ky.) 405; *Eck v. Hatcher*, 58 Mo. 235; *Hoppin v. Doty*, 25 Wis. 573; *Tillinghast v. Champlin*, 4 R. I. 173; s. c., 67 Am. Dec. 510. But it was held in *Le Gierse v. Whitehurst*, 66 Tex. 244, that unless a merchant who sells his stock of goods is insolvent, the character of the sale does not necessarily put the purchaser on enquiry.

**Subsequent Transactions.**—Notice to a party, actual or constructive, in a particular transaction, of a fact which exempts a defendant from liability in that transaction, is notice of all subsequent transactions of the same character between the same parties. *Cox v. Pearce*, 112 N. Y. 637. Compare *Hamilton v. Royce*, 1 Sch. & Lef. (Eng.) 315; *Warrick v. Warrick*, 3 Atk. (Eng.) 294.

**Withdrawal of Deed After Filing.**—The

statement of the fact that a deed was filed for record, but that before being recorded it was withdrawn is sufficient to put a third party, who proposed to purchase the property, upon enquiry. *Lawton v. Gordon*, 37 Cal. 202.

**Refusal to make full and ordinary assurance** is sufficient to excite suspicion and put the party upon enquiry. *Woodfolk v. Blount*, 3 Hayw. (Tenn.) 147; s. c., 9 Am. Dec. 736. So also a refusal to give a general warranty of title is sufficient to put one on enquiry. *Lowry v. Brown*, 1 Coldw. (Tenn.) 456.

**Provision for Liens.**—Where provision is made, in a sale of land, for a credit for an amount sufficient to satisfy such claims as shall be ascertained to be legally chargeable as liens thereon, sufficient notice of an attorney's lien is afforded. *Fry v. Calder*, 74 Ga. 7.

**Inaccurate Description.**—A mortgage of "one bay horse, eight years old, weight about 1,200," describes the horse sufficiently to put a purchaser on enquiry even though the horse is in fact many years older. *Peters v. Parsons*, 18 Neb. 191.

**Statement of Debtor.**—The mere statement of a debtor to his creditor, who is enquiring after the debtor's property, with a view to compelling payment of his debt out of it, that his property or any particular part of it is mortgaged for all it is worth, is not notice of the existence of any particular mortgage, so as to give an unrecorded mortgage precedence over a judgment subsequently obtained. *Condit v. Wilson*, 36 N. J. Eq. 370.

**Notice of intention to execute a deed** is not notice of the contents of the deed as executed. *Ponder v. Scott*, 44 Ala. 241; *Cothay v. Sydenham*, 2 Bro. C. C. (Eng.) 391.

**All Other Lands in the State.**—A conveyance of lands without description of boundary or location, but merely as "all other lands owned by the vendor in the State of Louisiana," is not notice as to any particular tract conveyed. *Green v. Witherspoon*, 37 La. An. 751.

**Facts Held Insufficient to Charge with Notice—Equitable Interest of Devisee.**—Where, after the estate in fee of a widow had become, by her election to take under her husband's will, reduced to a life estate, with an equitable fee in remainder to her grandson, she mortgaged the premises, *held*, that the probate of the will and her election was not constructive notice to the mortgagee of the grandson's equitable interest, and

that the mortgage was the first lien. *Hibbs v. Union Central Life Ins. Co.*, 40 Ohio St. 543.

**Incorrect Description.**—The fact that a purchaser of land, known as section 21, residing ten miles therefrom, had, seventeen years before, resided in the vicinity—*held*, not to put him on enquiry as to a mortgage conveying the same as section 19. *Slattery v. Rafferty*, 93 Ill. 277.

**Overdue Coupons.**—The mere fact that coupons for interest upon bonds of a municipal corporation are overdue and unpaid when such coupons are purchased is not of itself sufficient, without other circumstances, to put the purchaser on his guard, to charge such purchaser with notice of defences to the bonds, especially where the record shows that the sale of the bonds, during all of the time when the coupons were maturing, was restrained by an injunctive order, which was dissolved after the coupons had become due, but before the purchase of the same. *Prebble v. Portage Co.*, 8 Biss. (U. S.) 358. See also 4 Am. & Eng. Encyc. of Law 438.

**Real Estate the Property of Partnership.**—The fact that real estate is purchased with money of a firm and title taken in the name of the firm is not sufficient to charge with notice that it is held as partnership property. To accomplish this as to strangers, purchasers, mortgagees and creditors it should be expressed in the deed or in some instrument to that effect duly executed and recorded. *Kepler v. Erie Dime Sav. Bank*, 101 Pa. St. 602; *Lefevre's Appeal*, 69 Pa. St. 122; s. c., 8 Am. Rep. 229.

**Change of Partnership Name.**—The change of the name of a partnership from "Davis Creamery" to "Beloit Creamery" does not import notice that D. J. Davis has retired from the firm, nor does it, aided by the fact that, whereas checks were formerly signed "Davis Creamery by W. J. Davis," after the change they were signed simply "W. J. Davis." *Coggswell v. Davis*, 65 Wis. 191.

**Unrecorded Mortgage on Crop.**—Knowledge of the existence of a debt for unpaid purchase money of land does not affect a purchaser of cotton grown thereon with notice of an unrecorded mortgage to secure said purchase money. *Bell v. Tyson*, 74 Ala. 353.

**Verdict, but No Judgment Entered.**—One buying land is not bound to notice a verdict, the judgment, which

**1. Duty of One Put on Enquiry.**—It becomes the duty of one who has received knowledge of such facts as should put him on enquiry to make such enquiry with all due diligence and in good faith, and anything short of this will impose upon the negligent party the same liability as though he had acted with full knowledge of all that the enquiry would have disclosed.<sup>1</sup> The question of diligence in making enquiry is one of law, and should not be submitted to the jury.<sup>2</sup>

**2. Limitation of the Rule.**—The rule, as stated above, has been limited by many of the courts to those cases only where the failure to make the enquiry suggested amounts to gross negligence.<sup>3</sup> A mere suspicion of notice is not sufficient to charge one with the consequences of notice.

**3. When Due Enquiry Has Been Made.**—If one who has been put upon enquiry investigates the matter diligently and in good faith, but is unsuccessful in his search, he will be protected as a *bona fide* purchaser.<sup>4</sup>

may create a lien, not having been rendered. *Miller v. Wolf*, 63 Iowa 233; *Ware v. Lord Egmont*, 4 DeG. M. & G. (Eng.) 460; *Fort v. Burch*, 6 Barb. (N. Y.) 78; *Peck v. Mallams*, 10 N. Y. 518; *Bugbee's Appeal*, 110 Pa. St. 331; *Simms v. Morse*, 2 Fed. Rep. 325; *Hine v. Dodd*, 2 Atk. (Eng.) 275. Compare *Burnham v. Brennan*, 42 N. Y. Super. Ct. 51.

**Paying Extraordinary Rate of Discount.**—Where A, being engaged in extensive business operations, pays an extraordinarily large discount for a loan, such fact is not notice, to the parties making the loan, of his insolvency, although commercial paper similar to A's was at the same time selling at high rates, if it appear that A's pressing need of money, by reason of his desire to hold large quantities of salable products for more favorable prices, was not inconsistent with his pretensions as a man of means. *Golson v. Neihoff*, 5 Nat. Bank Reg. 56.

1. *Foster v. Stallworth*, 62 Ala. 547; *Bryan v. Tormey* (Cal.), 21 Pac. Rep. 725; *Filmore v. Reithman*, 6 Colo. 120; *Walker v. Dement*, 42 Ill. 272; *Hoopeston Building Assoc. v. Green*, 16 Ill. App. 204; *Cox v. Milner*, 23 Ill. 476; *Doyle v. Teas*, 5 Ill. 202; *Stokes v. Riley*, 121 Ill. 166; *Bernard v. Scott*, 12 La. An. 489; *Oliver v. Sanborn*, 60 Mich. 346; *Price v. McDonald*, 1 Md. 403; s. c., 54 Am. Dec. 657; *Williamson v. Brown*, 15 N. Y. 354; *Sergeant v. Ingersoll*, 15 Pa. St. 343; s. c., 7 Pa. St. 340; *Maybin v. Kirby*, 4 Rich. Eq. (S. Car.) 105; *Cook v. Garza*, 13 Tex. 431;

*Bacon v. O'Connor*, 25 Tex. 213; *Blaisdell v. Stevens*, 16 Vt. 179; *Atterbury v. Willis*, 39 Eng. L. & Eq. 175.

**Reasonable Time to be Given.**—One put upon enquiry is to be allowed a reasonable time to make it before he is held chargeable with notice. *Carr v. Hilton*, 1 Curt. (U. S.) 390.

2. *Pollak v. Davidson*, 87 Ala. 551. Compare *Nute v. Nute*, 41 N. H. 60.

3. In *Acer v. Westcott*, 46 N. Y. 384; s. c., 7 Am. Rep. 355, *PECKHAM, J.*, quoting from *Jones v. Smith*, 1 Phila. (Pa.) 244, and commenting said: "'Undoubtedly in the present case a cautious, prudent, circumspect person would not have advanced the money without the production of the deed. But that is not the principle on which cases of this sort have been decided.' Again 'I do not consider this a case of gross negligence; but the party having only omitted that caution which a prudent, wary and cautious person might and probably would have adopted,' is not to be charged with notice. The majority of men are not 'wary,' and where no bad faith is found the law does not usually require such conduct as can be expected only from the 'wary' to protect an innocent purchaser from loss." *Buttrick v. Holden*, 13 Met. (Mass.) 355; *Jackson v. Van Valkenburgh*, 8 Cow. (N. Y.) 260; *Woodworth v. Paige*, 5 Ohio St. 70; *Briggs v. Rice*, 130 Mass. 50; *Dexter v. Harris*, 2 Mason (U. S.) 531; *Willis v. Vallette*, 4 Metc. (Ky.) 186; *Ware v. Lord Egmont*, 4 DeG. M. & G. (Eng.) 460.

4. *McGehee v. Gindrat*, 20 Ala. 95;

**4. Question for the Jury.**—As to whether the circumstances are sufficient to charge one with notice is a question for the jury,<sup>1</sup> and should always be strictly proven.<sup>2</sup>

**5. Statements by Interested Parties and Third Persons.**—A direct statement by one having a right, or by his representative, of the existence of such right is sufficient to charge a person with notice.<sup>3</sup> If a person about to acquire a right receives information from a third party tending to show the existence of a prior adverse right, which information, considering its character and source, is sufficient, if acted upon with reasonable diligence, to lead to a discovery of such right, then the reasonable inference is that the interested party acquired such knowledge, and he will be chargeable with notice thereof.<sup>4</sup> When a person has been put

*Gregory v. Savage*, 32 Conn. 250; *Bell v. Davis*, 75 Ind. 314; *Cavin v. Middleton*, 63 Iowa 618; *Barnard v. Campau*, 29 Mich. 165; *Schweiss v. Woodruff*, 73 Mich. 473; *Massie v. Greenhow*, 2 Patt. & H. (Va.) 255; *Hewitt v. Lovsemore*, 9 Eng. L. & Eq. 35.

1. *Chiles v. Conley*, 2 Dana (Ky.) 21; *Schutt v. Large*, 6 Barb. (N. Y.) 373; *Nute v. Nute*, 41 N. H. 60.

2. *Rogers v. Wiley*, 14 Ill. 65; s. c., 56 Am. Dec. 491; *M'Mechan v. Griffing*, 3 Pick. (Mass.) 149; s. c., 15 Am. Dec. 198; *Emmons v. Murray*, 16 N. H. 385.

3. *Filmore v. Reithman*, 6 Colo. 120; *Wilson v. Miller*, 16 Iowa 111; *Davis v. Kennedy*, 105 Ill. 305; *Nelson v. Sims*, 23 Miss. 383; s. c., 57 Am. Dec. 144; *Wailles v. Cooper*, 24 Miss. 208; *Jackson etc. R. Co. v. Davison*, 65 Mich. 437; *Hosley v. Holmes*, 27 Mich. 415; *Bartlett v. Glasscock*, 4 Mo. 62; *Mense v. McLean*, 13 Mo. 298; *Barnes v. McClinton*, 3 P. & W. (Pa.) 67; s. c., 23 Am. Dec. 62; *Ripple v. Ripple*, 1 Rawle (Pa.) 386; *Lewis v. Bradford*, 10 Watts (Pa.) 67; *Ingram v. Phillips*, 3 Strobb. L. (S. Car.) 565.

**Notice by Owner When Title Is in Dispute.**—Notice of the true owner's claim to property, given while the title was in dispute to one who assisted by request of the other claimant in removing it, was held, in an action for indemnity by such assistant, not to be conclusive evidence that the assistant knew that the property was not in his employer. *Avery v. Halsey*, 14 Pick. (Mass.) 174.

**Statement Made a Long Time Before.**—O was the creditor of H. T having purchased land of H consulted O and asked his opinion of the transaction. Subsequently O examined the record to ascertain what property H possessed upon which he might levy, and found

that the title to the property appeared to be in H, but that there was a mortgage from T to H. The court held that while the information given by T to O, about two years before, in relation to the purchase of the land, would not of itself be sufficient after such a lapse of time, the facts disclosed by the record were sufficient to recall the circumstance to the memory of O, and that he was chargeable with both actual and constructive notice. *Ogden v. Haven*, 24 Ill. 57.

4. *Parkhurst v. Hosford*, 21 Fed. Rep. 827; s. c., 10 Sawy. (U. S.) 401; *Lawton v. Gordon*, 37 Cal. 202; *Cox v. Milner*, 23 Ill. 476; *Rupert v. Mark*, 15 Ill. 542; *Pittman v. Sofley*, 64 Ill. 155; *Wilson v. Miller*, 16 Iowa 111; *Currens v. Hart*, Hard. (Ky.) 41; *Curtis v. Mundy*, 3 Met. (Mass.) 405; *Maupin v. Emmons*, 47 Mo. 304; *Deetjen v. Richter*, 33 Kan. 410; *Pearson v. Daniel*, 2 Dev. & B. Eq. (N. Car.) 360; *Winborn v. Gorrell*, 3 Ired. Eq. (N. Car.) 117; s. c., 40 Am. Dec. 456; *Butcher v. Yocum*, 61 Pa. St. 168; s. c., 100 Am. Dec. 625; *Mulliken v. Graham*, 72 Pa. St. 484; *Lewis v. Bradford*, 10 Watts (Pa.) 67; *Quinlan v. Pierce*, 34 Wis. 304; *Lloyd v. Banks*, L. R., 3 Ch. App. 488; 37 L. J. R., N. S. 881.

**Source Immaterial.**—"It is not material in what manner information is acquired so long as it be shown that the party had knowledge at the time of the transaction." *Philips v. Bank of Lewistown*, 18 Pa. St. 394; *Trefts v. King*, 18 Pa. St. 157; *Lewis v. Bradford*, 10 Watts (Pa.) 67; *Rowan v. Adams*, 1 Smed. & M. (Miss.) 624; *Roberts v. Stanton*, 2 Munf. (Va.) 129; s. c., 5 Am. Dec. 463; *Tucker v. Constable*, 16 Oreg. 407.

**Such Knowledge as Men Usually Act**

upon enquiry he does not fulfil his obligation by simply making enquiry of one whose interest would induce him to misrepresent matters;<sup>1</sup> but, on the other hand, there are cases in which one acquiring a right is justified in relying upon the representations made by his vendor.<sup>2</sup> The information must be credible in its character and source, and sufficiently circumstantial to furnish one with a palpable clue or guide by means of which the truth may be ascertained; mere general statements or vague reports and rumors are insufficient.<sup>3</sup>

**On.**—"It is notice, not knowledge, which is required, and it can only be required to be such as men usually act upon in the ordinary affairs of life; and whenever it is sufficient to direct the attention of a purchaser to the prior rights or equities of third persons, and to enable him to ascertain their nature by enquiry, should be held sufficient." *Willcox v. Hill*, 11 Mich. 256.

"In equity, a purchase with notice of a secret trust is regarded as a fraud, and therefore it must be made out by clear proof of actual notice. 'My opinion is,' said DUNCAN, J., in *Peebles v. Reading*, 8 S. & R. (Pa.) 484, 'that in such a case the notice should be actual, circumstantial in the transaction and by the party in interest. It must be proved that he knew exactly the state of the party having the equity, and knowing that, acquired the legal estate. Nothing short of this, which is actual fraud, will postpone his legal title; and the fraud must be very clearly proved.' This is a pretty strong statement of the rule, and must be taken with the modification settled in subsequent cases already referred to, that what is sufficient to lead to the fact is notice of the fact." *Wilson v. McCullough*, 23 Pa. St. 440; s. c., 62 Am. Dec. 347.

**Contra.**—Information by a stranger, or even a general claim by a party, may be disregarded. *Woods v. Farmere*, 7 Watts (Pa.) 382; s. c., 32 Am. Dec. 772; *Kerns v. Swope*, 2 Watts (Pa.) 75; *Epley v. Witherow*, 7 Watts (Pa.) 163; *Rogers v. Hoskins*, 14 Ga. 166; *Barnhart v. Greenshields*, 28 Eng. L. & Eq. 77.

1. *Singer v. Jacobs*, 11 Fed. Rep. 559.

2. *Boyce v. Grundy*, 3 Pet. (U. S.) 210; *Rogers v. Jones*, 8 N. H. 264; *Curtis v. Blair*, 26 Miss. 309; s. c., 59 Am. Dec. 257; *Buttrick v. Holden*, 13 Met. (Mass.) 355; *Jones v. Smith*, 1 Hare (Eng.) 43.

3. Even a general rumor of a conveyance would not have been enough

to have made it the duty of the plaintiff to search the record. Notice of such a rumor is not considered as either actual or implied notice. Indeed, to set on foot an enquiry into the foundation of mere rumors would in most cases be a vain and impracticable pursuit. There must be some act, some declaration from an authentic source, which a person would be careless if he disregarded, which is necessary to put a party on enquiry, and call for the exercise of reasonable diligence." *Maul v. Rider*, 59 Pa. St. 172. See also *Jacques v. Weeks*, 7 Watts (Pa.) 261; *Kerns v. Swope*, 2 Watts (Pa.) 75; *Churchee v. Guernsey*, 39 Pa. St. 86; *Peebles v. Reading*, 8 S. & R. (Pa.) 484; *Lewis v. Bradford*, 10 Watts (Pa.) 67; *Miller v. Cresson*, 5 W. & S. (Pa.) 284; *Boggs v. Varner*, 6 W. & S. (Pa.) 469; *Mulliken v. Graham*, 72 Pa. St. 484; *Bugbee's Appeal*, 110 Pa. St. 331; *Wilson v. McCullough*, 23 Pa. St. 440; s. c., 62 Am. Dec. 347; *Loughridge v. Bowland*, 52 Miss. 546; *Wailles v. Cooper*, 24 Miss. 228; *Buck v. Paine*, 50 Miss. 648; *Condit v. Wilson*, 36 N. J. Eq. 370; *Williamson v. Brown*, 15 N. Y. 354; *Jackson v. Given*, 8 Johns. (N. Y.) 137; s. c., 5 Am. Dec. 328; *Dey v. Dunham*, 2 Johns. Ch. (N. Y.) 190; *M'Mechan v. Griffing*, 3 Pick. (Mass.) 149; s. c., 15 Am. Dec. 198; *Norcross v. Widgery*, 2 Mass. 509; *Buttrick v. Holden*, 13 Met. (Mass.) 355; *Hewes v. Wiswell*, 8 Me. 98; *Butler v. Stevens*, 26 Me. 484; *Cleveland Woolen Mills v. Sibert*, 81 Ala. 140; *Gill v. McAttee*, 2 Md. Ch. 255; *Foust v. Moorman*, 2 Ind. 17; *Otis v. Spencer*, 102 Ill. 622; s. c., 40 Am. Rep. 617; *Pittman v. Sofley*, 64 Ill. 155; *Jenkins v. Rosenberg*, 105 Ill. 157; *Emmons v. Murray*, 16 N. H. 385; *Ratteree v. Conley*, 74 Ga. 153; *Black v. Thornton*, 31 Ga. 641; *Filmore v. Reithman*, 6 Colo. 120; *Parker v. Kane*, 4 Wis. 1; s. c., 65 Am. Dec. 283; *Lamont v. Stimson*, 5 Wis. 443; *City Council r.*

**6. Recitals in Muniments of Title.**—A purchaser of real estate is bound to take notice of all recitals in the chain of title through which his own title is derived. Not only is he bound by everything stated in the several conveyances constituting that claim, but he is bound fully to investigate and explore everything to which his attention is thereby directed.<sup>1</sup> This is constructive

Page, Spears Eq. (S. Car.) 159; James v. Drake, 3 Sneed (Tenn.) 340; Flagg v. Mann, 2 Sumn. (U. S.) 486; Piatt v. Vattier, 1 McLean (U. S.) 146; Hine v. Dodd, 2 Atk. (Eng.) 276; Jollard v. Stainbridge, 3 Ves. (Eng.) 478; Eyee v. Dolphin, 2 Ball. & B. 301.

**General Notoriety.**—General notoriety alone is not evidence, but a jury may take into account the public nature of services in connection with other evidence to prove notice of such services. Low v. Connecticut etc. R. Co., 46 N. H. 284.

1. Deason v. Taylor, 53 Miss. 697; Wailes v. Cooper, 24 Miss. 208; Gordon v. Sizer, 39 Miss. 805; Chew v. Calvert, 1 Miss. 54; Burch v. Carter, 44 Ala. 115; Johnson v. Thweatt, 18 Ala. 741; Center v. Planters' etc. Bank, 22 Ala. 743; Hardy v. Heard, 13 Ark. 184; Weisenberg v. Truman, 58 Cal. 63; Sigourney v. Munn, 7 Conn. 324; Hamilton v. Nutt, 34 Conn. 501; State v. Shaw, 28 Iowa 67; Hall v. Orvis, 35 Iowa 366; Wiseman v. Hutchinson, 20 Ind. 40; White v. Kibby, 42 Ill. 510; Chicago etc. R. Co. v. Kennedy, 70 Ill. 350; Anderson v. Layton, 3 Bush (Ky.) 87; Hackwith v. Damron, 1 Mon. (Ky.) 235; Tiernan v. Thurman, 14 B. Mon. (Ky.) 224; Burrus v. Roulhae, 2 Bush (Ky.) 39; Bakewell v. Ogden, 2 Bush (Ky.) 265; Pike v. Collins, 33 Me. 38; Sargent v. Hubbard, 102 Mass. 380; George v. Kent, 7 Allen (Mass.) 16; Neale v. Hagthorpe, 3 Bland Ch. (Md.) 551; Bryan v. Harvey, 18 Md. 113; Wait v. Baldwin, 60 Mich. 622; Fitzhugh v. Barnard, 12 Mich. 104; Mason v. Payne, Walk. Ch. (Mich.) 459; Norris v. Hill, 1 Mich. 202; Case v. Erwin, 18 Mich. 434; Baker v. Mathee, 25 Mich. 51; Daughaday v. Paine, 6 Minn. 443; Ross v. Worthington, 11 Minn. 438; s. c., 88 Am. Dec. 95; Mason v. Black, 87 Mo. 329; Bronson v. Wanzer, 86 Mo. 408; Scott v. McCulloch, 13 Mo. 13; Durette v. Briggs, 47 Mo. 356; Christmas v. Mitchell, 3 Ired. Eq. (N. Car.) 535; Buchanan v. Balkum, 60 N. H. 406; Brown v. Eastman, 16 N. H. 588; Bell v. Twilight, 22 N. H. 500; Jennings v. Dixey, 36 N. J. Eq. 490; Van

Doren v. Robinson, 16 N. J. Eq. 256; Sea Grove Building Assoc. v. Parsons (N. J. 1889), 17 Atl. Rep. 834; Jackson v. Neely, 10 Johns. Rep. (N. Y.) 374; Harris v. Fly, 7 Paige (N. Y.) 421; Guion v. Knapp, 6 Paige (N. Y.) 35; s. c., 29 Am. Dec. 741; Howard Ins. Co. v. Halsey, 8 N. Y. 271; s. c., 59 Am. Dec. 478; Acer v. Westcott, 46 N. Y. 384; s. c., 7 Am. Rep. 355; Cambridge Valley Bank v. Delano, 48 N. Y. 326; Jacques v. Short, 20 Barb. (N. Y.) 269; Gibert v. Peteler, 38 Barb. (N. Y.) 488; Reeder v. Barr, 4 Ohio 446; s. c., 22 Am. Dec. 762; Bonner v. Ware, 10 Ohio 465; Gibson v. Winslow, 46 Pa. St. 380; s. c., 84 Am. Dec. 552; Willis v. Bucher, 2 Binn. (Pa.) 455; Urkett v. Coryell, 5 W. & S. (Pa.) 60; McAteer v. McMullen, 2 Pa. St. 32; Knouff v. Thompson, 16 Pa. St. 357; Kerr v. Kitchen, 17 Pa. St. 438; Bellas v. Lloyd, 2 Watts (Pa.) 401; Hackwith v. Damron, 1 Mon. (Ky.) 235; Payne v. Abercrombie, 10 Heisk. (Tenn.) 161; McGavock v. Deery, 1 Coldw. (Tenn.) 265; McRimmon v. Martin, 14 Tex. 318; Brush v. Ware, 15 Pet. (U. S.) 93; Oliver v. Platt, 3 How. (U. S.) 333; Cordova v. Hood, 17 Wall. (U. S.) 1; Lipse v. Spears, 4 Hughes (U. S.) 535; The Schooner Tilton, 5 Mason (U. S.) 465; Jackson v. Blackwood, 4 MacArthur (D. C.) 188.

**Reference to Unrecorded Instrument.**

—Where an instrument in the chain of title refers to some other instrument as affecting the rights of the parties, all persons claiming through that chain of title will be affected with notice of the contents of the instrument referred to, though it is not recorded. *Ætna L. Ins. Co. v. Bishop*, 69 Iowa 645; *Baker v. Mather*, 25 Mich. 51; *Dunham v. Dey*, 15 Johns. (N. Y.) 556; *Childs v. Clark*, 3 Barb. Ch. (N. Y.) 52; s. c., 49 Am. Dec. 164; *Central Trust Co. v. Wabash etc. R. Co.*, 29 Fed. Rep. 546.

**Collateral and Immaterial Deeds.**

—The general rule that a party is held to have constructive notice of what appears in the deeds and instruments referred to in the title papers constituting his claim of title does not, in principle,

apply to collateral and immaterial deeds or instruments incidentally referred to, not as relating in any way to the title or land conveyed, but only to the consideration. *Kansas City Land Co. v. Hill*, 87 Tenn. 589.

**Instrument Purporting to be Executed by Virtue of Decree or Order.**—Where a bond or other instrument purports to have been issued by virtue of a certain order named and referred to, but not copied or described, every one claiming any rights by virtue of that bond or instrument is chargeable with notice of the contents of the order. *Lewis v. Bourbon Co.*, 12 Kan. 186; *Martin v. Neblett*, 86 Tenn. 383.

**Vendor's Lien.**—"A declaration in a deed of conveyance that the purchase money, or any part thereof, remains unpaid is notice of the existence of a lien for it, in the absence of language indicating a waiver or extinguishment of the lien." *Tydings v. Pitcher*, 82 Mo. 379; *Major v. Buckley*, 51 Mo. 227; *Orrick v. Dunham*, 79 Mo. 179; *Wiseman v. Hutchinson*, 20 Ind. 40; *Lytle v. Turner*, 12 Lea (Tenn.) 641; *Willis v. Gay*, 48 Tex. 463; s. c., 26 Am. Rep. 328.

**Knowledge of Encumbrance from Previous Transaction.**—Where a party takes a conveyance of a moiety of land in which the existence of an encumbrance upon the whole tract is recited, he is chargeable, upon the purchase of the remaining portion, with notice of the encumbrance before mentioned, though there is no mention of it in the second conveyance. *Bellas v. Lloyd*, 2 Watts (Pa.) 401.

**Compare.**—A recital is not notice to the purchaser of title to any other land than that conveyed. *Boggs v. Varner*, 6 W. & S. (Pa.) 469.

**Inadequate Consideration.**—The recital of an inadequate consideration in the assignment under which Rice, the assignor of Gooding, claimed, if brought to the knowledge of the latter, might be competent as one circumstance in connection with other evidence to charge him with gross negligence or a fraudulent purpose, but it is not alone sufficient to put him on enquiry or prove fraud on his part. It is not easy to see in it anything calculated even to arouse suspicion. *Briggs v. Rice*, 130 Mass. 50. *Contra*, *Hume v. Franzen*, 73 Iowa 25.

**Instrument Capable of Two Interpretations.**—If within itself a repugnancy in a deed contains the elements of correction, one taking under it must

read it as it should be read. He cannot read it the other way and claim protection as a *bona fide* purchaser. *Shoemaker v. Chappell*, 4 Mackey (D. C.) 413.

**Contents of One's Own Deed.**—Where a wife executed a deed conveying, beside other lands, the homestead, without reading it, relying on her husband's false statement that it did not convey the homestead, and would not have signed it had she known that this was included, it was held that, as between herself and innocent parties who acted in good faith in the transaction, she could not take advantage of such negligence, and make it the ground of relief against her own signature. *McHenry v. Day*, 13 Iowa 445; s. c., 81 Am. Dec. 438.

**Recitals in a Subsequent Mortgage.**—The recitals in a subsequent mortgage cannot prejudice the rights of a prior mortgagee acquired before its execution. *Clabaugh v. Byerly*, 7 Gill (Md.) 354; s. c., 48 Am. Dec. 575. See also *Cook v. Travis*, 22 Barb. (N. Y.) 338.

**Statements in Certificates of Stock.**—Where it appears in a certificate of stock that the stock is held in trust for another, persons purchasing or loaning upon such stock are put upon enquiry by such statements, and are bound to investigate the authority of the person claiming a right to sell or pledge the stock. *Jaudon v. Nat. City Bank*, 8 Blatchf. (U. S.) 439; s. c., 82 U. S. 165; *Shaw v. Spencer*, 100 Mass. 382; s. c., 1 Am. Rep. 115; *Bayard v. Farmers' etc. Bank*, 52 Pa. St. 232.

**Fraud Apparent on Face of Instrument.**—"After the best reflection that I can bestow upon the question, I am constrained to hold that all who claim through a fraudulent deed, when the fraud is apparent on the face of the instrument, must be charged with notice of the fraud, otherwise we could lay down no rule upon the subject. And in determining whether one was chargeable with notice or not, we should have to take into consideration, perhaps, the mental capacities of those sought to be charged with notice; yet there may be a case of such doubtful equity, under the circumstances, that it ought not to be enforced against such a purchaser. 1 Story Eq., § 400. Now I will not say that a purchaser shall be charged with notice of the fraud if the provision of the deed merely throws suspicion upon the transaction, which is capable of being explained by proof, and thus shown



notice, and, therefore, cannot be rebutted.<sup>1</sup>

(a) **MUST BE DEFINITE.**—To charge a purchaser, the recital must be such as explains itself by its own terms, or refers to some deed or circumstance which explains it or leads to its explanation.<sup>2</sup>

(b) **RECITALS IN INSTRUMENTS OUTSIDE THE CHAIN OF TITLE.**—A purchaser is not chargeable with notice of anything contained in instruments lying outside of his chain of title.<sup>3</sup>

**7. Possession.**—Where one purchases property in the possession of one not the vendor, the purchaser is bound to make enquiry concerning the rights of the one in possession: and, failing to do so, is chargeable with notice of all that a proper enquiry would have disclosed.<sup>4</sup> Possession is not notice, however, except during

to be consistent with good faith. That question, however, is not before us. But when the impress of fraud is conclusively fixed upon the deed from its own provisions, a purchaser cannot escape from the consequences of notice." *Johnson v. Thweatt*, 18 Ala. 741.

1. *Nelson v. Allen*, 1 Yerg. (Tenn.) 360; *Wailles v. Cooper*, 24 Miss. 208.

2. *White v. Carpenter*, 2 Paige (N. Y.) 217; *Cambridge Valley Bank v. Delano*, 48 N. Y. 326; *Bell v. Twilight*, 22 N. H. 500; s. c., 45 Am. Dec. 367; *Kaine v. Denniston*, 22 Pa. St. 202; *Lodge v. Simonton*, 2 P. & W. (Pa.) 217; *Van Slyck v. Skinner*, 41 Mich. 186; *Morris v. Murray*, 82 Ky. 36; *French v. Loyal Land Co.*, 5 Leigh (Va.) 627.

3. *Burch v. Carter*, 44 Ala. 115; *Hazlett v. Sinclair*, 76 Ind. 488; s. c., 40 Am. Rep. 254; *Corbin v. Sullivan*, 47 Ind. 356; *Burke v. Beveridge*, 15 Minn. 205; *Crockett v. Maguire*, 10 Mo. 34; *Dingman v. McCollum*, 47 Mo. 372; *Tydings v. Pitcher*, 82 Mo. 379; *Coleman v. Barklew*, 27 N. J. L. 357; *Boggs v. Varner*, 6 W. & S. (Pa.) 469; *Polk v. Cosgrove*, 4 Biss. (U. S.) 487; *Ware v. Egmont*, 31 Eng. L. & Eq. 89.

4. *Garrett v. Lyle*, 27 Ala. 586; *Phillips v. Costley*, 40 Ala. 486; *Burt v. Cassety*, 12 Ala. 734; *McCaskle v. Amarine*, 12 Ala. 17; *Hamilton v. Fowikes*, 16 Ark. 340; *Daubenspeck v. Platt*, 22 Cal. 330; *Lestrade v. Barth*, 19 Cal. 660; *Jenkins v. Redding*, 8 Cal. 598; *Morrison v. Wilson*, 13 Cal. 494; s. c., 73 Am. Dec. 593; *Partridge v. McKinney*, 40 Cal. 181; *Smith v. Yule*, 31 Cal. 180; s. c., 89 Am. Dec. 167; *Peasley v. McFadden*, 68 Cal. 611; *Thompson v. Pioche*, 44 Cal. 516; *Pell v. McElroy*, 36 Cal. 268; *Landers v.*

*Bolton*, 26 Cal. 393; *Fair v. Sterenot*, 29 Cal. 486; *Bryan v. Ramirez*, 8 Cal. 461; s. c., 68 Am. Dec. 340; *Dreyfuss v. Hirt* (Cal.), 123 Pac. Rep. 193; *Haral v. Levery*, 50 Conn. 46; s. c., 47 Am. Rep. 608; *McRae v. McMinn*, 17 Fla. 876; *Wyatt v. Elam*, 23 Ga. 201; s. c., 68 Am. Dec. 518; *Veasey v. Graham*, 17 Ga. 99; s. c., 63 Am. Dec. 228; *Cox v. Jones*, 76 Ga. 296; *Helms v. O'Bannon*, 26 Ga. 132; *Clark v. Morris*, 22 Ill. 434; *Morrison v. Kelly*, 22 Ill. 610; s. c., 74 Am. Dec. 169; *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *Flint v. Lewis*, 61 Ill. 306; *Rupert v. Mark*, 15 Ill. 540; *Phillips v. Pitts*, 78 Ill. 72; *Brainard v. Hudson*, 103 Ill. 218; *Druley v. Adam*, 102 Ill. 177; *Maghee v. Robinson*, 98 Ill. 458; *Walsh v. Wright*, 101 Ill. 178; *Farmers' Nat. Bank v. Sperling*, 113 Ill. 273; *Higgins v. White*, 18 Ill. App. 480; *Jaques v. Lester*, 118 Ill. 246; *Harris v. McIntyre*, 118 Ill. 275; *Bartling v. Brasuhu*, 102 Ill. 441; *Porter v. Clark*, 22 Ill. App. 567; *Griffin v. Haskins*, 22 Ill. App. 264; *Tunson v. Chamberlin*, 88 Ill. 378; *Stagg v. Small*, 4 Ill. App. 192; *Partridge v. Chapman*, 81 Ill. 137; *Williams v. Brown*, 14 Ill. 200; *Reeves v. Ayres*, 38 Ill. 418; *Keyes v. Test*, 33 Ill. 316; *Cabeen v. Buckenridge*, 48 Ill. 91; *Aldrich v. Aldrich*, 37 Ill. 32; *White v. White*, 105 Ill. 313; *Meni v. Rathbone*, 21 Ind. 454; *Glidewell v. Sprauha*, 26 Ind. 319; *Tuttle v. Churchman*, 74 Ind. 311; *Barnes v. Union School Township*, 91 Ind. 301; *Lash v. Butch*, 4 Iowa 215; *Moore v. Pierson*, 6 Iowa 279; s. c., 71 Am. Dec. 409; *Humphrey v. Moore*, 17 Iowa 193; *Sears v. Munson*, 23 Iowa 380; *Lebrick v. Stahle*, 68 Iowa 515; *Hubbard v. Long*, 20 Iowa 140; *School Dist. No. 82 v. Taylor*, 19 Kan. 287; *Knox v.*

its continuance: and a vendee is not bound to take notice of the antecedent possession of third persons.<sup>1</sup> It has also been held in several States that where the registry laws require actual notice of

Thompson, 1 Litt. (Ky.) 350; s. c., 13 Am. Dec. 246; Goins v. Allen, 4 Bush (Ky.) 608; McLaughlin v. Shepherd, 32 Me. 143; s. c., 52 Am. Dec. 646; Feal v. Gordon, 55 Me. 482; Hull v. Noble, 40 Me. 459; McKecknie v. Hoskins, 23 Me. 230; Howe v. Willis, 51 Me. 226; Butler v. Stevens, 26 Me. 484; Clark v. Bosworth, 51 Me. 528; Baynard v. Norris, 5 Gill (Md.) 468; s. c., 46 Am. Dec. 647; Hardy v. Summers, 10 Gill & J. (Md.) 316; s. c., 32 Am. Dec. 167; Price v. McDonald, 1 Md. 403; s. c., 54 Am. Dec. 657; Bryan v. Harvey, 18 Md. 113; Ringgold v. Bryan, 3 Md. Ch. 488; Border State Sav. Inst. v. Wilcox, 63 Md. 525; Bloomer v. Henderson, 8 Mich. 395; s. c., 77 Am. Dec. 453; McKee v. Wilcox, 11 Mich. 358; Converse v. Blumrich, 14 Mich. 109; s. c., 90 Am. Dec. 230; Parsell v. Thayer, 39 Mich. 467; Hommel v. Deviney, 39 Mich. 522; Weisberger v. Wisner, 55 Mich. 246; Morrison v. March, 4 Minn. 422; Seager v. Burns, 4 Minn. 141; Minor v. Willoughby, 3 Minn. 225; New v. Wheaton, 24 Minn. 406; Siebert v. Rosser, 24 Minn. 155; Taylor v. Lowenstein, 50 Miss. 278; Taylor v. Eckford, 11 Smed. & M. (Miss.) 21; Jones v. Loggins, 37 Miss. 546; Vaughn v. Tracy, 25 Mo. 318; s. c., 69 Am. Dec. 471; Whitman v. Taylor, 60 Mo. 135; Pike v. Robertson, 79 Mo. 615; Frothingham v. Stacker, 11 Mo. 77; Wise v. Wimer, 23 Mo. 237; Lipp v. Hunt, 25 Neb. 91; Conlee v. McDowell, 15 Neb. 184; Patten v. Moore, 32 N. H. 382; Pritchard v. Brown, 4 N. H. 397; s. c., 17 Am. Dec. 431; Janvrin v. Janvrin, 60 N. H. 169; Bank v. Eastman, 44 N. H. 431; Hodge v. Ammerman, 40 N. J. Eq. 99; McCall v. Yard, 3 Stockt. (N. J.) 58; Losey v. Simpson, 3 Stockt. (N. J.) 246; Williams v. Birbeck, Hoff. Ch. (N. Y.) 372; Grimstone v. Carter, 3 Paige (N. Y.) 437; s. c., 24 Am. Dec. 230; De Ruyler v. Trustees of St. Peter's Church, 2 Barb. Ch. (N. Y.) 558; Cook v. Travis, 22 Barb. (N. Y.) 359; Moyer v. Hinman, 13 N. Y. 188; Troup v. Hurlburt, 10 Barb. (N. Y.) 354; Phelan v. Brady, 19 Abb. N. C. (N. Y.) 289; Lawrence v. Conklin, 17 Hun (N. Y.) 228; Hensler v. Sefrin, 19 Hun (N. Y.) 564; Chesterman v. Gardiner, 5 Johns.

Ch. (N. Y.) 33; Laverty v. Moore, 32 Barb. (N. Y.) 347; Staton v. Davenport, 95 N. Car. 11; Webber v. Taylor, 2 Jones Eq. (N. Car.) 9; McKinzie v. Perrill, 15 Ohio St. 162; Day v. Atlantic etc. R. Co., 41 Ohio St. 392; Ramsey v. Hardy, 43 Ohio St. 157; McCulloch v. Cowher, 5 W. & S. (Pa.) 427; Jaques v. Weeks, 7 Watts (Pa.) 261; Woods v. Farmere, 7 Watts (Pa.) 382; s. c., 32 Am. Dec. 772; Randall v. Silverthorn, 4 Pa. St. 173; Jamison v. Dimock, 95 Pa. St. 52; Rowe v. Ream, 105 Pa. St. 543; Berg v. Shipley, 1 Grant Cas. (Pa.) 429; Sheorn v. Robinson, 22 S. Car. 32; Brimann v. White, 23 S. Car. 490; Graham v. Nesmith, 24 S. Car. 285; Watkins v. Edwards, 23 Tex. 443; Pouton v. Ballard, 24 Tex. 619; Hawley v. Bullock, 29 Tex. 216; Mullins v. Wimberly, 50 Tex. 457; Mainwarring v. Templeman, 51 Tex. 205; Woodson v. Collins, 56 Tex. 168; Thompson v. Westbrook, 56 Tex. 265; Laroe v. Gaunt, 62 Tex. 481; Rublee v. Mead, 2 Vt. 544; St. Johnsbury v. Morrill, 55 Vt. 165; Parker v. Kane, 4 Wis. 1; s. c., 65 Am. Dec. 283; School Dist. v. Macloon, 4 Wis. 98; Stewart v. McSweeney, 14 Wis. 468; Gee v. Bolton, 17 Wis. 604; First Nat. Bank v. Damm, 63 Wis. 249; Fery v. Pfeiffer, 18 Wis. 510; Warner v. Fountain, 28 Wis. 405; Ehle v. Brown, 31 Wis. 405; Lamoreux v. Huntley, 68 Wis. 24; Lea v. Polk County C. Co., 21 How. (U. S.) 493; Crews v. Burcham, 1 Blackf. (Ind.) 352; Johnston v. Glancy, 4 Blatchf. (U. S.) 94; s. c., 28 Am. Dec. 45; Noyes v. Hall, 97 U. S. 34; Weld v. Madden, 2 Cliff. (U. S.) 584.

**When Doctrine May be Invoked.**—“The doctrine of constructive notice from possession, however broad or limited its application, is applied only as a shield to protect him who has equitable rights, and not for the benefit of one who is without equity. Gill v. Hardin, 48 Ark. 409.

**Possession by Cestui Que Trust.**—The possession of property by a *cestui que trust* is notice of the trust. Pritchard v. Brown, 4 N. H. 397; s. c., 17 Am. Dec. 431; Scott v. Gallagher, 14 S. & R. (Pa.) 333; s. c., 16 Am. Dec. 508.

1. Meehan v. Williams, 48 Pa. St. 238; Boggs v. Varner, 6 W. & S. (Pa.) 469; Hewes v. Wiswell, 8 Me. 94;

an unregistered instrument, possession alone is not sufficient to charge a purchaser with notice.<sup>1</sup>

(a) **WHAT IS SUFFICIENT POSSESSION.**—The possession must be actual, open and visible; it must not be equivocal, occasional, or for a special or temporary purpose; nor must it be consistent with the title of the apparent owner by the record.<sup>2</sup>

*Campbell v. Brackenridge*, 8 Blackf. (Ind.) 471.

1. *Hopping v. Burnam*, 2 Green (Iowa) 39; *Poydras v. Laurans*, 6 La. An. 772; *Moore v. Jourdan*, 14 La. An. 417; *Hubbard v. Smith*, 2 Mich. 207; *Sibley v. Leffingwell*, 8 Allen (Mass.) 584; *Pomroy v. Stevens*, 11 Metc. (Mass.) 244; *Mara v. Pierce*, 9 Gray (Mass.) 306; *Dooley v. Wolcott*, 4 Allen (Mass.) 406; *Casey v. Steinmeyer*, 7 Mo. App. 556; *Rogers v. Jones*, 8 N. H. 264; *Harris v. Arnold*, 1 R. I. 121.

Under a similar statute in *Missouri*, it was held that knowledge of possession was equivalent to actual knowledge of the deed under which the occupant held. *Vaughn v. Tracy*, 22 Mo. 415; 25 Mo. 318; s. c., 69 Am. Dec. 471.

2. *Brown v. Volkening*, 64 N. Y. 82; *Pope v. Allen*, 90 N. Y. 208; *Webster v. Van Steenberg*, 46 Barb. (N. Y.) 214; *Harwick v. Thompson*, 9 Ala. 409; *Havens v. Dale*, 18 Cal. 359; *Smith v. Yule*, 31 Cal. 180; s. c., 89 Am. Dec. 180; *Lestrade v. Barth*, 19 Cal. 675; *Dutton v. Warschauer*, 21 Cal. 627; s. c., 82 Am. Dec. 776; *Fair v. Stevenot*, 29 Cal. 486; *Bogue v. Williams*, 48 Ill. 371; *Truesdale v. Ford*, 37 Ill. 210; *Beaubien v. Hindman*, 38 Kan. 471; *Butler v. Stevens*, 26 Me. 484; *Hewes v. Wiswell*, 8 Me. 98; *M'Mechan v. Griffing*, 3 Pick. (Mass.) 149; s. c., 15 Am. Dec. 198; *Kendall v. Lawrence*, 22 Pick. (Mass.) 542; *McKee v. Wilcox*, 11 Mich. 358; *Bell v. Twilight*, 18 N. H. 159; s. c., 45 Am. Dec. 367; *Patten v. Moore*, 32 N. H. 382; *McCall v. Yard*, 11 N. J. Eq. 58; *Holmes v. Stout*, 4 N. J. Eq. 419; 10 N. J. Eq. 492; *Coleman v. Barklew*, 27 N. J. L. 359; *Meehan v. Williams*, 48 Pa. St. 238; *Wright v. Wood*, 23 Pa. St. 120; *Billington v. Welsh*, 5 Bin. (Pa.) 129; s. c., 6 Am. Dec. 406; *Martin v. Jackson*, 27 Pa. St. 504; s. c., 67 Am. Dec. 489; *Blankenship v. Douglas*, 26 Tex. 225; s. c., 82 Am. Dec. 608; *Satterwhite v. Rosser*, 61 Tex. 166; *Ely v. Wilcox*, 20 Wis. 523; s. c., 91 Am. Dec. 436; *Wickes v. Lake*, 25 Wis. 71; *Townsend v. Little*, 109 U. S. 504.

Possession is actual, when there is an

occupancy, according to its adaptation to use; constructive, when there is a paramount title to it, and adverse, when there is such an appropriation of it as will inform the vicinage that it is in the exclusive use of some known person. *Morrison v. Kelly*, 22 Ill. 610, s. c., 14 Am. Dec. 169.

All the characteristics of adverse possession are not necessary in order that possession may constitute notice. *Smith v. Jackson*, 76 Ill. 254.

**Question for Jury.**—Whether the possession of a vendee with an unrecorded deed is of such a character as to amount to constructive notice, is a question for the jury. *Ponton v. Ballard*, 24 Tex. 619.

**Acts Held Sufficient to Show Possession.**—Fencing and cultivating, and building on lots by those claiming under contracts of purchase. *Bright v. Buckman*, 39 Fed. Rep. 243. Plowing land in view of any who might pass on a public road. *Lyman v. Russell*, 45 Ill. 281. Cutting willows annually for a long time. *Krider v. Lafferty*, 1 Whart. (Pa.) 303. Cutting timber and employing persons in vicinity to watch premises. *Nolan v. Grant*, 51 Iowa 519. Fastening up doors and windows and leaving furniture in the house after removal of the tenant. *Wrede v. Cloud*, 52 Iowa 371.

**Acts Held Insufficient.**—Breaking a few acres of unoccupied land, fencing the same and cording rock. *Sandford v. Weeks*, 38 Kan. 319. Erection of a dam and occupation for six months of the year. *Boynton v. Rees*, 8 Pick. (Mass.) 329; s. c., 19 Am. Dec. 326. Occupation of one of a cluster of buildings under a parol contract and keeping silent after knowledge of *bona fide* purchase by another. *Billington v. Welsh*, 5 Binn. (Pa.) 129; s. c., 6 Am. Dec. 406. Improvement of one of two lots not sufficient as to the unimproved one, though both sold at one time and at one sale. *Dickey v. Lyon*, 19 Iowa 544. Making survey but not erecting house or division fence. *Meehan v. Williams*, 48 Pa. St. 238. Use for pasture by the grantee and others. *Coleman v. Bark-*

(b) WHEN POSSESSION IS NOT NOTICE.—When possession is consistent with the record title,<sup>1</sup> or the grantor remains in possession after a conveyance of the property,<sup>2</sup> or the vendor and vendee remain in joint possession,<sup>3</sup> or a mortgagor continues to occupy the premises after foreclosure sale,<sup>4</sup> or when one has been in possession for a long time without claim of title and then acquires one, but without any change in the mode and character of his occupancy,<sup>5</sup> such possession is not notice to a subsequent purchaser of any right acquired since the first entry, for the first entry de-

lew, 27 N. J. L. 357. Hanging out and drying clothes on a vacant unimproved town lot. *Williams v. Sprigg*, 6 Ohio St. 585. Grading begun by a railroad company but suspended and the grading not indicating its purpose. *Master-son v. West End etc. R. Co.*, 72 Mo. 342; 4 Am. & Eng. R. Cas. 439.

**Possession Not Clearly Defined.**—A person had an equitable title to one half of a certain tract of land. The line of the government survey did not divide the tract in accordance with his right, and it was not shown that the parties had ever run the line or that it had ever been marked, or that there had been any cultivation or actual possession up to the line claimed as the correct one. *Held*, that such person's possession could only operate as notice of his claim within the lines of the government survey. *Hanrick v. Thompson*, 9 Ala. 409.

1. *Smith v. Yule*, 31 Cal. 180; s. c., 89 Am. Dec. 167; *McNeil v. Polk*, 57 Cal. 323; *Crassen v. Swoveland*, 22 Ind. 427; *M'Mechan v. Griffing*, 3 Pick. (Mass.) 149; s. c., 15 Am. Dec. 198; *Newhall v. Pierce*, 5 Pick. (Mass.) 450; *Dutton v. McReynolds*, 31 Minn. 66; *Palmer v. Bates*, 22 Minn. 532; *Staples v. Fenton*, 5 Hun (N. Y.) 172; *Great Falls Co. v. Worster*, 15 N. H. 412; *Bell v. Twilight*, 22 N. H. 500; s. c., 45 Am. Dec. 367; *Williams v. Sprigg*, 6 Ohio St. 585; *Plumer v. Robertson*, 6 S. & R. (Pa.) 179; *Woods v. Farmere*, 7 Watts (Pa.) 382; s. c., 32 Am. Dec. 772; *Townsend v. Little*, 109 U. S. 504. Compare *Randall v. Silverthorn*, 4 Pa. St. 173.

**Must be Such as to Affect Conscience.**—Constructive notice, arising from the first purchaser's being in possession, must be taken to extend to all the circumstances attending the equity, and where these are such as do not affect the conscience of the second purchaser, the court will not vacate his purchase. *Taylor v. Kelly*, 3 Jones Eq. (N. Car.) 240.

2. *Tuttle v. Churchman*, 74 Ind. 311; *Crassen v. Swoveland*, 22 Ind. 427; *Sprague v. White*, 73 Iowa 670; *Newhall v. Pierce*, 5 Pick. (Mass.) 449; *Hennessey v. Andrews*, 6 Cush. (Mass.) 170; *Humphrey v. Hurd*, 29 Mich. 44; *Abbott v. Gregory*, 39 Mich. 68; *Bloomer v. Henderson*, 8 Mich. 395; s. c., 77 Am. Dec. 453; *Van Keuren v. Central R. Co.*, 38 N. J. L. 167; *Groton Sav. Bank v. Batty*, 30 N. J. Eq. 133; *Burt v. Baldwin*, 8 Neb. 487; *Cook v. Travis*, 20 N. Y. 400; *Scott v. Gallagher*, 14 S. & R. (Pa.) 333; s. c., 16 Am. Dec. 508; *Wood v. Farmere*, 7 Watts (Pa.) 382; s. c., 32 Am. Dec. 772; *Hoffman v. Blume*, 64 Tex. 334; *Eylar v. Eylar*, 60 Tex. 315; *Matesky v. Feldman*, 75 Wis. 103.

**Grant of Part of Premises.**—"Where there has been an actual change of possession given by the grantor to the grantee, which purports to be for the purpose of carrying the grant into effect, and where the premises granted are a portion of a larger tract owned by the grantor, his retention up to a certain line, and his surrender beyond it, would naturally indicate that he claimed ownership to that boundary. *Bower v. Earl*, 18 Mich. 367. Compare *McLaughlin v. Shepherd*, 32 Me. 143; s. c., 52 Am. Dec. 646; *Boggs v. Anderson*, 50 Me. 161.

If the grantor continues in possession after conveyance of the property, purchasers from the grantee are affected with notice of the grantor's rights. *White v. White*, 89 Ill. 460; *Ford v. Marcall*, 107 Ill. 136.

3. *McCarthy v. Nicrosi*, 72 Ala. 332; s. c., 47 Am. Rep. 418; *Butler v. Stevens*, 26 Me. 484; *Bell v. Twilight*, 18 N. H. 159; s. c., 45 Am. Dec. 367; *Billington v. Welsh*, 5 Binn. (Pa.) 129; s. c., 6 Am. Dec. 406.

4. *Dawson v. Danbury Bank*, 15 Mich. 489.

5. *Emmons v. Murray*, 16 N. H. 385. Compare *Coarl v. Olsen*, 91 Ill. 273.

termines the character and quality of the possession.<sup>1</sup>

(c) POSSESSION OF A TENANT.—The possession of a tenant is notice to a purchaser of any interest the tenant may have in the premises.<sup>2</sup> There is a conflict of opinion as to whether the possession of the tenant is notice of anything more than his own rights, one line of cases holding that it is not,<sup>3</sup> while another class holds that the occupation of the tenant is notice of the rights of the person under whom he claims.<sup>4</sup>

1. *M'Mechan v. Griffing*, 3 Pick. (Mass.) 154; s. c., 15 Am. Dec. 198; *Hewes v. Wiswell*, 8 Mc. 94; *Quinn v. Quinn*, 27 Wis. 168; *Patton v. Hollidaysburg*, 40 Pa. St. 206.

Compare the following: A dowress in possession of land and slaves purchased the reversionary interest of one of the reversioners, which in the slaves was conveyed by a direct bill of sale, but as to the land remained in the form of an executory contract; execution against the reversion was levied upon the land, and it was held that the possession of the dowress was sufficient notice of her equitable right therein, and would prevail against the title of the purchaser under the execution. *Russell v. Moore*, 3 Metc. (Ky.) 436. See also *Smith v. Gibson*, 25 Neb. 511.

2. *Coari v. Olsen*, 91 Ill. 273; *Russell v. Moore*, 3 Metc. (Ky.) 436; *Cunningham v. Pattee*, 99 Mass. 248; *Kerr v. Day*, 14 Pa. St. 112; s. c., 53 Am. Dec. 526; *Marsh v. Nelson*, 101 Pa. St. 51; *Fery v. Pfeiffer*, 18 Wis. 510; *Wickes v. Lake*, 25 Wis. 71; *Daniels v. Davison*, 16 Ves. (Eng.) 253; 17 Ves. (Eng.) 433.

**Equitable Right of Tenant.**—Where a person is a tenant of the vendor and after a sale takes a lease from the vendee, he cannot be heard to set up his possession at the time of sale as notice of an equitable title in himself of which he had no knowledge when he took the lease. *Smith v. Miller*, 63 Tex. 72.

**Duty to Make Enquiry as to Occupant's Right.**—A purchaser having notice that another person, or his undertenant, is in possession of the property, is not justified in presuming the possession of that person to be the possession of the vendor; but is bound to make enquiries of the person who, by himself or his undertenant, is so in possession, or he will be deemed to have notice of the title of such person. *Bailey v. Richardson*, 15 Eng. L. & Eq. 218.

3. *Dickey v. Lynn*, 19 Iowa 547; *Veazie v. Parker*, 23 Me. 170; *Beatie*

*v. Butler*, 21 Mo. 313; s. c., 64 Am. Dec. 234; *Flagg v. Mann*, 2 Sumn. (U. S.) 486; *Barnhart v. Greenshields*, 28 Eng. L. & Eq. 77.

#### Enquiry as to How Possession Is Held.

—Possession will put a purchaser on enquiry as to title, but when the party in possession is in under a lease, a knowledge of the lease dispenses with the enquiry how the possession is held. One is not bound to enquire of the tenant in possession if the lease was fair or fraudulent, or whether there was a trust notwithstanding. *Leach v. Ansbacher*, 55 Pa. St. 85.

#### When Tenant Asserts that He Is Owner.

—If a tenant, in possession, affirms himself to be the owner, he will, as to third parties having no actual or constructive knowledge of his tenancy, be regarded as the owner. *Jeffersonville etc. R. Co. v. Oyler*, 82 Ind. 394. Compare *Clarke v. Beck*, 72 Ga. 127.

4. *Dutton v. Warschauer*, 21 Cal. 609; s. c., 82 Am. Dec. 765; *Landers v. Bolton*, 26 Cal. 419; *O'Rourke v. O'Connor*, 39 Cal. 442; *Thompson v. Pioche*, 44 Cal. 508; *Pittman v. Gaty*, 10 Ill. 186; *Haworth v. Taylor*, 108 Ill. 275; *Franz v. Orton*, 75 Ill. 100; *Whitaker v. Miller*, 83 Ill. 381; *Smith v. Jackson*, 76 Ill. 254; *Dickey v. Lynn*, 19 Iowa 544; *Nelson v. Wade*, 21 Iowa 49; *Hanly v. Morse*, 32 Me. 287; *Conlee v. McDowell*, 15 Neb. 184; *Purcell v. Enright*, 31 N. J. Eq. 74; *Jaques v. Weeks*, 7 Watts (Pa.) 261; *Lewis v. Bradford*, 10 Watts (Pa.) 67; *Boggs v. Varner*, 6 W. & S. (Pa.) 469; *Sailor v. Hertzog*, 4 Whart. (Pa.) 259; *Hood v. Farnestock*, 1 Pa. St. 470; s. c., 44 Am. Dec. 147; *Kerr v. Day*, 14 Pa. St. 112; s. c., 53 Am. Dec. 526; *United States v. Sliney*, 21 Fed. Rep. 894; *Edwards v. Wray*, 12 Fed. Rep. 42.

**Defects in Title.**—"While possession is notice, at least so far as to put the vendee upon enquiry to ascertain by what right the occupant holds, this rule is not extended so far as to give notice of the defects existing in his title, nor

(d) **RIGHT OF PURCHASER TO RELY ON STATEMENT OF TENANT.**—When a purchaser has been put upon enquiry by the possession of a tenant, and upon making such enquiry receives information as to the tenant's claim, he may rely on such information in the absence of anything to give notice of its falsity.<sup>1</sup> If information be refused the person so refusing will be estopped from setting up any right in himself to the injury of the person to whom he refused information.<sup>2</sup>

(e) **PRESUMPTION MAY BE REBUTTED.**—The presumption of notice from possession by one claiming an adverse right may be rebutted.<sup>3</sup>

**8. Notice to Agent or Attorney.**—(See also **AGENCY; ATTORNEY AND CLIENT**).—Notice to an agent,<sup>4</sup> attorney,<sup>5</sup> or trustee<sup>6</sup> is

yet of the defects in the title paramount to the person in possession." *Suiter v. Turner*, 10 Iowa 517. See also *Fassett v. Smith*, 23 N. Y. 252.

**Possession of an Intruder.**—"The possession of one either in person or by his tenant is notice of his unrecorded title; but the possession of an intruder cannot be held to be notice of the title of a stranger. *Wright v. Wood*, 23 Pa. St. 120. See also *Munn v. Burges*, 70 Ill. 604.

1. *Thompson v. Pioche*, 44 Cal. 508; *Rogers v. Jones*, 8 N. H. 264; *Wright v. Wood*, 23 Pa. St. 120.

**Compare.**—"A tenant is not allowed to dispute or deny his landlord's title, nor can he attorn to any other person during the tenancy, nor is the landlord bound by the false and fraudulent conduct of his tenant to his prejudice. The denial of the title of the landlord by the tenant, or the denial of the tenancy by the tenant, cannot operate to the prejudice of the landlord; the possession of the tenant is still the possession of the landlord." *Clarke v. Beck*, 72 Ga. 127.

2. *Riley v. Quigley*, 50 Ill. 304; s. c., 99 Am. Dec. 516.

3. *Williamson v. Brown*, 25 N. Y. 354; *Thompson v. Pioche*, 44 Cal. 508; *Fair v. Stevenot*, 29 Cal. 486; *Rogers v. Jones*, 8 N. H. 264; *Nutting v. Herbert*, 37 N. H. 346; *M'Mechan v. Griffig*, 3 Pick. (Mass.) 149; s. c., 15 Am. Dec. 198; *Cunningham v. Buckingham*, 1 Ohio 264; *Harris v. Arnold*, 1 R. I. 126.

4. See **AGENCY**, 1 Am. & Eng. Encyc. of Law 419, *et seq.*

5. *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *McCormick v. Wheeler*, 36 Ill. 114; s. c., 85 Am. Dec. 388; *Williams v. Tatnall*, 29 Ill. 553; *Jones v. Bamford*, 21 Iowa 217; *Walker v.*

*Ayres*, 1 Iowa 449; *Allen v. McCalla*, 25 Iowa 464; s. c., 96 Am. Dec. 56; *Walker v. Schreiber*, 47 Iowa 529; *Haven v. Snow*, 14 Pick. (Mass.) 28; *Losey v. Simpson*, 11 N. J. Eq. 246; *Griffith v. Griffith*, 9 Paige (N. Y.) 315; *Reed's App.*, 34 Pa. St. 207; *Hood v. Fahnestock*, 8 Watts (Pa.) 489; *Vermont Min. Co. v. Windham Co. Bank*, 44 Vt. 489; *Hart v. Farmers' etc. Bank*, 33 Vt. 252; *Beecher v. Gillespie*, 6 Ben. (U. S.) 356; *Polk v. Cosgrove*, 4 Biss. (U. S.) 487; *Boursot v. Savage*, 2 L. R., Eq. 134; *Espin v. Pemberton*, 3 De G. & J. (Eng.) 547.

**Knowledge Acquired in Business of Another Client.**—An attorney took a mortgage on property on which he had previously taken one for another client, he having neglected to have the mortgage first taken recorded. It was held that the holder of the second mortgage could not be charged with notice of the first unless the attorney was shown to have recollected it when he took the second mortgage. *Constant v. University of Rochester*, 111 N. Y. 604; s. c., 7 Am. St. Rep. 769. See *Dunlap v. Wilson*, 32 Ill. 517; *McCormick v. Wheeler*, 36 Ill. 115; s. c., 85 Am. Dec. 588; *Hood v. Fahnestock*, 8 Watts (Pa.) 489; s. c., 34 Am. Dec. 489.

**When Mortgagor Is Solicitor and Draws Mortgage.**—The circumstances of a mortgagor being a solicitor, and preparing the mortgage deed, and of the mortgagee employing no other solicitor, are not sufficient to constitute the former the solicitor of the latter, so as to affect him with notice of an encumbrance known to the solicitor. *Espin v. Pemberton*, 3 De G. & J. (Eng.) 547. See also **AGENCY**, 1 Am. & Eng. Encyc. of Law 419, *et seq.*

6. *Pope v. Pope*, 40 Miss. 516;

notice to the principal or person represented. So also notice to a partner binds the firm,<sup>1</sup> and notice to an officer's deputy is conclusive against the officer.<sup>2</sup> Notice to a husband will not charge the wife unless it be shown that he was acting as her agent in the transaction.<sup>3</sup>

**9. Notice to Cotenant.**—Notice to one cotenant is not, by mere force of the relation, notice to another.<sup>4</sup>

*Pierce v. Emery*, 32 N. H. 484; *Fidelity Ins. T. etc. Co. v. Shenandoah Valley R. Co.*, 32 W. Va. 244; s. c., 38 Am. & Eng. R. Cas. 577; *French v. Loyal Land Co.*, 5 Leigh (Va.) 627; *Beverly v. Brooke*, 2 Leigh (Va.) 425; *Miller v. Rutland etc. R. Co.*, 36 Vt. 452; *Willes v. Greenhill*, 4 De G. F. & J. (Eng.) 147.

A person having forged certain notes made an assignment wherein he preferred the holders of the notes with the expectation that if the notes were paid he would not be prosecuted for the forgery. *Held*, that the knowledge of the trustee in the assignment of the debtor's expectation would not charge the creditors with notice so as to avoid the trust deed, because the consideration was the compounding of a felony. *Brooks v. Marbury*, 11 Wheat. (U. S.) 78. See also *AGENCY*, 1 Am. & Eng. Encyc. of Law 419, *et seq.*, and *TRUSTS AND TRUSTEES*.

1. *Watson v. Wells*, 5 Conn. 468; *Middleton Sav. Bank v. Dubuque*, 19 Iowa 469; *Frank v. Blake*, 58 Iowa 750; *Holton v. McPike*, 27 Kan. 286; *Quinn v. Fuller*, 7 Cush. (Mass.) 224; *Otis v. Adams*, 41 Me. 258; *Miller v. Finn*, 1 Neb. 254; *Herbert v. Odlin*, 40 N. H. 267; *Ruckman v. Decker*, 23 N. J. Eq. 283 (reversed on other grounds, 28 N. J. Eq. 614); *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518; s. c., 28 Am. Dec. 476; *Powell v. Waters*, 8 Cow. (N. Y.) 669; *Marietta etc. R. Co. v. Mowry*, 28 Hun (N. Y.) 79; *Stockdale v. Keyes*, 79 Pa. St. 251; *McClurkan v. Byers*, 74 Pa. St. 405; *Barney v. Currier*, 1 Chip. (Vt.) 315; s. c., 6 Am. Dec. 739; *Stevens v. Goodenough*, 26 Vt. 683; *Hubbard v. Galusha*, 23 Wis. 398; *Pease v. McClelland*, 2 Bond (U. S.) 42; *Duffill v. Goodwin*, 23 Grant's Ch. (Up. Can.) 431; *Snarr v. Small*, 13 Up. Can. Q. B. 125.

**Facts Which Partner Is Not Under Obligation to Communicate.**—A man called upon one member of a firm and stated that he was the agent of another for whom he desired to purchase. The

partner stated that they had not the goods for sale at that time. The agent replied that he would call again, which he did in about four weeks and made a purchase of another member of the firm without disclosing his agency. *Held*, that as the first partner was under no duty to report the call of the agent the first time, the statement as to the agency made at the first call was not notice to the firm. *Baldwin v. Leonard*, 39 Vt. 260; s. c., 94 Am. Dec. 324. See also *AGENCY*, 1 Am. & Eng. Encyc. of Law 419, *et seq.*, and *PARTNERSHIP*.

2. *United States v. Bank of Arkansas, Hemp.* (U. S.) 460.

See also *OFFICE AND OFFICERS* and various titles treating of particular officers.

3. *Sponable v. Snyder*, 1 Hill (N. Y.) 567; s. c., 7 Hill (N. Y.) 427; *Clark v. Fuller*, 39 Conn. 238; *Murphy v. Nathans*, 46 Pa. St. 508; *Pringle v. Dunn*, 37 Wis. 449; s. c., 19 Am. Rep. 772.

4. "We do not understand the rule to be that, in case of the purchase of property by two or more persons, each will be charged with notice of facts known to another. There doubtless may be cases in which such a result will follow, as when one of the purchasers is made the agent of the others to consummate the purchase, and in the transaction of the business pertaining to his agency acquires notice or knowledge of facts which vitiate the purchase; but unless one has been made the agent of the other, by virtue of partnership relations, or of some other means, neither can, ordinarily, be charged and held accountable for the knowledge of the other. If an encumbrance, or conveyance, be in existence affecting the title to land, and a purchase be made by several jointly, or as tenants in common, those who have notice of the encumbrance, or conveyance, will hold their title in subordination to it, while those who did not have such notice will obtain their title free from the claim to which their cotenants are subjected." *Rippetoe v.*

**10. Knowledge Acquired as Scrivener or Witness.**—The fact that a person drew certain papers will not, in a subsequent transaction a considerable time afterwards, charge such person with notice of the contents of the papers so drawn by him;<sup>1</sup> nor is the fact that a party attested a document sufficient to charge him with notice of its contents.<sup>2</sup>

**11. Statutes and Ordinances.**—The laws of the State are in force without notice to individuals, and are supposed to be known by all; and all are charged with notice of their contents and rights arising thereunder.<sup>3</sup>

**III. WHEN NOTICE IS NECESSARY**—1. **Generally.**—In all proceedings of a judicial nature notice is indispensable;<sup>4</sup> and the term "due process of law" is held to imply notice of all proceedings which affect the rights of a person with an opportunity to be heard in relation thereto.<sup>5</sup> But it is not always necessary to "due process of law" that the notice be personal.<sup>6</sup>

Dwyer, 65 Tex. 703; Wait v. Smith, 92 Ill. 385; Burt v. Batavia Paper Mfg. Co., 86 Ill. 66; Wiswall v. McGown, 2 Barb. (N. Y.) 281; Snyder v. Sponable, 1 Hill (N. Y.) 567.

1. White v. Fisher, 77 Ind. 65; s. c., 40 Am. Rep. 287.

The fact that the vendor, who was recorder, had copied deeds which purported to convey land that he afterwards sold with warrantee, is not evidence of fraud on his part in the sale. Tong v. Matthews, 23 Mo. 437.

2. 2 Sugd. Vend. 563, 1060; Vest v. Michie, 31 Gratt. (Va.) 149; s. c., 31 Am. Rep. 722; Welford v. Beezley, 1 Ves. Sr. R. 7; Harding v. Creathom, 1 Esp. (Eng.) 56; Beckett v. Cordley, 1 Bro. C. C. (Eng.) 353. Compare Moccatta v. Murgatroyd, 1 P. Wms. (Eng.) 394; Boling v. Ewing, 9 Dana (Ky.) 76.

3. Corbin v. Mulligan, 1 Bush (Ky.) 297; Bailey v. Miltenberger, 31 Pa. St. 37; Georgetown v. Smith, 4 Cranch (C. C.) 91; *In re* Smith, 2 Hughes (U. S.) 307.

**Instructions of the President** in time of war are not, as laws are, in force without notice to individuals. The Mary and Susan, 1 Wheat. (U. S.) 46.

4. Ryan v. Boyd, 33 Ark. 778; State Bank v. Marsh, 2 Eng. (Ark.) 390; Flint River Steamboat Co. v. Foster, 5 Ga. 194; s. c., 48 Am. Dec. 248; Dearing v. Bank of Charleston, 5 Ga. 497; s. c., 48 Am. Dec. 300; Foster v. Justices, 9 Ga. 185; Parish v. Parish, 32 Ga. 653; Munroe v. People, 102 Ill. 406; Gilmore v. Sapp, 100 Ill. 297; White v. Jones, 38 Ill. 159; Black v. Black, 4 Bradf. (N. Y.) 205; Roberts v. Stowers, 7 Bush (Ky.) 295; Farmer

v. Hasley, 38 La. An. 232; McKim v. Mason, 3 Md. Ch. Dec. 186; Ewer v. Coffin, 1 Cush. (Mass.) 23; s. c., 48 Am. Dec. 587; Tyler v. Peatt, 30 Mich. 63; Steen v. Steen, 25 Miss. 513; Roach v. Burnes, 33 Mo. 319; Penobscot R. Co. v. Weeks, 52 Me. 456; Brewster v. Newark, 11 N. J. Eq. 114; New Jersey Turnpike v. Hall, 17 N. J. L. 337; Town of Kinderhook v. Claw, 15 Johns. Rep. (N. Y.) 537; People v. Tallman, 36 Barb. (N. Y.) 222; Philadelphia v. Miller, 49 Pa. St. 440; Ervine's Appeal, 16 Pa. St. 256; Corliss v. Corliss, 8 Vt. 389; Woodruff v. Taylor, 20 Vt. 65; Sika v. Chicago etc. R. Co., 21 Wis. 370; Flanders v. Seelye, 105 U. S. 718; Hale v. Finch, 104 U. S. 261; Pana v. Bowler, 107 U. S. 529; Windsor v. McVeigh, 93 U. S. 277; Settlementier v. Sullivan, 97 U. S. 444; McVeigh v. United States, 11 Wall. (U. S.) 267; Harris v. Harde-man, 14 How. (U. S.) 334; Farmers' etc. Trust Co. v. McKinney, 6 McLean (U. S.) 1; The Mary, 9 Cranch (U. S.) 126; The J. W. French, 5 Hughes (U. S.) 429.

5. Willburn v. McCalley, 63 Ala. 436; Mead v. Larkin, 66 Ala. 87; Zeigler v. S. & N. Ala. R. Co., 58 Ala. 594; Jeck v. Anderson, 57 Cal. 251; s. c., 40 Am. Rep. 115; Mason v. Messenger, 17 Iowa 267; Vardin v. Mount, 78 Ky. 86; s. c., 39 Am. Rep. 208; Parsons v. Russell, 11 Mich. 113; s. c., 83 Am. Dec. 728; Clark v. Mitchell, 64 Mo. 564; People v. Supervisors, 70 N. Y. 228; Pennoyer v. Neff, 95 U. S. 733; San Mateo Co. v. Southern Pac. R. Co., 13 Fed. Rep. 722.

6. Otis v. Dargan, 53 Ala. 178; Beard



**2. Facts Within the Knowledge of Both Parties.**—When a fact is equally well known to both parties, or when one party is bound to know, or actually does know it, it is not necessary that notice be given to him.<sup>1</sup>

(a) **FACTS PECULIARLY WITHIN KNOWLEDGE OF ONE PARTY.**—Where the facts are peculiarly within the knowledge of one party to a transaction, he must give notice to the other.<sup>2</sup>

**3. Summary Proceedings.**—There are a few instances in which it is held that proceedings may be summarily taken without giving notice, as in the case of summary process by the government to collect a debt due to itself,<sup>3</sup> or in certain cases where sureties are summarily proceeded against,<sup>4</sup> or where officers act in a purely ministerial capacity, wherein they could not act differently though notice and a hearing were given.<sup>5</sup>

**IV. FORM OF NOTICE.**—Unless some form is especially prescribed it is not necessary that a notice be given in any particular form,<sup>6</sup> and mere informalities will not vitiate so long as the notice does not mislead and gives the necessary information.<sup>7</sup>

**V. SERVICE OF NOTICE BY PUBLICATION**—1. **When Notice by Publication May be Given**—(See WRIT AND PROCESS).—A court may cause the notice necessary to the acquisition of jurisdiction over

*v. Beard*, 21 Ind. 321; *Mason v. Messenger*, 17 Iowa 261; *Com. v. Martin*, 130 Mass. 467; *Matter of Empire City Bank*, 18 N. Y. 200; *Rockwell v. Nearing*, 35 N. Y. 302; *Happy v. Mosher*, 48 N. Y. 313; *Cupp v. Seneca Co.*, 19 Ohio St. 173.

1. *Hobart v. Hilliard*, 11 Pick. (Mass.) 144; *Farwell v. Smith*, 12 Pick. (Mass.) 87.

In a case where something is promised absolutely it is unnecessary for the promisee to give notice. *Bulkley v. Elderkin*, Kirby (Ga.) 188.

2. *Watson v. Walker*, 23 N. H. 471; *Hatch v. White*, 22 Pick. (Mass.) 518; *Lamphere v. Cowen*, 42 Vt. 175.

3. *Murray v. Hoboken Land & Imp. Co.*, 18 How. (U. S.) 272.

4. The bond of a surety is an assent to the provisions of the statute in relation thereto . . . "The constitutional prohibition against depriving any person of his property without 'due process of law' was obviously intended only to protect persons from being deprived of their property *without their assent*, unless by due process of law. The constitution would become a very officious instrument, indeed, if it sought to force its protection upon any man against his will." *Chappee v. Thomas*, 5 Mich. 53. See also *Pratt v. Donovan*, 10 Wis. 378; *Booth v. Ableman*, 20 Wis. 602; *Ketch-*

*um v. Zeilsdorff*, 26 Wis. 514. Compare *Hughes v. Hughes*, 4 Mon. (Ky.) 43; *Dawson v. Shaver*, 1 Blackf. (Ind.) 206; *Smith v. Smith*, 1 How. (Miss.) 102; *Ervine's Appeal*, 16 Pa. St. 256; *Brown v. Hummell*, 6 Pa. St. 86.

5. *Bouton v. Neilson*, 3 Johns. (N. Y.) 474; *Beach v. Saunders*, 9 Johns. (N. Y.) 229; *Blaizier v. Miller*, 10 Hun (N. Y.) 435.

6. *Dovle v. Teas*, 5 Ill. 202; *Barnes v. McClinton*, 3 P. & W. (Pa.) 67; s. c., 23 Am. Dec. 62; *Tillinghast v. Champ-*

*plin*, 4 R. I. 173; s. c., 67 Am. Dec. 510. **Objection to the form of notice in execution sales** should be made in apt time, if made at all, by some one who is prejudiced by the informality. *Freem. on Executions*, § 286; *Swiggart v. Har-*

*ber*, 5 Ill. 364; s. c., 39 Am. Dec. 418; *Rigg v. Cook*, 4 Gilm. (Ill.) 336; s. c., 46 Am. Dec. 412; *Phillips v. Coffee*, 17 Ill. 157; s. c., 63 Am. Dec. 357; *McCor-*

*mick v. Wheeler*, 36 Ill. 114; s. c., 85 Am. Dec. 388; *Lee v. Davis*, 16 Ala. 516.

7. *Black v. Chicago etc. R. Co.*, 18 Wis. 208.

A notice in the name of nobody is no notice. *Rogers v. Hoskins*, 14 Ga. 166. See also, as to signature of notices, *Crawford v. State Bank*, 5 Ala. 679; *People v. Carpenter*, 24 N. Y. 86; *Stephens' Appeal*, 8 W. & S. (Pa.) 186.

a nonresident to be given by publication,<sup>1</sup> so also when the resi-

1. Ashurst v. Fountain, 67 Cal. 18; Lobree v. Mullan, 70 Cal. 150; Anderson v. Goff, 72 Cal. 65; Johnson v. Patterson, 12 Ind. 471; Miller v. Davison, 31 Iowa 435; Hartley v. Boynton, 17 Fed. Rep. 873; Elting v. Gould, 96 Mo. 535; Adams v. Cowles, 95 Mo. 501; Magrew v. Foster, 54 Mo. 258; Gates v. Clavadetscher, 19 Mo. 125; Drake v. Hale, 38 Mo. 346; Goldworthy v. Johnson, 87 Mo. 233; Lockwood v. Brantley, 31 Hun (N. Y.) 155; Morgan v. Burnet, 18 Ohio 535; Gamble v. Dalrymple, 28 Tex. 593; Hare v. Hare, 10 Tex. 355; Byrnes v. Sampson (Tex.), 11 S.W. Rep. 1073; American F. L. M. Co. v. Benson, 33 Fed. Rep. 456; Martin v. Pond, 30 Fed. Rep. 15.

**Intent to Remove from State.**—Where a citizen left the State intending to take up his residence elsewhere, but after a few months returned without having acquired a residence elsewhere, *held*, that a notice served by publication during his absence was valid. Fernandez v. Casey, 77 Tex. 452.

**Real Property the Subject of the Action.**—Under a statute allowing service by publication when the subject of the action is real property, or a lien or interest therein, such notice may be given in an action to abate a liquor nuisance on the property of a bankrupt estate. Radford v. Thornell (Iowa), 45 N. W. Rep. 890. So also an action against an assignee in bankruptcy to set aside an alleged fraudulent transfer of real estate to the assignee, is one in which notice may be given by publication. Lane v. Innes, 43 Minn. 137.

**Action for Possession of Railroad Bonds.**—Where an action was brought for the possession of bonds of a railroad company having offices in the State in which the action was brought, it was held that the court having jurisdiction over the obligor could acquire jurisdiction by publication, though the bonds and some of the defendants who claimed them were in France. Von Hess v. Morton, 5 N.Y. Supp. 790; 16 Civ. Pro. Rep. (N. Y.) 333.

**Property in the State.**—It is held in a number of the States that nonresidence does not give the court power to order service by publication, unless the party has property within the State at the time the order is made. Fiske v. Anderson, 12 Abb. Pr. (N. Y.) 8; 33 Barb. (N. Y.) 71; Haigt v. Husted, 4 Abb.

Pr. (N. Y.) 348; Bryan v. University Pub. Co., 112 N. Y. 382; Williams v. Welton, 28 Ohio St. 451; Spiers v. Halstead, 71 N. Car. 209. See also Farmers' etc. Bank v. Bank of Allen Co., 88 Tenn. 274; Ellis v. Reynolds, 35 Fed. Rep. 394; United States Electric Lighting Co. v. Martin, 43 Kan. 526.

A chose in action is property within the meaning of such a statute. Winfree v. Bagley, 102 N. Car. 515.

**Action Fully Brought.**—In Iowa the action must be fully brought before the code gives authority to serve by publication. Billings v. Kothe, 49 Iowa 34; and a return, "not found," on the original notice should be made to the court not before the first day of the term at which the defendant is to plead. Pinkney v. Pinkney, 4 Greene (Iowa) 324; Trask v. Key, 4 Greene (Iowa) 327; Lot Two v. Swetland, 4 Greene (Iowa) 465; Taylor v. Brobst, 4 Greene (Iowa) 534.

**Verified Complaint Filed.**—The Wis. Rev. St., § 2640, requires that a duly verified complaint be filed with the clerk of the court before an order of publication can issue. Cummings v. Tabor, 61 Wis. 185.

**Service of Attachment.**—Under the Michigan statute, service of an attachment must first be made in the county where the process issued. Service in a foreign county in the first instance cannot be made the basis for proceeding by publication. Stearns v. Taylor, 27 Mich. 88.

In Mississippi it is in the discretion of the court whether notice of attachment of property shall be given to a non-resident or not, the seizure being, in general, sufficient notice. Ridley v. Ridley, 24 Miss. 648; Calhoun v. Ware, 34 Miss. 146.

**Probate Proceedings.**—Publication is sufficient in the ordinary proceedings under the Michigan statute to adjust claims against an estate, but after the executor has given a bond, and the *jus ad rem* has been changed to a personal obligation of the executor, the notice must be personal and publication is insufficient. Durfee v. Abbott, 50 Mich. 278.

A United States commissioner temporarily residing in Honolulu is a non-resident within the meaning of the Oregon Code authorizing service by

dence of a party is unknown, though it may be within the State in which the court sits,<sup>1</sup> or if the party to be served conceal himself for the purpose of avoiding service,<sup>2</sup> or when, in order to determine property rights, unknown owners must be made parties.<sup>3</sup>

(a) CONSTITUTIONALITY OF STATUTES.—Statutes providing for giving notice by publication are not unconstitutional.<sup>4</sup>

publication. *Collinson v. Teal*, 4 Sawyer (U.S.) 241.

**Mariner.**—Temporary absence from the State of a defendant, as a mariner, does not authorize proceedings against him by publication as a nonresident. *McKim v. Odom*, 3 Bland Ch. (Md.) 407.

**Fugitive from Justice.**—A person under indictment, whom neither his bail nor the police could find, was properly proceeded against as a nonresident, and served with notice of foreclosure as a nonresident. *Wichman v. Aschpurwis*, 55 N. Y. Super. Ct. 218.

**Lunatic defendants** may be served by publication, if nonresidents, as well as sane persons. *Sturges v. Longworth*, 1 Ohio St. 544.

**Periodical Visits.**—A person may be served as a nonresident notwithstanding the fact that he habitually visits the State once a fortnight. *Palmer v. McCormick*, 30 Fed. Rep. 82.

**Publication During War.**—A court gained no jurisdiction by the publication of a summons in an action brought by a person resident within the confederate lines against a person residing in New York, the war of the rebellion being at the time in progress. *Dorr v. Rohr*, 82 Va. 359. See also *Walker v. Day*, 8 Baxt. (Tenn.) 77; *Deitrich v. Lang*, 11 Kan. 636.

**Absconding Debtor.**—The fact that a debtor has absconded does not authorize service by publication, especially where he still holds real estate on which his family continues to reside. *Fuller v. Riggs*, 66 Iowa 328.

In *North Carolina*, no advertisement or notice in writing is necessary in garnishment proceedings against one who has absconded. *Parker v. Gilreath*, 7 Ired. L. (N. C.) 400.

**A motion for relief from judgment** under Ind. Rev. St. 1881, § 396, is not a proceeding where notice to the opposite party can be given by publication. *Beck v. Koester*, 79 Ind. 135.

**Satisfaction of the Judge.**—An order for service by publication may be made if the judge is "satisfied" as to the necessary facts; his order thereon is a

judgment that he was satisfied, and though erroneous, so that it could be reversed by a direct proceeding, it is not void, so as to sustain a motion to vacate the judgment for want of jurisdiction of the person, made in proceedings supplementary to execution. *Collins v. Ryan*, 32 Barb. (N. Y.) 647.

**Publication in Another State.**—A notice to nonresident defendants was, by order of the register, published in a paper in another State, Georgia. *Held*, that a decree based thereon was valid. *Mobley v. Leophart*, 47 Ala. 257.

**Service on Nonresident Infant.**—A citation to an infant under fourteen, residing in another State, should be directed to be served personally, or by publication, not less than thirty days previous to the return day. It is improper to cause the infant and his guardian to be brought into the State in order to make shorter service. *Merritt's Will*, 5 Den. (N. Y.) 544. See also *Wunstel v. Landry*, 39 La. An. 312; *Walkenhorst v. Lewis*, 24 Kan. 420.

**Foreign Corporation.**—Where personal service cannot be made upon some officer or agent of a foreign corporation, service by publication may be made. *McLaren v. Byrnes* (Mich.), 45 N. W. Rep. 143.

1. *Thompson v. Carrol*, 36 N. H. 21; *Close v. Van Husen*, 6 How. Pr. (N. Y.) 157; *Foot v. Harris*, 2 Abb. Pr. (N. Y.) 454.

**When Defendant Can be Located.**—Where the defendant is absent attending to his business as a theatrical manager, and his location can be ascertained at any time, he cannot be served by publication as one whose place of sojourn is unknown, or if within the State he avoids service, so that personal service cannot be made, though the statute of limitations will run against the action if service is not made. *Ottman v. Daly*, 7 N. Y. Supp. 897.

2. *Cameron v. Savage*, 40 Ill. 124; *Cole v. Hoeburg*, 36 Kan. 263; *Brockway v. Oswego Township*, 32 Kan. 221.

3. *Allen v. Allen*, 11 How. Pr. (N. Y.) 277.

4. *Mason v. Messenger*, 17 Iowa 261;

(b) **EFFECT OF NOTICE BY PUBLICATION.**—Notice by publication in pursuance of statute is constructive notice;<sup>1</sup> but the jurisdiction which a court obtains in this manner cannot support a judgment *in personam*; it is only available where the subject matter is within the jurisdiction of the court.<sup>2</sup>

**2. Order of Publication.**—(a) **AFFIDAVIT TO OBTAIN.**—If there is a total want of evidence upon a vital point in an affidavit, the court acquires no jurisdiction by publication of the summons; where, however, there is not an entire omission to state some material fact, but it is insufficiently set forth, the proceedings are merely voidable.<sup>3</sup> The requirements of the statute must be strictly complied with.<sup>4</sup> There is a difference of opinion as to the particularity required in the allegations in the affidavit, one class of cases holding that "general statements, substantially in the language of the statute, are all that is required,"<sup>5</sup> while, on the other

Angell *v.* Angell, 14 R. I. 541; Palmer *v.* McCormick, 28 Fed. Rep. 541.

1. Kellogg *v.* French, 15 Gray (Mass.) 358.

2. Belcher *v.* Chambers, 53 Cal. 635; Denny *v.* Ashley, 12 Colo. 165; Dearing *v.* Bank of Charleston, 5 Ga. 497; s. c., 48 Am. Dec. 300; Cloyd *v.* Trotter, 118 Ill. 391; Dillon *v.* Heller, 39 Kan. 599; Sowders *v.* Edmunds, 76 Ind. 123; Middleworth *v.* McDowell, 49 Ind. 386; Lytle *v.* Lytle, 48 Ind. 200; Beard *v.* Beard, 21 Ind. 321; King *v.* Vance, 46 Ind. 246; Fisher *v.* Evans, 25 Mo. App. 582; Cooper *v.* Smith, 25 Iowa 269; Eaton *v.* Badger, 33 N. H. 228; Hoyt *v.* Thorn, 7 N. J. Eq. 9; Shepard *v.* Wright, 59 How. Pr. (N. Y.) 512; Bartlett *v.* Spicer, 75 N. Y. 528; Penoyer *v.* Neff, 95 U. S. 714.

**Right of Appearance Unqualified.**—The publication of notice under Comp. L., ch. 140, § 18, is intended as a substitute for personal service; and after proof of publication is made, both parties, so far as relates to the question of appearance and pleading, stand in the same position as they would have occupied on the return of summons personally served. The defendant need not ask leave of the court to defend, nor can the court impose terms at any stage of the case, when such leave would not have been required nor terms imposed had the suit been commenced by ordinary summons personally served. Thompson *v.* Thomas, 11 Mich. 274.

**Publication Effectual for Local Purposes.**—A decree pronounced against an absent defendant, who has been brought into court by publication, is in all respects just as valid and effectual for all

local purposes as personal service. Mutual L. Ins. Co. *v.* Pinner, 43 N. J. Eq. 52.

**No Relief Except that Demanded.**—When notice is given by publication, and the defendant does not appear, the court does not acquire jurisdiction to grant any relief except that demanded in the petition or complaint. Vorce *v.* Page (Neb.), 44 N. W. Rep. 452.

3. Atkins *v.* Atkins, 9 Neb. 200; Forbes *v.* Hyde, 31 Cal. 342; Harris *v.* Clafin, 36 Kan. 543; Ogden *v.* Walters, 12 Kan. 282; Pierce *v.* Butters, 21 Kan. 124; Claypoole *v.* Houston, 12 Kan. 324; Frazier *v.* Miles, 10 Neb. 109.

4. Wheeler *v.* Cobb, 75 N. Car. 21; Ricketson *v.* Richardson, 26 Cal. 149; Dowell *v.* Lahr, 97 Ind. 146; Fontaine *v.* Houston, 58 Ind. 316; Wortman *v.* Wortman, 17 Abb. Pr. (N. Y.) 66; Ciasell *v.* Pulaski Co., 3 McCreary (U. S.) 446.

5. Field *v.* Malone, 102 Ind. 251; Ogden *v.* Walters, 12 Kan. 282; Smith *v.* Mahon, 27 Hun (N. Y.) 40; 63 How. Pr. (N. Y.) 382; Yates *v.* Gridley, 16 S. Car. 496; National Exchange Bank *v.* Stelling, 31 S. Car. 360; Hannas *v.* Hannas, 110 Ill. 53; McCormick *v.* Paddock, 20 Neb. 486; Storm *v.* Adams, 56 Wis. 137; Frisk *v.* Reigelman, 75 Wis. 499.

**Words of Statute or Specific Facts.**—"To comply with the requirements of the statute, the affidavit should aver, in the language of the statute, 'that upon diligent enquiry the place of residence of the defendant could not be ascertained;' or it should give the facts connected with the enquiry, so that the court could readily determine that diligent

hand, it is held that "an affidavit which merely repeats the language or substance of the statute is not sufficient."<sup>1</sup> The fact of nonresidence is jurisdictional, and must be shown by the affidavit;<sup>2</sup> and, in addition, it must appear that the party to be served cannot, after due diligence, be found within the State.<sup>3</sup> So also it must be shown that the plaintiff has a good cause of action

enquiry had been made by the affiant, and that upon such enquiry the residence of the defendant could not be ascertained." *Hartung v. Hartung*, 8 Ill. App. 156.

1. "An affidavit which merely repeats the language or substance of the statute is not sufficient. Unavoidably the statute cannot go into details, but is compelled to content itself with a statement of the ultimate facts which must be made to appear, leaving the details to be supplied by the case. Between the statute and the affidavit there is a relation which is analogous to that existing between a pleading and the evidence which supports it. The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts upon which each ultimate fact depends. These ultimate facts are conclusions drawn from the existence of other facts, to disclose which is the special office of the affidavit. To illustrate: It is not sufficient to state, generally, that after due diligence the defendant cannot be found within the State, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence, or the facts showing he is a necessary party, should be stated. To hold that a bald repetition of the statute is sufficient is to strip the court or judge to whom the application is made of all judicial functions, and allow the party himself to determine in his own way the existence of jurisdictional facts—a practice too dangerous to the rights of defendants to admit of judicial toleration. The ultimate facts stated in the statute are to be found, so to speak, by the court or judge from the probatory facts stated in the affidavit, before the order for publication can be legally entered." *Ricketson v. Richardson*, 26 Cal. 149; *Yolo Co. v. Knight*, 70 Cal. 431; *Forbes v. Hyde*, 31 Cal. 342; *Thompson v. Shiawassee Judge*, 54 Mich. 236; *Mackubin v. Smith*, 5 Minn. 367; *Harrington v. Loomis*, 10 Minn. 366; *Beach v. Beach* (Dak.), 43 N. W. Rep. 701.

2. *Chase v. Kaynor*, 77 Iowa 449;

*Barber v. Morris*, 37 Minn. 194; *McGarvock v. Pollack*, 13 Neb. 535.

Nonresidence is a jurisdictional fact, and in the absence of a requirement in the statute that it appear in the affidavit it is competent to show it by other evidence. *Taylor v. Ormsby*, 66 Iowa 109.

Where service is by publication, the court only has jurisdiction where the defendant is actually a nonresident, of which the affidavit for publication is only *prima facie* evidence. *Kitchen v. Crawford*, 13 Tex. 516.

**Verified Complaint.**—The section of the New York Code of Civil Procedure requiring that the affidavit be founded on a verified complaint, does not mean that the verified complaint must be presented to the judge, and in a case where such complaint had been filed and a copy was presented to the judge it was *held* sufficient. *McCully v. Heller*, 66 How. Pr. (N. Y.) 468.

The validity of an order for the publication of summons must be judged solely upon the sufficiency of the affidavits upon which it was granted. Subsequent proof that defendant was not in fact within the State when the order was made, cannot be made to sustain it. *Wortman v. Wortman*, 17 Abb. Pr. (N. Y.) 66.

**Action Against Foreign Corporation.**—An affidavit for an order of publication of summons, which states "that the defendants are a corporation or company established and doing business under and by virtue of the laws of the State of Illinois," shows sufficiently that the defendants are a foreign corporation. *Broome v. Galena etc. Packet Co.*, 9 Minn. 239.

In an action against a nonresident to foreclose a mortgage against a nonresident, the omission of the name of the county or principal meridian in the affidavit to procure an order of publication, *held* not fatal. *Fouts v. Mann*, 15 Neb. 172. See also *Butler v. Davis*, 5 Neb. 521.

3. *Carleton v. Carleton*, 85 N. Y. 313 (distinguishing 82 N. Y. 256; 74 N. Y. 68); *Peck v. Cook*, 41 Barb. (N. Y.)

against the defendant; and it is generally held that there must be some evidence of this fact, the mere statement of the affiant's opinion being insufficient.<sup>1</sup> The affidavit may be made upon information and belief.<sup>2</sup> Where the affidavit or order is so defective as to render the service by publication invalid, the defect cannot be cured by personal service without the State.<sup>3</sup> Upon an application for an order of publication the proponent may use affidavits that have been used in other actions.<sup>4</sup>

(1) *Consideration of Affidavit by Appellate Court.*—Where the record shows the proof made before the judge making the order of publication, the appellate court may look into the proof made and pass upon its sufficiency; but not if the record fails to show the proof and the order recites that it appeared to the satisfaction of the judge making such order.<sup>5</sup>

(2) *Attack in Collateral Proceedings.*—Defects in the affidavit

549; *Easterbrooke v. Easterbrooke*, 64 Barb. (N. Y.) 421; *Beach v. Beach* (Dak.), 43 N. W. Rep. 701; *Swain v. Chase*, 12 Cal. 283; *Bealy v. Seaman*, 30 Cal. 610.

**Return of Sheriff.**—The fact of due diligence must appear by affidavit, the return of the sheriff is not sufficient. The affidavit of the plaintiff is competent for the purpose. *Waffle v. Goble*, 53 Barb. (N. Y.) 517; *Fetes v. Volmer*, 8 N. Y. Supp. 294. *Compare* *Yates v. Gridley*, 16 S. Car. 496; *Sueterlee v. Sir*, 25 Wis. 357; *Young v. Schenck*, 22 Wis. 556.

**Proof of nonresidence** does not, of itself, tend to show that the defendant cannot with reasonable diligence be found within the State. *Bixby v. Smith*, 49 How. Pr. (N. Y.) 50; *McLeod v. Moore*, 3 N. Y. Supp. 792. *Compare* *Byrne v. Roberts*, 31 Iowa 319.

If the affidavit states that defendant resides out of the State and gives his residence, that is sufficient. *Anderson v. Goff*, 72 Cal. 65.

1. *Forbes v. Hyde*, 31 Cal. 342; *Dowell v. Lahr*, 97 Ind. 146; *Claypoole v. Houston*, 12 Kan. 324; *Phillips v. Evans*, 64 Mo. 17; *Shedenhelm v. Shedenhelm*, 21 Neb. 387; *Holmes v. Holmes*, 15 Neb. 615; *Slocum v. Slocum*, 17 Wis. 150.

**Subject of the Action.**—Where a statute required that it should be shown that the court had jurisdiction of the "subject of the action," it was held that the words were not synonymous with "cause of action," and that where the property was not shown to have been attached before publication, the court acquired no jurisdiction by publication

of the summons. *McKinney v. Collins*, 88 N. Y. 216.

**Principal defendant's name** should be stated in the affidavit, and if he is a nonresident, that a cause of action exists against him. *Rankin v. Adams*, 18 Wis. 292.

2. *Colton v. Rupert*, 60 Mich. 318; *Belmont v. Cornen*, 82 N. Y. 256; *Howe Machine Co. v. Pettibone*, 74 N. Y. 68; *Seiler v. Wilson*, 43 Hun (N. Y.) 629; *Steinle v. Bell*, 12 Abb. Pr., N. S. (N. Y.) 171; *VanWyck v. Hardy*, 11 Abb. Pr. (N. Y.) 473; 20 How. Pr. 222; *Chase v. Lawson*, 36 Hun (N. Y.) 221; *Wunnenberg v. Gearty*, 36 Hun (N. Y.) 243.

The following cases hold, more or less directly, that an affidavit on information and belief alone, without stating the source of information and ground of belief, is insufficient: *Waggoner v. Fogleman* (Ark. 1890), 13 S. W. Rep. 729; *Turnage v. Fisk*, 22 Ark. 286; *Greenbaum v. Dwyer*, 66 How. Pr. (N. Y.) 266; *Lyon v. Baxter*, 64 How. Pr. (N. Y.) 426.

Where an affidavit for service by publication was correct, except that at its close it purported to have been made upon information and belief, held that this qualified the positive declarations, and made the affidavit defective, but not void, and after judgment it might be amended. *Harrison v. Beard*, 30 Kan. 532.

3. *Peck v. Cook*, 41 Barb. (N. Y.) 549; *Manning v. Heady*, 64 Wis. 630.

4. *Barnard v. Heydrick*, 49 Barb. (N. Y.) 62, cited with approval in 80 N. Y. 551.

5. *Manning v. Heady*, 64 Wis. 630.

cannot be objected to in a collateral proceeding in the same State; such errors must be corrected by appeal.<sup>1</sup>

(b) CONTENTS AND FORM OF THE ORDER.—The order directing publication need not be identical with the notice; it is sufficient if it informs the defendant what and where he is to answer.<sup>2</sup> And there need be no recital that the necessary facts satisfactorily appeared to the judge.<sup>3</sup> A discrepancy in the name of the paper as given in the order and in the affidavit of publication will not invalidate the notice,<sup>4</sup> and in some of the States it has been held that the paper need not be named in the order.<sup>5</sup> A discrepancy between the order and complaint as to the time to answer is not error.<sup>6</sup> The order should direct that a copy of the notice be mailed,<sup>7</sup> but where the order did not so direct, but it was nevertheless done, it has been held that the notice was properly given.<sup>8</sup> So also where the time of publication was incorrectly stated in the order, but the publication made complied with the statute, the notice was held valid.<sup>9</sup> The order need not, in addition to the direction of publication and mailing, direct that the plaintiff may have personal service made.<sup>10</sup> The caption of the order is not conclusive; if it be shown that the order was properly obtained an error in the caption will not invalidate the notice.<sup>11</sup> An order

1. *Pennoyer v. Neff*, 95 U. S. 714; *Kennedy v. New York L. Ins. etc. Co.*, 101 N. Y. 487; *Belmont v. Cornen*, 82 N. Y. 256; *McCracken v. Flanagan*, 5 N. Y. Supp. 338; *Pike v. Kennedy*, 15 Oreg. 420; *Ogden v. Walters*, 12 Kan. 282; *Dowell v. Lahr*, 97 Ind. 146; *Crawford v. Branch Bank*, 7 Ala. 205; *Lawson v. Moorman*, 85 Va. 880; *Storm v. Adams*, 56 Wis. 137.

2. *Deitrich v. Lang*, 11 Kan. 636; *Gilliland v. Cullum*, 6 Lea (Tenn.) 521.

3. *Green v. Squires*, 20 Hun (N. Y.) 15.

4. A notice published in the "New York Day Book," held a compliance with an order directing publication in "The Evening Day Book," there being no evidence that there were two papers called the "Day Book." *Soule v. Chase*, 1 Abb. Pr., N. S. (N. Y.) 48. See also *Frisk v. Reigelman*, 75 Wis. 499.

5. *Steele v. Creditors*, 58 Cal. 244; *Green v. Squires*, 20 Hun (N. Y.) 15.

6. *McGowan v. Branch Bank*, 7 Ala. 823.

7. *Ritten v. Griffith*, 16 Hun (N. Y.) 454; *Park v. Higbee* (Utah), 24 Pac. Rep. 524.

The fact that the address to which the notice is mailed is not, in fact, the correct one, does not render the judgment void if the plaintiff acts in good faith upon the best information obtainable. *Martin v. Pond*, 30 Fed. Rep. 15.

Code Civil Proc. N. Y., § 440, prescribes that an order of publication against a nonresident defendant must contain a direction for a deposit in the postoffice of copies of the summons and of the complaint, directed to defendant at a place specified in the order. *Held*, that the place specified in the order must be shown by the affidavit on which the order is based to be either that of defendant's residence or a place at which he would probably receive matter transmitted through the postoffice; and, where the affidavit shows that defendant resides at "Marion, Washington County, Iowa," the order directing the papers to be mailed to "Washington, Iowa," is fatally defective. *Fetes v. Volmer*, 8 N. Y. Supp. 204.

8. *Lyon v. Comstock*, 9 Iowa 306; *Anderson v. Goff*, 72 Cal. 65.

9. *Blight v. Banks*, 6 Mon. (Ky.) 192; s. c., 17 Am. Dec. 136.

10. *O'Neil v. Bender*, 30 Hun (N. Y.) 204.

An order authorizing personal service without the State without direction of publication or mailing is void. *Berford v. New York Iron Mine*, 55 N. Y. Super. Ct. 516.

11. *Phinney v. Broschell*, 19 Hun (N. Y.) 116; 58 How. Pr. (N. Y.) 492; *Mojarietta v. Saenz*, 58 How. Pr. (N. Y.) 494.

An order of publication, dated and

of publication in tax proceedings need not contain a description of the land.<sup>1</sup>

(c) **POWER OF CLERK TO MAKE ORDER.**—In some of the States the clerk of the court has power to make an order directing that notice be given by publication.<sup>2</sup>

**3. Contents of the Notice.**—The right to give notice by publication being statutory, the contents of the notice are generally prescribed by the statute to which reference must be had in each particular case. A notice, which is substantially correct as to all essential matters, so as to give the party sought to be charged the nature of the interest to be affected and the relief sought, is sufficient.<sup>3</sup> An omission to direct a summons only to those to be served will not render the notice void;<sup>4</sup> and in probate proceedings it is quite generally held sufficient to use the language of the statute, "to the heirs-at-law, next of kin, and all other persons interested in the estate of, etc.," without giving the names of such persons.<sup>5</sup> Where it is held necessary to name the persons to be notified it is generally,<sup>6</sup> though not always,<sup>7</sup> held that a mistake in the name is fatal. Under a statute requiring a brief statement of the cause of action a detailed and specific statement is un-

issued on a day which was neither a rule-day nor in term, is a nullity. *Coal R. Nav. Co. v. Webb*, 3 W. Va. 438.

1. *Allen v. Ray*, 96 Mo. 542; *Goldsworthy v. Johnson*, 87 Mo. 233.

2. *Ayres v. Lusk*, 2 Ill. 536; *Rogers v. Rush*, 4 Coldw. (Tenn.) 272.

A publication in attachment ordered by the clerk in vacation after the lapse of two terms from the date of process, and without any new affidavit, *held* to be good. *Johnson v. Gage*, 57 Mo. 160. See also *Kane v. McCown*, 55 Mo. 181.

3. *Gary v. May*, 16 Ohio 66; *Hoyt v. Pawtucket Sav. Institution*, 110 Ill. 390; *Ziegenhager v. Strong*, 1 Ind. 296; *McBride v. Hartwell*, 2 Kan. 405; *White v. McClellan*, 62 Md. 347; *Van Wyck v. Hardy*, 4 Abb. App. Dec. (N. Y.) 496; *Newman v. Jackson*, 12 Wheat. (U. S.) 570.

**Clerical Error.**—A palpable clerical error in a notice which could not mislead, will not vitiate the notice. *Mitchell v. Nodaway Co.*, 80 Mo. 257.

**Error Causing Actual Damage.**—A sale will be set aside if the notice erroneously states that certain parties claim some interest and the property is consequently sold at a sacrifice. *Equitable Trust Co. v. Fisher*, 106 Ill. 189.

**Notice of Sale.**—A notice of sale saying that the sale would take place at the door of the courthouse, when there was none there or any place known as

such, *held* void. *Bottineau v. Aetna L. Ins. Co.*, 31 Minn. 125.

**Evidence.**—The burden of showing that a notice was defective is on him objecting to the notice. *Tartt v. Clayton*, 109 Ill. 579.

4. *Loring v. Binney*, 38 Hun (N. Y.) 152.

There were three parties defendant, two of whom it was necessary to serve by publication, and in the notice so served only they were mentioned. *Held*, that the notice was not void, though all three should have been named. *White v. Lea*, 9 Lea (Tenn.) 449.

5. *Wells v. Child*, 12 Allen (Mass.) 330; *Boston Safe Deposit etc. Co. v. Mixter*, 146 Mass. 100.

A citation, on which it was sought to found a judgment for delinquent taxes, which was addressed to the heirs of a certain person *held* insufficient for not mentioning the names of such heirs. *New Orleans v. St. Romes*, 28 La. An. 17. Compare *Irwin v. New Orleans*, 28 La. An. 670.

6. *Entrekin v. Chambers*, 11 Kan. 368; *Colton v. Rupert*, 60 Mich. 318; *Magoffin v. Mandaville*, 28 Miss. 354; *Troyer v. Wood*, 96 Mo. 478; *Chamberlain v. Blodgett*, 96 Mo. 482. Compare *Elting v. Gould*, 96 Mo. 535; *Whelen v. Weaver*, 93 Mo. 430; *McRee v. Brown*, 45 Tex. 503.

7. *Lane v. Innes*, 43 Minn. 137; *Horton v. Bassett* (R. I.), 16 Atl. Rep.



necessary.<sup>1</sup> In proceedings relating to real property a detailed description of the property does not seem to be necessary unless especially prescribed by statute.<sup>2</sup> An error in the date or its omission, if not likely to mislead, will not invalidate the summons.<sup>3</sup> When it is sought to make one a party to a judgment the notice should apprise him of the judgment already existing against his codefendant.<sup>4</sup> The notice in attachment proceedings need not state that they are in attachment, a statement of the pendency of the action being sufficient.<sup>5</sup> Where the name of the city was omitted in the attorney's address, but was given in the date of the notice, it was held sufficient.<sup>6</sup> It has been held that where a summons served by publication required the defendant to answer in a shorter time than the law requires, the summons could be amended and publication continued in its amended form.<sup>7</sup> Where some of the parties are properly served they cannot set up the insufficiency of the notice to others in order to prevent the court from acquiring jurisdiction.<sup>8</sup>

715; *White v. McClellan*, 62 Md. 347.

A notice to two partners properly served on both is good, though it misstate the firm name. *Tabber v. Mitchell*, 62 Miss. 437.

A notice to a married woman transposed the initial letters of her name, but described her also as the wife of her husband, by which designation she was better known. *Held*, that the notice was valid. *Fanning v. Krapf*, 68 Iowa 244.

1. *Pipkin v. Kaufman*, 62 Tex. 545; *Adams v. Cowles*, 95 Mo. 501.

When service, in a proceeding by attachment against a nonresident, is made by publication, notice that the proceedings are "founded on two promissory notes for the sum of \$386.94," is not a sufficient statement of the amount under a statutory requirement that the notice shall state the "nature and amount of the plaintiff's demand." *Haywood v. Russell*, 44 Mo. 252.

2. *Morris v. Trustees of Schools*, 15 Ill. 266; *Grebe v. Jones*, 15 Neb. 312; *Cooper v. Holmes* (Md.), 17 Atl. Rep. 711; *Snyder v. Hemmingway*, 47 Mich. 549.

Where a description is more detailed than the statute requires, an error in the part not required by statute will not invalidate the notice if the essential facts are correctly stated. *Kane v. Brooklyn*, 114 N. Y. 586.

**Description Must be Correct.**—If land is described in a notice of sale, it must be correct. Sale of one tract of land founded on notice designating a differ-

ent one is void. *Freeman on Jud. Sales*, § 18; *Reynolds v. Wilson*, 15 Ill. 354; s. c., 60 Am. Dec. 753; *Frazier v. Steenrod*, 7 Iowa 339; *Farr v. Sims*, Rich. Eq. Cas. (S. Car.) 122; s. c., 24 Am. Dec. 396; *Merwin v. Smith*, 2 N. J. Eq. 182.

3. *Forsyth v. Warren*, 62 Ill. 68; *Parmly v. Walker*, 102 Ill. 617; *Pipkin v. Kaufman*, 62 Tex. 545.

A publication of an order against absent defendants, requiring them to appear at the next April term, but not specifying the date or term at which the order was made, was held to be no notice to the defendants. *Miller v. Hall*, 3 Mon. (Ky.) 242.

4. *Firebaugh v. Hall*, 63 Ill. 81.

The advertisement and adjudication of the interest of the debtor in certain judgments, obtained in the name of certain parties against others which does not state the nature, extent, or proportion of his interest, will not divest his rights. *Moore v. Knapp*, 7 La. An. 21.

5. *Dronillard v. Whistler*, 29 Ind. 552.

In case of the attachment of personal property, a description of the property is not necessary in the notice of publication to a nonresident defendant. *Race v. Malony*, 21 Kan. 31.

6. *Van Wyck v. Hardy*, 11 Abb. Pr. (N. Y.) 473; 20 How. Pr. (N. Y.) 222.

7. *Gibbon v. Freel*, 93 N. Y. 93; *Deimel v. Scheveland*, 9 N. Y. Supp. 482.

8. *Fergus v. Tinkham*, 38 Ill. 407.

**4. Irregularities—(a) STATUTES STRICTLY CONSTRUED.**—Statutes providing for giving notice by publication are in derogation of common law, and, as has been said already, in discussing the affidavit and order, all of the statutory provisions must be followed strictly.<sup>1</sup>

**(b) DELAY IN MAKING PUBLICATION.**—Where there is a delay in making publication, the court will not dismiss the case for want of jurisdiction.<sup>2</sup>

**(c) FILING AFFIDAVIT AND COMPLAINT.**—Where the statute requires that the affidavit or the complaint be filed before the publication of the notice, the requirement is jurisdictional, and a judgment founded on a publication without such filing is void.<sup>3</sup>

**(d) EFFECT OF VOLUNTARY APPEARANCE.**—If there be an irregularity in obtaining the order for publication, or in the notice itself, the appearance of the defendant will waive the defect, and jurisdiction will attach.<sup>4</sup>

**5. Computation of Time—Publication for a Certain Number of Weeks.**—Where a notice is required to be published once a week for a certain number of weeks, it is held in a majority of the cases,<sup>5</sup> though not in all,<sup>6</sup> that the full number of days to consti-

1. *Allen v. Bankston*, 33 Ark. 740; *Guise v. Early*, 72 Iowa 283; *New Orleans v. Cochrane*, 8 La. An. 365; *Botts v. New Orleans*, 9 La. An. 233; *Thompson v. Carrol*, 36 N. H. 21; *Doughty v. Hope*, 1 N. Y. 79; *Kendall v. Washburn*, 14 How. Pr. (N. Y.) 380; *Garrison v. Cheeney*, 1 Wash. Ter. 489; *Ramsey v. Hommel*, 68 Wis. 12; *Gray v. Larrimore*, 2 Abb. (U. S.) 542; *Le Roy v. Jamison*, 3 Sawy. (U. S.) 269; *Cissell v. Pulaski Co.*, 3 McCrary (U. S.) 446; *Galpin v. Page*, 1 Sawy. (U. S.) 309.

A published summons not signed by an attorney, and not stating when the complaint is or will be filed, is insufficient. *Hays v. Lewis*, 21 Wis. 663.

2. *Bacher v. Shawhan*, 41 Ohio St. 271; *Penniman v. Daniel*, 93 N. Car. 332; *Matter of Clarke*, 3 Den. (N. Y.) 167. Compare *Allen v. Lee*, 6 Wis. 478; *McCoy v. McCoy*, 29 W. Va. 794.

3. *Bradley v. Jamison*, 46 Iowa 68; *Barber v. Morris*, 37 Minn. 194 (overruling *Gemmett v. Rice*, 13 Minn. 400); *Anderson v. Coburn*, 27 Miss. 558; *Murphey v. Lyons*, 19 Neb. 689; *McGavock v. Pollack*, 13 Neb. 535; *Frazier v. Miles*, 10 Neb. 109; *Blair v. West Point Mfg. Co.*, 7 Neb. 146; *Kendall v. Washburn*, 14 How. Pr. (N. Y.) 380.

It is not essential to the acquiring of jurisdiction, in a case where service of the original notice is properly made by publication, that the petition should be

filed before the publication is made. *Foster v. Henderson*, 54 Iowa 220, overruling *Billings v. Kothe*, 49 Iowa 34.

**Filing Declaration and Affidavit of Publication.**—Where the statute provided that one might, upon filing an affidavit of publication, also file his declaration and proceed as though actual notice had been given, held that in a case where the declaration was filed on September 2nd, and the affidavit of publication not until the 28th of December following, the judgment was void. *Nugent v. Nugent*, 70 Mich. 52.

4. *Clarke v. Borrel*, 21 Hun (N. Y.) 594; *Williams v. Stewart*, 3 Wis. 773.

5. *Williams v. Sacramento Co.*, 58 Cal. 237; *Boyd v. McFarlin*, 58 Ga. 208; *Bacon v. Kennedy*, 56 Mich. 329; *Market Nat. Bank v. Pacific Nat. Bank*, 89 N. Y. 397; s. c., 11 Abb. N. Cas. (N. Y.) 104; *Bunce v. Reed*, 16 Barb. (N. Y.) 347; *Richardson v. Bates*, 23 How. Pr. (N. Y.) 516; *Brod v. Heyman*, 3 Abb. Pr., N. S. (N. Y.) 396; *Re North Whitehall*, 47 Pa. St. 156; *Wallace's Estate*, 2 Pittsb. (Pa.) 145; *Hill v. Faison*, 27 Tex. 428; *Herrick v. Graves*, 16 Wis. 163; *McDonald v. Cooper*, 32 Fed. Rep. 745; *Early v. Doe*, 16 How. (U. S.) 610; *Dillard v. Krise* (Va.), 10 S. E. Rep. 430.

6. *Gilmore v. Sapp*, 100 Ill. 297; *Pearson v. Bradley*, 48 Ill. 250; *Garrett v. Mose*, 20 Ill. 554; *Banta v. Wood*, 32

tute the required number of weeks must elapse between the first publication and the happening of the event of which notice is given and that publication, once in each of the required number of weeks, is not sufficient, unless the full number of days has elapsed. But generally it is not held necessary that the publication should be on the same day in each week,<sup>1</sup> though some of the cases hold this to be necessary.<sup>2</sup>

(a) **METHOD OF COMPUTATION.**—In computing the time for which a notice is given, either the day of giving the notice, or the day on which the event takes place, is to be counted and the other excluded.<sup>3</sup> In computing the time for giving notice, statutes are construed in favor of the person to be notified.<sup>4</sup>

(b) **PUBLICATION FOR LESS THAN PRESCRIBED TIME.**—Where the statute requires that a notice shall be published for a certain length of time, a publication for any shorter period is of no avail, and proceedings founded on such notice are void.<sup>5</sup> A postponement of the event, of which notice is given, will not cure a defect-

Iowa 469; *Swett v. Sprague*, 55 Me. 190; *Knowles v. Summey*, 52 Miss. 377; *Bachelor v. Bachelor*, 1 Mass. 256; *Lowenstine v. Gillespie*, 6 Lea (Tenn.) 641.

1. *Bachelor v. Bachelor*, 1 Mass. 256; *Wood v. Knapp*, 100 N. Y. 109; *Wilson v. Scott*, 29 Ohio St. 636; *Roukendorff v. Taylor*, 4 Pet. (U. S.) 349.

2. *Hernandes v. His Creditors*, 57 Cal. 333; *In re King*, 7 N. Bank Reg. 279; 5 Ben. (U. S.) 453.

3. *Savings etc. Soc. v. Thompson*, 32 Cal. 347; *Forsyth v. Warren*, 62 Ill. 68; *Mitchell v. Woodson*, 37 Miss. 567; *Kane v. Brooklyn*, 114 N. Y. 586; *Hagerman v. Ohio Building etc. Assoc.*, 25 Ohio St. 186.

4. *Hill v. Falson*, 27 Tex. 428.

5. *Jordan v. Gibbin*, 12 Cal. 100; *Townsend v. Tallant*, 33 Cal. 45; s. c., 91 Am. Dec. 617; *Alameda Macadamizing Co. v. Huff*, 57 Cal. 331; *Boyd v. McFarlin*, 58 Ga. 208; *Gibson v. Roll*, 30 Ill. 172; s. c., 83 Am. Dec. 181; *Monahan v. Vandyke*, 27 Ill. 154; *Muncey v. Yoest*, 74 Ind. 409; *Cravens v. Dyer*, 1 Litt. (Ky.) 153; *Pyle v. Cravens*, 4 Litt. (Ky.) 17; *Payne v. Wallace*, 2 A. K. Marsh. (Ky.) 244; *Barclay v. Hendricks*, 4 Mon. (Ky.) 251; *Robinson v. Richardson*, 4 J. J. Marsh. (Ky.) 574; *Lawlin v. Clay*, 4 Litt. (Ky.) 284; *Parsons v. Lanning*, 27 N. J. Eq. 70; *Havens v. Sherman*, 42 Barb. (N. Y.) 636; *Olcott v. Robinson*, 20 Barb. (N. Y.) 148; *Early v. Doe*, 16 How. (U. S.) 610; *Hunt v. Wickliffe*, 2 Pet. (U. S.) 201.

**Paper Not Published.**—A statute required that a notice should be published daily for ten days excepting Sundays; the notice was published eight times during ten consecutive days, the paper not being published on the other two days which were not Sundays. *Held*, that the notice was insufficient and void. *Haskell v. Bartlett*, 34 Cal. 281.

**Part of the Edition Published at Wrong Time.**—A large part of the edition of a paper containing the notice of a foreclosure sale was published on the last day the mortgage had to run, and the other portion of the edition on the following day. *Held*, that the publication was not good. *Pratt v. Tinkcom*, 21 Minn. 142.

Where property seized under executory process was advertised on the day of the seizure, it was held good provided there were thirty days' advertisement and thirty-three clear days intervened between the seizure and sale. *Luckett v. Crain*, 29 La. An. 128.

**Change of Time for Holding Court.**—An order was made that notice in a certain action be published for a certain length of time. *Held*, that the fact that a law was passed changing the time for holding terms of court did not authorize the rendition of judgment until the full time had elapsed. *Saffaracus v. Bennett*, 7 Miss. 277.

Where the service by publication is not made a sufficient time before the return term of a writ, such service will be good for the next term. *Hill v. Baylor*, 23 Tex. 261.

ive publication, rendered so because the full time has not elapsed;<sup>1</sup> and the publication of a notice requiring a party to do a certain thing for more than the prescribed time, will not extend the time within which the act was to be performed.<sup>2</sup>

(c) **WHEN SERVICE BY PUBLICATION IS COMPLETE.**—Service by publication is deemed complete when the time prescribed for publication has expired; and the time within which the party notified must act is computed from that date.<sup>3</sup>

(d) **PUBLICATION FOR A CERTAIN NUMBER OF DAYS.**—Requirements that notice shall be given for a certain number of days have been variously construed. Some cases hold that a requirement that notice be given for a certain period means that the notice must be published every day for that length of time,<sup>4</sup> others that it must be in each successive issue of the paper,<sup>5</sup> and others that a single publication the required period of time before the event of which notice is given is sufficient.<sup>6</sup>

(e) **NOTICE FOR A CERTAIN TIME PRIOR.**—Where it is required that notice be given for a certain time prior to the happening of the event, some of the cases hold that the first publication shall be that length of time before the event,<sup>7</sup> others that the publication shall be complete that length of time before the event.<sup>8</sup> In cases where the requirement is that the publication shall be complete for the specified time before the event, the question has also been raised as to whether it must be completed exactly on the specified number of days before the event, or whether it must be at least that length of time before, but not necessarily exactly the specified time. The latter view seems to be the correct one.<sup>9</sup>

**6. Mailing and Posting.**—The statutes in many, if not all, of the

1. *Sawyer v. Wilson*, 61 Me. 529; *Pratt v. Tinkcom*, 21 Minn. 142.

2. *Anderson v. Goff*, 72 Cal. 65.

3. *Conley v. Morris*, 6 Colo. 212; *Skiles v. Baker*, 6 Colo. 295; *Brooklyn Trust Co. v. Bulmer*, 49 N. Y. 84; *Mackay v. Laidlaw*, 13 How. Pr. (N. Y.) 129.

4. *Scammon v. Chicago*, 40 Ill. 146; *Washington v. Bassett*, 15 R. I. 563.

In a case where thirty days elapsed between the first publication and the day of sale, but the notice appeared but twenty-seven times, but no injury was shown to have resulted, *held*, that it was not necessary, though perhaps advisable, that the notice should be in every issue of the paper, and that the sale would not be set aside unless injury was shown to have resulted. *German Bank v. Stumpf*, 73 Mo. 311. See also *Brewer v. Springfield*, 97 Mass. 152.

5. *McCurdy v. Baker*, 11 Kan. 211; *Treptow v. Buse*, 10 Kan. 170; *Whitaker v. Beach*, 12 Kan. 492; *Watkins v.*

*Williams*, 33 Kan. 149; *Rounsaville v. Hazen*, 33 Kan. 71.

6. *Andrews v. Ohio etc. R. Co.*, 14 Ind. 169; *Muskingum Valley Turnp. Co. v. Ward*, 13 Ohio 120.

"Where a statute requires the notice of sale to be published 'weekly for two weeks' between the fourth Monday in April and the fourth Monday in May, two weeks must elapse between the first publication and the fourth Monday in May; and where the publication is made on the 16th and 23rd days of May, and the fourth Monday of the month is the 25th, the notice is void." *Martin v. Barbour*, 34 Fed. Rep. 701. Compare *Lawson v. Gibson*, 18 Neb. 137.

7. *Security Co. v. Arbuckle (Ind.)*, 24 N. E. Rep. 329.

8. *Mowry v. Blandin*, 64 N. H. 3; *Bussey v. Leavitt*, 12 Me. 378.

9. *Tooke v. Newman*, 75 Ill. 219; *Taylor v. Reid*, 103 Ill. 349; *Fry v. Bidwell*, 74 Ill. 381; *Beal v. Blair*, 33 Iowa 318; *Kipp v. Collins*, 33 Minn. 394.

States require that, in addition to the publication of the summons in a newspaper, a copy of the summons and complaint and the order of publication shall be mailed to the adverse party,<sup>1</sup> or that a copy of the summons be posted in some public place.<sup>2</sup>

(a) **NOTICE MAILED TO WRONG ADDRESS.**—The notice must be mailed to the party at the address stated in the order of publication; a mailing to a different address will not be sufficient;<sup>3</sup> but if the address stated in the order, or the affidavit to procure the order, is not, in fact, the correct one, a judgment obtained thereon will not be void, if the plaintiff acted in good faith.<sup>4</sup>

1. *Callum v. Branch Bank*, 23 Ala. 797; *Scorpion Silver Min. Co. v. Marsano*, 10 Nev. 370.

When a person testifies that he did not receive a notice sent by mail, an issue of fact is made which should be submitted to a jury. *McCoy v. New York*, 46 Hun (N. Y.) 268.

**When Complaint has Been Amended.**—When the complaint in the action has been amended before the order for publication is made, the amended pleading is the proper one to be mailed to the adverse party. *Mudge v. Steinhart*, 78 Cal. 34.

**Place of Mailing.**—A summons and complaint in an action where service is made by publication may properly be mailed at the postoffice where the plaintiff's attorney resides instead of at the place where the order of publication was made. *Mudge v. Steinhart*, 78 Cal. 34.

**Mailing Forthwith.**—"Forthwith" in the provisions of a statute relating to the time of mailing a notice means without delay, and a reasonable time is to be allowed, taking into consideration the circumstances of each case. *Deitrich v. Lang*, 11 Kan. 636. See also *Lyon v. Comstock*, 9 Iowa 306; *Cleland v. Tavernier*, 11 Minn. 194.

For a case in which fifteen days' delay was held too great, see *Black v. Crussel*, 2 Abb. Pr. (N. Y.) 386. Compare *Van Wyck v. Hardy*, 11 Abb. Pr. (N. Y.) 473; 20 How. Pr. (N. Y.) 222.

2. *Batre v. Auze*, 5 Ala. 173; *McKey v. Cobb*, 33 Miss. 533; *Zecharie v. Bowers*, 11 Miss. 641; *Myric v. Adams*, 4 Munf. (Va.) 366.

**Substantial Compliance With Statute.**—Where the statute required that a notice should be published in a newspaper or advertised on the door of the court house, or at the door of the house where courts are usually held and in three of the most public places in the county, and an application under the

statute was made before there was any court house or place where courts were usually held, it was held that an advertisement in four of the most public places in the county was a sufficient compliance with the statute. *Drew v. Gant*, 1 Oreg. 197.

**Posting in Lieu of Publication.**—It was provided by statute that in a certain county notice might be given by posting in lieu of publication in a newspaper. A notice ordered to be published in that county was published in a newspaper for a time, until the paper suspended publication, and posted for the balance of the time. *Held*, that it was not a compliance with the order. *Falkner v. Guild*, 10 Wis. 563. See also *Halleck v. Moss*, 17 Cal. 339.

**"Public Place."**—An officer stated in his return that a school house on which he posted a notice was a public place. *Held*, sufficient evidence of the fact. *Wilson v. Brickman*, 71 Me. 545.

Where a statute requires that a notice be published in a conspicuous public place, proof that it was posted in a public place is insufficient. *Lewey Island R. Co. v. Bolton*, 48 Me. 451.

Posting on a court house, though not on the front thereof, *held* a compliance with the law requiring posting in a public place. *Campbell v. Wheeler*, 69 Iowa 588.

3. *Paulling v. Creagh*, 63 Ala. 398; *Smith v. Wells*, 69 N. Y. 600.

**Mailing Notice to Firm Address.**—In a case where defendants were members of a firm and a single notice was mailed to them by their firm name, the initials only of their Christian names being given, *held*, that at best it would be notice to one only, and that the uncertainty who might receive it made it *prima facie* void as to both, and that if two copies had been so directed and mailed it would have been doubtful service. *Likens v. McCormick*, 39 Wis. 313.

4. *Martin v. Pond*, 30 Fed. Rep. 15.

(b) **AFFIDAVIT OF MAILING.**—The affidavit that the notice was served by mail should show the date of mailing; that it was to the usual residence of the defendant, and that the mailing was in sufficient time for the party to act upon the notice.<sup>1</sup> It has been held also that the conditions on which such service depends should appear in the affidavit.<sup>2</sup>

**7. The Paper.**—(a) **DESIGNATION.**—When a paper in which notice is to be published is designated by statute or by order of court, a publication in any other paper is of no effect.<sup>3</sup>

(b) **PLACE OF PUBLICATION.**—The place of publication of a paper is the place where the paper is first issued; that is, given to the public for circulation, and not the place where it is sent for distribution.<sup>4</sup>

1. *Briggs v. Finn*, 10 Iowa 590; *Pinkney v. Pinkney*, 4 Greene (Iowa) 324; *Trask v. Key*, 4 Greene (Iowa) 372; *Lot Two v. Swetland*, 4 Greene (Iowa) 465; *Taylor v. Brobst*, 4 Greene (Iowa) 534.

It must clearly appear that notice was sent to the postoffice address of the defendant. The fact that the solicitor was so informed, without stating the source of information, or that he was "credibly" informed and "verily" believes, is not sufficient. *Rogers v. Rogers*, 18 N. J. Eq. 445.

2. *Clark v. Adams*, 33 Mich. 159.

3. *Foster v. Simmons*, 40 Miss. 585; *Otis v. Epperson*, 88 Mo. 131; *Brisbane v. Peabody*, 3 How. Pr. (N. Y.) 109; *Hafern v. Davis*, 10 Wis. 501.

**Notices.**—Where no newspaper is printed and published in a county, publication of notices may be made in a newspaper printed in either of the counties bordering upon the one where suit is brought, at the election of plaintiff's attorney. *Cooke v. Tallman*, 40 Iowa 133.

**Designated Paper Merged in Another.**—A paper called the "Financier" was designated, but before the notice was published the "Financier" was merged in a paper called the "Public." The facts being made known to the judge, he directed publication in the "Public." *Held*, that whether the judge had authority to make the order or not, the publication as made was a substantial compliance with the original order. The purpose of the publication was not affected by the change of name or union with another paper. *Sage v. Central R. Co.*, 99 U. S. 334.

**Suspension of Paper.**—A publication was directed to be made in a certain paper weekly for four weeks. After three publications had been made the

paper suspended publication, and the notice was inserted in another paper for the remaining week. *Held*, insufficient. *Townsend v. Tallant*, 33 Cal. 45; s. c., 91 Am. Dec. 617.

**Change of Official Paper.**—Where a paper which had been designated as the official paper had ceased to be such before the last publication of a notice, *held*, that the notice was insufficient. *Bussey v. Leavitt*, 12 Me. 378.

**Failure to Designate Paper.**—Certain papers were designated by city ordinance for the publication of assessment notices during one year, but failed to make any for the next year. *Held*, that publication in the same papers the next year was invalid. *Adrian v. McCafferty*, 2 Rob. (N. Y.) 153.

Where papers for the publication of certain notices should have been designated by the governor and comptroller, but they failed to do it and the notices were published in all of the papers from which they could have made their designation, *held*, that the notice was good. *State v. Gloucester Co.*, 50 N. J. L. 585; s. c., 23 Am. & Eng. Corp. Cas. 161.

**"City Paper."**—To constitute a publication in a "city paper" it must appear that the paper is both published and circulated in the city; publication alone is insufficient. *Haskell v. Bartlett*, 34 Cal. 281.

**Discretion of Officer Making Designation.**—Where a register, having discretionary power to designate a paper for the publication of a notice, designated one published in another State, *held*, that the fact that the paper was published out of the State was not a good ground of objection to the order. *Mobley v. Leophart*, 51 Ala. 587.

4. *Le Roy v. Jamison*, 3 Sawy. (U. S.) 269.

(c) LANGUAGE OF PUBLICATION.—In the absence of some express provision, a notice should be published in the English language.<sup>1</sup>

(d) SHOULD BE IN A SECULAR PAPER.—When a statute requires that a notice shall be published in a newspaper, a secular paper of general circulation is intended, unless there be some more explicit designation.<sup>2</sup>

*Supplement.*—If a notice be published in the supplement of a paper, the supplement should be coextensive in circulation with the paper itself.<sup>3</sup>

(e) SHOULD BE ON A WEEK DAY.—The publication of a legal notice on Sunday is without effect.<sup>4</sup>

(f) NOTICE IN AN OBSCURE PAPER.—In cases where notice of foreclosure and sale was published in an obscure paper not likely to give actual notice of the sale, it has been held that although there was a literal compliance with the law, the mortgagee should be allowed to redeem, or the sale set aside.<sup>5</sup>

(g) SUBSCRIPTION FOR PAPER DOES NOT CHARGE WITH NOTICE OF CONTENTS.—Proof of the fact that a person subscribes for a newspaper containing a notice is not sufficient to charge such person with actual notice of its contents,<sup>6</sup> though it has been held that subscription is a fact from which actual notice might be inferred, in the absence of evidence to the contrary.<sup>7</sup>

**8. Death of Party Pending Publication.**—When the defendant

**Patent Inside.**—A local paper made up partly of a "patent inside" printed in another State is to be considered as "printed" where it is issued. *Palmer v. McCormick*, 30 Fed. Rep. 82.

**"Published" and "Printed" Not Equivalent.**—The insertion of a notice in a paper "published" in the county does not comply with a statute requiring that it be inserted in a paper "printed" in the county. *Bragdon v. Hatch*, 77 Me. 433.

1. *Graham v. King*, 50 Mo. 22; s. c., 11 Am. Rep. 401; *Cincinnati v. Bickett*, 26 Ohio St. 49; *Road in Upper Hanover*, 44 Pa. St. 277.

**English Language in a German Paper.**—A notice was published in a German newspaper, but in the English language. *Held*, sufficient. *Richardson v. Tobin*, 45 Cal. 30; *Wakeley v. Nicholas*, 16 Wis. 588.

**Nine English and One German Paper.**—A certain notice was required to be published in ten newspapers. *Held*, that a publication in nine English and one German paper was a sufficient compliance. *Donohue v. O'Connor*, 45 N. Y. Super. Ct. 278.

2. *Railton v. Lauder*, 26 Ill. App. 655; *Beecher v. Stephens*, 25 Minn. 146.

3. *Tully v. Bauer*, 52 Cal. 487; *Zohradnicek v. Selby*, 15 Neb. 579.

4. *Scammon v. Chicago*, 40 Ill. 146; *Shaw v. Williams*, 87 Ind. 158; s. c., 44 Am. Rep. 756; *Shaw v. Dodge*, 5 N. H. 462; *Smith v. Wilcox*, 24 N. Y. 353.

5. *Webber v. Curtiss*, 104 Ill. 309; *Briggs v. Briggs*, 135 Mass. 306.

6. *Rowley v. Horne*, 3 Bing. (Eng.) 2; *Watkins v. Peck*, 13 N. H. 360; s. c., 40 Am. Dec. 156; *Clark v. Ricker*, 14 N. H. 44; *Zollar v. Janvrin*, 47 N. H. 324; *Pope v. Risley*, 23 Mo. 185; *Bank of the Commonwealth v. Mudgett*, 44 N. Y. 519; 45 Barb. (N. Y.) 664; *Little v. Clark*, 36 Pa. St. 114; *Lincoln v. Wright*, 23 Pa. St. 76; s. c., 62 Am. Dec. 316; *Hutchins v. Bank of Tennessee*, 8 Humph. (Tenn.) 419; *Reilly v. Smith*, 16 La. An. 31.

7. *Treadwell v. Wells*, 4 Cal. 260; *King v. Paterson etc. R. Co.*, 29 N. J. L. 82.

**Subscription by Persons in Neighborhood.**—Evidence that persons residing near the person sought to be charged subscribed for a paper containing a

dies during the publication of a notice, it renders the order of publication inoperative.<sup>1</sup>

**9. Effect of Personal Service Without the Jurisdiction.**—The decisions do not seem to be harmonious as to the effect of personal service outside the State, after constructive service by publication has been ordered. Some hold that this does away with, and renders unnecessary the further steps to complete a notice by publication.<sup>2</sup> On the other hand, it has been held that a defective service by publication was not cured by personal service without the State.<sup>3</sup>

**10. Proof of Publication.**—The publication of a notice is generally proven by the affidavit of the publisher or editor of the paper, or of his foreman or chief clerk, with a copy of the printed notice annexed.<sup>4</sup>

Where, however, the affidavit is absent from the record, a recital in the judgment or decree that there was due service of notice is *prima facie* evidence of the fact, and the service cannot be attacked in a collateral proceeding in the same State.<sup>5</sup>

notice is not competent. *Clark v. Ricker*, 14 N. H. 44.

1. *Auerbach v. Maynard*, 26 Minn. 421; *Paget v. Pease*, 6 N. Y. Supp. 386; *Reilly v. Hart*, 8 N. Y. Supp. 717.

2. *Abrahams v. Mitchell*, 8 Abb. Pr. (N. Y.) 123; *Fiske v. Anderson*, 12 Abb. Pr. (N. Y.) 8; *Waffle v. Goble*, 53 Barb. (N. Y.) 517. Compare *Tyler v. Williams*, 9 Daly (N. Y.) 451.

**Voluntary Appearance.**—If the defendant appears voluntarily after publication has been commenced, further publication becomes unnecessary. *Tuller v. Beck*, 46 Hun (N. Y.) 519.

3. If no valid order of service by publication has been made a personal service without the State does not cure the defect. *Manning v. Heady*, 64 Wis. 630; *Weatherbee v. Weatherbee*, 20 Wis. 499. Compare *Keeler v. Keeler* 24 Wis. 522.

4. *Cissel v. Pulaski Co.*, 3 McCrary U. S. 446; *Bolin v. Francis*, 72 Iowa 619; *Kay v. Watson*, 17 Ohio 27.

In *Tennessee*, proof of publication may be made either by the affidavit of the printer or the production of the newspaper in court. *Claybrook v. Wade*, 7 Coldw. (Tenn.) 555. See also *Schley v. Lyon*, 6 Ga. 530.

**Editor.**—The affidavit of the "editor" is sufficient under a statute requiring that of the "foreman or printer." *Pennoyer v. Neff*, 95 U. S. 715. See also *Sharp v. Daughney*, 33 Cal. 512; *Bunce v. Reed*, 16 Barb. (N. Y.) 350.

An affidavit of publication made by a

"publisher and proprietor" is a substantial compliance with the rule requiring it to be made by the "printer, foreman or principal clerk." *Sharp v. Daughney*, 33 Cal. 505.

**Parol Evidence in Collateral Proceeding.**—Where it is sought to set aside a sale on the ground that the judgment was void for want of proof of service, the proof must be made by the certificate of the printer or publisher, his testimony to that effect is not sufficient. It cannot be shown by parol in a collateral proceeding. *Haywood v. Collins*, 60 Ill. 328. See also *Martin v. Barbour*, 34 Fed. Rep. 701.

5. *Swift v. Stebbins*, 4 Stew. & P. (Ala.) 447; *Prout v. People*, 83 Ill. 154; *Tompkins v. Wiltberger*, 56 Ill. 385; *Millett v. Pease*, 31 Ill. 377; *Tibbs v. Allen*, 27 Ill. 119; *Dowell v. Lahr*, 97 Ind. 146; *Foyles v. Kelso*, 1 Blackf. (Ind.) 215; *McCauley v. Fulton*, 44 Cal. 355; *Reilly v. Lancaster*, 39 Cal. 354; *Hahn v. Kelly*, 34 Cal. 391; s. c., 94 Am. Dec. 742; *Fowler v. Whiteman*, 2 Ohio St. 270; *Beattie v. Wilkinson*, 36 Fed. Rep. 646; *Galpin v. Page*, 1 Sawyer (U. S.) 309. Compare *Hunter v. Spotswood*, 1 Wash. (Va.) 145.

**Sufficiency of Recital.**—The recital in a judgment entry of "due and legal service on the defendant" is insufficient under Ala. Code, 1886, § 2936. The record should state the name of the paper and the length of time that publication was made. *Diston v. Hood*, 83 Ala. 331.



(a) **CONTENTS OF THE AFFIDAVIT OF PUBLICATION.**—The affidavit of the person making proof of the publication should show that all the requirements of the statute relating to the publication have been complied with.<sup>1</sup>

**Recital Nunc Pro Tunc.**—In a case where the record failed to show that publication had been made, it was held proper after a writ of error had been sued out to prove the fact of publication and have a recital of the fact inserted in the record of the court below *nunc pro tunc* in order to prevent a reversal of the decree. *Cullum v. Batre*, 2 Ala. 415.

**Fact of Nonresidence.**—Where there is a recital of due notice by publication there must be affirmative evidence in the record that there was proper ground for such notice, such as nonresidence, or the judgment or decree cannot stand. *Coons v. Throckmorton*, 25 Ark. 60. See also *Hartley v. Boynton*, 17 Fed. Rep. 873.

**Lapse of Time.**—Where a long time has elapsed since the decree was made, the regularity of the proceedings and proof of publication will be inferred from comparatively slight evidence. *Clyburn v. Reynolds*, 31 S. Car. 91.

But it has been held that affidavits of publication filed more than two years after a judicial sale could not be considered as a part of the record of the proceedings or of the official files of the office, and that they had no legal sanction. *Martin v. Barbour*, 34 Fed. Rep. 701.

1. *Gibney v. Crawford*, 51 Ark. 34; *Coster v. Bank of Georgia*, 24 Ala. 37; *Steinbach v. Leese*, 27 Cal. 295; *Cissell v. Pulaski Co.*, 3 McCrary (U. S.) 446; *Gray v. Larrimore*, 4 Saw. (U. S.) 638, 646; *Galpin v. Page*, 1 Sawy. (U. S.) 309; s. c., 18 Wall. (U. S.) 350; *Settlemyer v. Sullivan*, 97 U. S. 444; *Staples v. Fairchild*, 3 N. Y. 43; *Payne v. Young*, 8 N. Y. 158; *Finch v. Pinckard*, 5 Ill. 69.

The fact of publication must be proved, and it is not sufficient to show that there was an order of publication. *Moore v. Wright*, 4 Stew. & P. (Ala.) 84.

If the essential facts authorizing notice by publication appear in the affidavit it is immaterial that the facts are not fully stated. *Field v. Malone*, 102 Ind. 251.

The statute required that notice should be published in a "public" news-

paper, but the officer's return omitted the word "public." *Held*, not fatal, as a newspaper is necessarily public. *Bailey v. Myrick*, 50 Me. 171. See also *Millet v. Pease*, 31 Ill. 377; *Witt v. Meyer*, 69 Wis. 595.

**Affiant's Connection with Paper.**—An affidavit that the notice was published should state what the affiant's connection with the paper is. *Cross v. Wilson* (Ark.), 12 S. W. Rep. 576; *Pillow v. Sentelle*, 39 Ark. 61; *Haywood v. Collins*, 60 Ill. 328; *Miller v. Hall*, 3 Mon. (Ky.) 242; *Evans v. Benton*, 3 Mon. (Ky.) 389; *Wilkinson v. Perin*, 7 Mon. (Ky.) 214; *Freeman v. Brown*, 7 Mon. (Ky.) 263; *Bainbridge v. Owen*, 2 J. J. Marsh. (Ky.) 463; *Mims v. Mims*, 3 J. J. Marsh. (Ky.) 103; *Brown v. Mahan*, 4 J. J. Marsh. (Ky.) 59; *Brown v. Wood*, 6 J. J. Marsh. (Ky.) 11; *Hill v. Hoover*, 5 Wis. 354.

An affidavit which showed that the affiant was the only clerk is sufficient under a law requiring the affidavit of the principal clerk. *Gray v. Palmer*, 9 Cal. 616.

But an affidavit by one who inserts the words "printer and publisher," or "chief clerk" as words of description, without a direct averment that the affiant fills such a position, is not sufficient. *Farmers' Nat. Bank v. Fonda*, 64 Mich. 533; *Steinbach v. Leese*, 27 Cal. 295.

**Date of Publication.**—The date of the publication of the notice should appear in the affidavit. *Milam v. Thomasson*, 7 B. Mon. (Ky.) 324; *Tevis v. Richardson*, 7 B. Mon. (Ky.) 654; *Hopkins v. Claybrook*, 5 J. J. Marsh. (Ky.) 234; *Berryman v. Mullins*, 8 B. Mon. (Ky.) 152; *King v. Harrington*, 14 Mich. 532.

Where the date stated in the affidavit and the other averments as to time of publication are inconsistent and the mistake is apparently a mere clerical error, the affidavit will be held sufficient. *Pile v. McBratney*, 15 Ill. 314; *Lane v. Innes*, 43 Minn. 137; *Swayze v. Doe*, 21 Miss. 317.

**Direction of Notice.**—The affidavit of service by publication should show that the notice was addressed to the party to be notified "at his usual place of residence." *Foley v. Connelly*, 9 Iowa 240.

(b) AMENDMENT OF AFFIDAVIT OF PUBLICATION.—Where there is a defect in the proof of publication, but it can be shown that all the requirements of the law have been fulfilled, the affidavit of service of publication may be so amended as to show the actual facts.<sup>1</sup>

**VI. NOTICE BY MAIL—1. Presumption of Receipt.**—Proof of the mailing of a notice properly addressed and postpaid raises a presumption that the notice was received by the person to whom it was directed.<sup>2</sup> This is a presumption of fact and may be rebutted

**Annexation of Printed Copy Taken from Paper.**—Where a statute provides that publication may be proved by an affidavit, etc., "annexed to a printed copy of such notice taken from the paper in which it was published," it is not necessary that the notice should be cut from the paper, and if the affidavit contains a copy which is sworn to be true the statute is sufficiently complied with. *Wilkinson v. Conaty*, 65 Mich. 614.

**Time Clauses.**—A certificate by a printer stating that a notice had been published nine weeks without stating the dates of the publication is not sufficient to show a publication for two calendar months. *Passmore v. Moore*, 1 J. J. Marsh. (Ky.) 591.

Where the affidavit shows a compliance with the statute and states the date of the first publication and left that of the last one blank, *held*, not defective. *Feustmann v. Gott*, 65 Mich. 592.

An affidavit of publication for "six successive weeks" does not show that the publication was made "once in each week" for the period stated. *Godfrey v. Valentine*, 39 Minn. 336.

An averment of publication "once in each week for ten weeks" fulfils a requirement of publication "for the space of ten weeks." *Wood v. Knapp*, 100 N. Y. 109.

An affidavit that a summons was published "six weeks successively" does not show a compliance with a statute requiring publication for "not less than once a week for six weeks." *Frisk v. Reigelman*, 75 Wis. 499. *Compare* *Sexton v. Rhames*, 13 Wis. 99.

A publisher's affidavit that a notice was published for five weeks, commencing on a certain day, does not show a compliance with a statute requiring publication "once in each week for four successive weeks." *Ramsey v. Hommel*, 68 Wis. 12; *Morris v. Carmichael*, 68 Wis. 133. See also

*Morris v. Mississippi River Logging Co.*, 68 Wis. 133.

An affidavit showing that publication of a notice was commenced in the first issue of the paper in July and ended with the last paper in August, *held* insufficient because the publication was not two calendar months. *Lawlins v. Lackey*, 6 Mon. (Ky.) 70.

1. *Re Newman*, 75 Cal. 213; *Hackett v. Lathrop*, 36 Kan. 661; *Pierce v. Butters*, 21 Kan. 124; *Foreman v. Carter*, 9 Kan. 674; *Burr v. Seymour*, 43 Minn. 101; *Britton v. Larson*, 23 Neb. 806; *Frisk v. Reigelman*, 75 Wis. 499.

The court has power to allow an amendment of a printer's affidavit, so as to show the date upon which the publication of a summons began. *Weaver v. Roberts*, 84 N. Car. 493.

Proof of service by publication may be amended after judgment to conform to the facts. *Hackett v. Lathrop*, 36 Kan. 661.

2. *Huntley v. Whittier*, 105 Mass. 391; s. c., 7 Am. Rep. 536; *Dana v. Kemble*, 19 Pick. (Mass.) 112; *Groton v. Lancaster*, 16 Mass. 110; *Munn v. Baldwin*, 6 Mass. 316; *Marston v. Bigelow*, 150 Mass. 45; *Hartford Bank v. Hart*, 3 Day (Conn.) 491; *Starr v. Torrey*, 22 N. J. L. 190; *Austin v. Holland*, 69 N. Y. 571; s. c., 25 Am. Rep. 246; *Howard v. Daly*, 61 N. Y. 362; s. c., 19 Am. Rep. 285; *McCoy v. New York*, 46 Hun (N. Y.) 268; *Montelius v. Atherton*, 6 Colo. 224; *Callan v. Gaylord*, 3 Watts (Pa.) 321; *Tanner v. Hughes*, 53 Pa. St. 289; *Russell v. Buckley*, 4 R. I. 525; s. c., 70 Am. Dec. 167; *Oaks v. Weiler*, 16 Vt. 63; *Walworth v. Seaver*, 30 Vt. 728; s. c., 73 Am. Dec. 332; *Rosenthal v. Walker*, 111 U. S. 185; *Saunderson v. Judge*, 2 H. Bl. 509; *Woodcock v. Houldsworth*, 16 M. & W. 124; *Dunlop v. Higgins*, 1 H. L. Cas. (Eng.) 381.

**Notice According to Terms of a Contract.**—Where a contract provides that a party shall be notified, the obligation

when it becomes a question for the jury.<sup>1</sup>

**VII. EFFECT OF NOTICE.**—One chargeable with notice acquires only such rights as his grantor has in the subject matter, and takes subject to all adverse claims affecting his grantor's rights, of which he had notice.<sup>2</sup>

is not fulfilled by simply mailing it; it must be shown that the notice was actually received. *Castner v. Farmers' Mut. F. Ins. Co.*, 50 Mich. 273; *Carpenter v. Providence Washington Ins. Co.*, 4 How. (U. S.) 185.

**Notice of Protest.**—"Notice by mail of the dishonor of commercial paper is in most cases sufficient by the law merchant to charge an endorser. It is a part of the contract that notice may be given in this way, and it is not material in fixing the liability of the endorser whether he receives it or not." *Austin v. Holland*, 69 N. Y. 571; s. c., 25 Am. Rep. 246; *Walworth v. Seaver*, 30 Vt. 728; s. c., 73 Am. Dec. 332; *Carpenter v. Providence Washington Ins. Co.*, 4 How. (U. S.) 185.

It has also been held that there should be proof that the party resided at the place to which the notice was addressed or that it was the proper place to address him. *Crawford v. Branch Bank*, 7 Ala. 205.

**Notice of Legal Proceedings.**—Proof of deposit of notice to opposite attorney is not sufficient proof of service to support an application made in the absence of such attorney. *Anonymous*, 11 N. J. L. 94.

**Deposit in Mail on Last Day.**—A notice deposited in the mail on the last day within which notice may be given, but too late to be dispatched on that day is not sufficient. *Field v. Mann*, 42 Vt. 61.

**Computation of Time.**—Time is to be computed from the time of receipt of a notice sent by mail, not from the time of its deposit in the mail. *Brattleboro East Soc. v. Reed*, 42 Vt. 76.

**Post Mark.**—In order to raise the presumption that a letter containing a notice was at the place indicated by its postmark at the date thereof there must also be evidence of the genuineness of the post mark. *Crawford v. Branch Bank*, 7 Ala. 205.

1. *Rosenthal v. Walker*, 111 U. S. 185; *Crane v. Pratt*, 12 Gray (Mass.) 348; *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Huntley v. Whittier*, 105 Mass. 391; s. c., 7 Am. Rep. 536; *Eck-erly v. Alcorn*, 62 Miss. 228; *Austin v.*

*Holland*, 69 N. Y. 571; s. c., 25 Am. Dec. 246; *McCoy v. New York*, 46 Hun (N. Y.) 268.

2. *Hamilton v. Fowikes*, 16 Ark. 340; *Watkins v. Wassell*, 15 Ark. 73; *Neal v. Spiegle*, 33 Ark. 63; *Woodworth v. Guzman*, 1 Cal. 203; *Roberts v. Unger*, 30 Cal. 676; *Hilton v. Young*, 73 Cal. 196; *Gilbert v. Sleeper*, 71 Cal. 290; *Hamilton v. Nutt*, 34 Conn. 501; *Lewis v. Farrell*, 51 Conn. 216; *Bush v. Golden*, 17 Conn. 594; *Mead v. New York & R. Co.*, 45 Conn. 199; *Street v. Lynch*, 38 Ga. 631; *Cox v. Prater*, 67 Ga. 588; *Fry v. Calder*, 74 Ga. 7; *Jordan v. Rhodes*, 24 Ga. 478; *Dunlap v. Willson*, 32 Ill. 517; *Rupert v. Mark*, 15 Ill. 540; *Mann v. Elgin*, 24 Ill. App. 419; *Walker v. Cox*, 25 Ind. 271; *Garrett v. Puckett*, 15 Ind. 485; *Boyer v. Libey*, 88 Ind. 235; *Maxwell v. Brooks*, 54 Ind. 98; *Farmers' Bank v. Butterfield*, 100 Ind. 229; *Mitchell v. Peters*, 18 Iowa 119; *Warburton v. Lauman*, 2 Greene (Iowa) 420; *Baldwin v. Lowe*, 22 Iowa 367; *Norton v. Williams*, 9 Iowa 528; *Peters v. Haw*, 62 Iowa 656; *Council Bluffs Lodge v. Billups*, 67 Iowa 674; *Afton Bank v. Thompson*, 72 Iowa 417; *Walker v. Schreiber*, 47 Iowa 529; *Cragin v. Carmichael*, 11 Bank Reg. 511; *Duncan v. Miller*, 64 Iowa 223; *Stinchfield v. Emerson*, 52 Me. 465; s. c., 83 Am. Dec. 524; *Porter v. Sevey*, 43 Me. 519; *Clabaugh v. Byerly*, 7 Gill (Md.) 354; s. c., 48 Am. Dec. 575; *Ohio L. Ins. & Trust Co. v. Ross*, 2 Md. Ch. 25; *Phillips v. Pearson*, 27 Md. 242; *Johnston v. Canby*, 29 Md. 211; *Smoot v. Rea*, 19 Md. 398; *Priest v. Rice*, 1 Pick. (Mass.) 164; s. c., 11 Am. Dec. 156; *Adams v. Cuddy*, 13 Pick. (Mass.) 460; s. c., 25 Am. Dec. 330; *Flynt v. Arnold*, 2 Met. (Mass.) 623; *Lawrence v. Stratton*, 6 Cush. (Mass.) 167; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen (Mass.) 169; *Farnsworth v. Childs*, 4 Mass. 641; s. c., 3 Am. Dec. 249; *Davis v. Blunt*, 6 Mass. 487; s. c., 4 Am. Dec. 168; *Prescott v. Heard*, 10 Mass. 60; *Brown v. Maine Bank*, 11 Mass. 158; *Eaton v. Tuson*, 145 Mass. 218; *Ryerson v. Eldred*, 18 Mich. 12; *Aultman v. Pettys*, 59 Mich. 482; *Nailor v. Fisk*, 27

Notice of an equity does not affect the rights of a party in a trial at law, however,<sup>1</sup> nor will the notice of an illegal act make it valid.<sup>2</sup>

**VIII. WAIVER OF NOTICE.**—Objections for want of notice are waived by placing a refusal to comply upon other grounds.<sup>3</sup>

**IX. EVIDENCE.**—"Notice is a fact to be proved, like other facts, by evidence, direct or circumstantial."<sup>4</sup>

Miss. 256; Hagman v. Shaffner, 88 Mo. 24; Hughes v. Menefer, 29 Mo. App. 192; Cox v. Esteb, 81 Mo. 396; Johnston v. Shortridge, 93 Mo. 227; Nelson v. Bevins, 19 Neb. 715; Whitehorn v. Cranz, 20 Neb. 392; Grellet v. Heilshorn, 4 Nev. 526; Rogers v. Jones, 8 N. H. 264; Emmons v. Murray, 16 N. H. 385; Brown v. Manter, 22 N. H. 471; Patten v. Moore, 32 N. H. 382; Danbury v. Robinson, 14 N. J. Eq. 213; s. c., 82 Am. Dec. 244; Wells v. Roalson, 17 N. J. Eq. 13; Den v. McKnight, 11 N. J. L. 385; Gale v. Morris, 30 N. J. Eq. 285; Seymour v. McKinstry, 106 N. Y. 230; McLachlin v. Brett, 105 N. Y. 391; Gildersleeve v. Landon, 73 N. Y. 609; Kellogg v. Smith, 26 N. Y. 18; Lewis v. Palmer, 28 N. Y. 271; Truscott v. King, 6 N. Y. 147; Livingston v. Amoux, 56 N. Y. 520; Mayo v. Leggett, 96 N. Car. 237; Simons v. Pierce, 16 Ohio St. 215; Day v. Munson, 14 Ohio St. 488; Gifford v. Morrison, 37 Ohio St. 502; s. c., 41 Am. Rep. 537; Baker v. Woodward, 12 Oreg. 3; Johns v. Tiers, 114 Pa. St. 611; Follweiler v. Lutz, 102 Pa. St. 585; Givens v. Branford, 2 McCord (S. Car.) 152; s. c., 13 Am. Dec. 702; Fawke v. Woodward, Spears Eq. (S. Car.) 232; Gibbs v. Cobb, 7 Rich. Eq. (S. Car.) 54; Paul v. Williams, 12 Lea (Tenn.) 215; Gibson v. Jones, 13 Lea (Tenn.) 684; Brock v. Southwick, 10 Tex. 65; Morris v. Geisecke, 60 Tex. 633; Ragland v. Wisrock, 61 Tex. 391; Hefner v. Downing, 57 Tex. 576; Hart v. Farmers' etc. Bank, 33 Vt. 252; Smith v. Proffitt, 82 Va. 832; Cosgray v. Core, 2 W. Va. 353; Bull v. Bell, 4 Wis. 54; Brown v. Peck, 2 Wis. 261; School Dist. No. 3 v. Macloon, 4 Wis. 79; Gilbert v. Jess, 31 Wis. 110; Kinney v. Consolidated Va. Min. Co., 4 Sawy. (U. S.) 382; Smith v. Shane, 1 McLean (U. S.) 22; The Brig Ploughboy, 1 Gall. (U. S.) 41; Bill v. New Albany R. Co., 2 Biss. (U. S.) 390; Lord v. Doyle, 1 Cliff. (U. S.) 453; Vermilye v. Adams Express Co., 21 Wall. (U. S.) 138.

1. Million v. Riley, 1 Dana (Ky.) 359; s. c., 25 Am. Dec. 149.

2. Wilson v. Mason, 1 Cranch (U. S.) 45.

3. Montelius v. Atherton, 6 Colo. 224; Bryant v. Goodnow, 5 Pick. (Mass.) 228; Marston v. Massachusetts L. Ins. Co., 59 N. H. 92; Linderman v. Disbrow, 31 Wis. 465.

4. Lemay v. Poupenez, 35 Mo. 71; Maupin v. Emmons, 47 Mo. 304; Wood v. Stewart, 7 Vt. 152.

A party cannot be held to be affected with notice, though there is evidence from which it may be inferred, when there are no corresponding allegations in the pleadings. Cooper v. Loughlin, 75 Tex. 524.

**Proof of Actual Notice When Constructive Notice Defective.**—Where a record or other means of giving constructive notice of a fact is so defective as to be insufficient for its purpose, evidence is admissible to show that a person had actual notice of the fact. Rowley v. Bartholomew, 37 Iowa 374; Ketcham v. Brazil Block Coal Co., 88 Ind. 515; Shultz v. Moore, 1 McLean (U. S.) 520.

**Matter of Public Notoriety.**—It is admissible to show the public notoriety of a fact in the neighborhood in which a party resides for the purpose of charging him with notice, but it is not sufficient of itself; other evidence of the existence of the fact must be adduced. Cleveland Woolen Mills v. Sibert, 81 Ala. 140. Compare Clark v. Ricker, 14 N. H. 44.

**Acts of Parties Proving Notice.**—Where parties gave notice to the sheriff that they claimed a certain share in the proceeds of a sale by him, held, proof that the parties had notice of the sale itself. Carey v. Bright, 58 Pa. St. 70.

**Acting on a Rumor Apparently Disproved.**—An attaching creditor had heard that his debtor had previously conveyed all his property to A, on condition that A should pay his debts, and the creditor had thereupon asked A to

**X. NOTICE IN CONNECTION WITH BONA FIDE PURCHASERS—1. Who Is a Bona Fide Purchaser.**—A *bona fide* purchaser is one who buys property of another without notice that some third person has a right to, or interest in, such property, and pays a full and fair price for the same, at the time of such purchase, or before he has notice of the claim or interest of such other in the property.<sup>1</sup>

(a) CREDITOR.—The term creditors, as generally used in statutes relating to their rights in the property of their debtors, does not mean creditors at large, but those whose debts are liquidated and who have procured liens on the property.<sup>2</sup> Irrespective of the statutes giving a docketed judgment precedence over an unrecorded deed, a mere judgment or attaching creditor is not, as such, a *bona fide* purchaser for a valuable consideration. The reason for this seems to be that such a creditor is deemed to be entitled only to such rights as the debtor himself possessed, since he claims under him and not through him, and there is no new consideration as in the case of a purchaser.<sup>3</sup> The statutes relating to registra-

pay the debt due him from the debtor, which A had not refused to pay nor had denied his liability, but died without paying. Subsequently, the creditor searched the records, but found no such deed to A. Held, that these facts did not prove that the creditor had previous actual notice of a prior unrecorded deed from the debtor to A. *Richardson v. Smith*, 11 Allen (Mass.) 134.

**Facts Adduced in a Former Trial.**—The evidence of an attorney that certain facts had been brought out in a former trial in which he appeared against the party denying notice of the facts in the present trial, held admissible. *Whitten v. Jenkins*, 34 Ga. 297.

**Declarations of Disbelief in Adverse Claim.**—Where the declarations of the subsequent purchaser show both his disbelief that any prior deed of the premises had been given by his grantor, and his knowledge of the claim of the parties professing to hold under such a deed, they do not warrant the conclusion that he had actual notice of the existence of the deed; nor can his conduct be considered fraudulent in taking a conveyance to himself under those circumstances.

**Charge to Jury.**—Although evidence as to notice is conflicting, court may charge as to legal effect if jury believe it was given. *Central R. Co. v. Mitchell*, 63 Ga. 173; s. c., 1 Am. & Eng. R. Cas. 145.

1. *Spicer v. Waters*, 65 Barb. (N.Y.) 227; *Merritt v. Northern R. Co.*, 12 Barb. (N. Y.) 605; *Girard v. Rowan*, 3 Ill. 499; *Watts v. Scofield*, 76 Ill. 261.

**Widow of Pledgor of Unrecorded Deed.**—Where unrecorded title deeds are deposited with a creditor by the grantee therein as security for his debt, the fact that no deeds to him are on record, or in his possession, is sufficient notice to put a purchaser for a valuable consideration on enquiry. But a widow of the pledgor is not a purchaser for a valuable consideration in such a sense that she may contest such pledge for want of registry. *Griffin v. Griffin*, 18 N. J. Eq. 104.

2. *Ohio L. Ins. etc. Co. v. Ledyard*, 8 Ala. 866; *Columbus Buggy Co. v. Graves*, 108 Ill. 459.

3. *Story's Eq. Jur.*, § 410, note; *Apperson v. Burgett*, 33 Ark. 328; *Pixley v. Huggins*, 15 Cal. 127; *Plant v. Smythe*, 45 Cal. 161; *Orth v. Jennings*, 8 Blackf. (Ind.) 420; *Kelly v. Mills*, 41 Miss. 267, distinguishing *Henderson v. Downing*, 24 Miss. 106; *Greenleaf v. Edes*, 2 Minn. 264. Compare *Dutton v. McReynolds*, 31 Minn. 66; *Jackson v. Dubois*, 4 Johns. (N. Y.) 216; *Jackson v. Town*, 4 Cow. (N. Y.) 599; s. c., 15 Am. Dec. 405; *Jackson v. Post*, 9 Cow. (N. Y.) 120; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165; s. c., 47 Am. Dec. 305; *Schmidt v. Hoyt*, 1 Edw. Ch. (N. Y.) 652; *Stevens v. Watson*, 4 Abb. App. Dec. (N. Y.) 302; *Thomas v. Kelsey*, 30 Barb. (N. Y.) 268; *Wilder v. Butterfield*, 50 How. Pr. (N. Y.) 385; *Withnell v. Courtland Wagon Co.*, 25 Fed. Rep. 372; *Tousley v. Tousley*, 5 Ohio St. 78; *Bank of Muskingum v. Carpenter*, 7 Ohio 21; s. c., 28 Am. Dec. 616; *Lake v. Doud*, 10

tion in a number of the States, as construed by the courts, protect the judgment creditor as a *bona fide* purchaser, provided he is not chargeable with notice of a prior right or encumbrance at the time of perfecting his judgment.<sup>1</sup> A creditor is as much bound by actual knowledge of a prior unrecorded encumbrance, acquired before the entry of his judgment, as subsequent purchasers are.<sup>2</sup>

Ohio 415; Shryock v. Wagoner, 28 Pa. St. 430; Cover v. Black, 1 Pa. St. 493; Rogers v. Gibson, 4 Yeates (Pa.) 111; Heister v. Fortner, 2 Binn. (Pa.) 40; s. c., 4 Am. Dec. 417; Stewart v. Freeman, 22 Pa. St. 120; Goepp v. Gartiser, 35 Pa. St. 130; Sigworth v. Meriam, 66 Iowa 477; Duncan v. Miller, 64 Iowa 223; Phelps v. Fockler, 61 Iowa 340; Bell v. Evans, 10 Iowa 353; Seevers v. Delashmutt, 11 Iowa 174; s. c., 77 Am. Dec. 139; Parker v. Pierce, 16 Iowa 227; Norton v. Williams, 9 Iowa 529; Welton v. Tizzard, 15 Iowa 495; Hays v. Thode, 18 Iowa 51; Evans v. McGlasson, 18 Iowa 150; First Nat. Bank v. Hayzlett, 40 Iowa 659; Hoy v. Allen, 27 Iowa 208; Churchill v. Morse, 23 Iowa 229; Patterson v. Linder, 14 Iowa 414; First Nat. Bank v. Hayzlett, 40 Iowa 659; Ash v. Livingston, 2 Bay (S. Car.) 80; Hampton v. Levy, 1 McCord Eq. (S. Car.) 107; Knell v. Green St. Building Assoc., 34 Md. 67; Righter v. Forrester, 1 Bush (Ky.) 278; Morton v. Robards, 4 Dana (Ky.) 258; Davis v. Ownsby, 14 Mo. 170; s. c., 55 Am. Dec. 105; Black v. Long, 60 Mo. 181; Sappington v. Oeschli, 49 Mo. 244; Reed v. Ownby, 44 Mo. 204; Potter v. McDowell, 43 Mo. 93; Stilwell v. McDonald, 39 Mo. 282; Valentine v. Havener, 20 Mo. 133; Holden v. Garrett, 23 Kan. 98; Wallace v. Mahaffey (Kan.), 12 Pac. Rep. 705; Hackett v. Calender, 32 Vt. 97; Wright v. Jones, 105 Ind. 17; Hays v. Reger, 102 Ind. 524; Foltz v. Wert, 103 Ind. 404; Boyd v. Anderson, 102 Ind. 217; Heberd v. Wines, 105 Ind. 237; Mansfield v. Gregory, 11 Neb. 297; Galway v. Malchow, 7 Neb. 285; Herbert v. Mechanics' Assoc., 17 N. J. Eq. 497; s. c., 90 Am. Dec. 601; Garwood v. Garwood, 9 N. J. L. 193; Wheeler v. Kirtland, 24 N. J. Eq. 552; Finch v. Winchelsea, 1 P. Wms. (Eng.) 277; Brace v. Marlborough, 2 P. Wms. (Eng.) 491.

1. Martin v. Dryden, 6 Ill. 216; Massey v. Westcott, 40 Ill. 160; Guiteau v. Wisely, 47 Ill. 433; McFadden v. Worthington, 45 Ill. 365; Columbus

Buggy Co. v. Graves, 108 Ill. 459; Munford v. McIntyre, 16 Ill. App. 316; Reichert v. McClure, 23 Ill. 516; De Vendell v. Hamilton, 27 Ala. 156; Ohio L. Ins. etc. Co. v. Ledyard, 8 Ala. 866; Henderson v. Downing, 24 Miss. 106 (distinguished in Kelly v. Mills, 41 Miss. 267); Mississippi Valley Co. v. Chicago etc. R. Co., 58 Miss. 846; s. c., 8 Am. & Eng. R. Cas. 575; Jaques v. Weeks, 7 Watts (Pa.) 261; Mechanics' Bank v. Bank of Pennsylvania, 7 W. & S. (Pa.) 440; Uhler v. Hutchinson, 23 Pa. St. 110; Corpman v. Baccastow, 84 Pa. St. 363; Howell v. Brewer (N. J.), 5 Atl. Rep. 137; Hoag v. Sayre, 33 N. J. Eq. 552; Dutton v. McKeynolds, 31 Minn. 66; Van Thorniley v. Peters, 26 Ohio St. 471; Mayham v. Coombs, 14 Ohio 428; White v. Denman, 16 Ohio 59; Fosdick v. Barr, 3 Ohio St. 471; Butler v. Maury, 10 Humph. (Tenn.) 420; Heam v. Morgan, 2 Humph. (Tenn.) 115; Welch v. Gould, 2 Root (Conn.) 500; Moor v. Watson, 1 Root. (Conn.) 388; Bissell v. Nooney, 33 Conn. 411; Ludlow v. Clinton Line R. Co., 1 Flipp. (U. S.) 25; Stevenson v. Texas & Pac. R. Co., 105 U. S. 703; King v. Portis, 77 N. Car. 25; Mainwarring v. Templeman, 51 Tex. 205; Andrews v. Mathews, 59 Ga. 466; Young v. Devries, 31 Gratt. (Va.) 307; Anderson v. Nagle, 12 W. Va. 98.

#### Judgment Preferred to Prior Equity.—

A judgment for a pre-existing debt is sufficient to entitle the owner to preference as a *bona fide* purchaser over the prior equity of one having no legal right, provided the judgment creditor had no notice of the equity. Uhler v. Semple, 20 N. J. Eq. 288.

A judgment creditor will be protected against a subsequently recorded mortgage, though it be to secure a part of the purchase money. Roane v. Baker (Ill.), 2 N. E. Rep. 501. Compare Elder v. Derby, 98 Ill. 232.

2. Henderson v. Downing, 24 Miss. 106; Dixon v. Doe, 1 Smed. & M. (Miss.) 70; Mead v. New York etc. R. Co., 45 Conn. 199; Swan v. Moore, 14 La. An.

(1) *Preferred Creditor*.—Preferences in assignments or by transfer of property before assignment, without any new consideration, are valid as against mere general creditors and the assignee, but not as against those who have protected themselves by a lien or such other title as the law has provided for the collection of debts; as to them the assignee is not a *bona fide* purchaser for value.<sup>1</sup> As between mere general creditors the equities are equal; and when one of them has fairly obtained a transfer to himself of a sufficient portion of the debtor's property to pay his debts, he is protected in accordance with the maxim that "where

845; *Martinez v. Layton*, 4 Martin, N. S. (La.) 368; *Planters' Bank v. Allard*, 8 Martin, N. S. (La.) 136; *Priest v. Rice*, 11 Pick. (Mass.) 164; s. c., 11 Am. Dec. 156. *Compare Uhler v. Hutchinson*, 23 Pa. St. 110; *Sayre v. Hewes*, 32 N. J. Eq. 652.

1. *Pierson v. Manning*, 2 Mich. 445; overruling *Hollister v. Loud*, 2 Mich. 309; *Knowles v. Lord*, 4 Whart. (Pa.) 500; s. c., 34 Am. Dec. 525; *Dobbins v. Walton*, 37 Ga. 619; s. c., 95 Am. Dec. 37; *Seaving v. Brinckerhoff*, 5 Johns. Ch. (N. Y.) 329.

The following cases hold the assignee a *bona fide* purchaser for value: *Gates v. Lebeaume*, 19 Mo. 117; *Evans v. Greenhow*, 15 Gratt. (Va.) 153.

**Unrecorded Deed**.—The grantee in an unrecorded deed can hold the property against the assignee of the grantor for the benefit of creditors. *Hardin v. Osborn*, 94 Ill. 571.

**Vendor's Lien**.—The lien of the vendor for unpaid purchase-money is a superior equity to that of the assignee in bankruptcy or for the benefit of creditors. *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46; *Brown v. Vanlier*, 7 Humph. (Tenn.) 239; *Repp v. Repp*, 12 Gill & J. (Md.) 341.

**Unrecorded Mortgage**.—The title of the holder of an unrecorded mortgage is good against the assignee in a general assignment. The assignee and creditors whom he represents stand in the place of the debtor, and as the unrecorded mortgage would be good against him it is equally so against the assignee. *Van Hensen v. Radcliff*, 17 N. Y. 580; s. c., 72 Am. Dec. 480; *Mellon's Appeal*, 32 Pa. St. 121; *Fielde v. Baker*, 12 Blatchf. (U. S.) 439.

In the case of *Dey v. Dunham*, 2 Johns. Ch. (N. Y.) 182, an absolute conveyance was given and recorded as such, but there was a secret understanding that it should operate only as

a mortgage. A general assignment was made and Ch. Kent held the assignee a *bona fide* purchaser without notice, but in the later case of *Haggerty v. Palmer*, 6 Johns. Ch. (N. Y.) 437, he seems to have changed his opinion, for he held the equitable right to goods of the assignor resting in a third person superior to the right of the assignee for the benefit of creditors.

A mortgagee may call upon a court of equity to correct a mistake in a mortgage, and decree its foreclosure against an assignee for the benefit of creditors, and the assignee will not be allowed to plead that he is a *bona fide* purchaser because the court holds him a volunteer for want of any new consideration. *Willis v. Henderson*, 5 Ill. 13; s. c., 38 Am. Dec. 120. See also *Walker v. Miller*, 11 Ala. 1067.

**Instrument Void for Want of Seal**.—An instrument intended for a mortgage, but ineffectual for want of a seal, creates no lien in favor of the mortgagee as against the assignee under a subsequent general assignment by the mortgagor for the benefit of creditors, even though said assignee have notice of such instrument (affirming *Bloom v. Noggel*, 4 Ohio St. 45); *Erwin v. Shuey*, 8 Ohio St. 509.

**Execution Levied Before Assignment**.—Where a levy has been made under an execution before the execution of the deed of assignment the assignee is not a *bona fide* purchaser as against the execution creditor, and the sheriff is bound to proceed and sell unless the creditors see fit to withdraw their executions. *Slade v. Van Vechten*, 11 Paige (N. Y.) 21; *Ray v. Birdseye*, 5 Den. (N. Y.) 619.

**Landlord's Lien for Rent**.—An assignee for the benefit of creditors is not a *bona fide* purchaser as against a landlord who has a lien for rent. *O'Hara v. Jones*, 46 Ill. 288.

the equities are equal the legal title will prevail."<sup>1</sup> The creditor who has protected himself by a lien, or similar security, is in a better position than the general creditor, and his right can only be overcome by one who has secured a still higher equity, by parting in good faith with a new and valuable consideration on the strength of the vendor's possession and apparently good title.<sup>2</sup>

(b) PURCHASE AT JUDICIAL SALE.—One who purchases at judicial sale, without notice, actual or constructive, at the time of sale, of a prior encumbrance, will be protected as a *bona fide* purchaser.<sup>3</sup> There is a conflict of decisions on the question of treating the judgment creditor who purchases at the sale under his own judgment as a *bona fide* purchaser. One line of cases holds that he is not such a purchaser because he parts with no new consideration.<sup>4</sup> But the courts in a number of the States have held that he is en-

1. Story's Eq. Jur., § 1228; Seymour v. Wilson, 19 N. Y. 417.

2. Murphy v. Briggs, 89 N. Y. 446.

3. Ohio L. Ins. etc. Co. v. Ledyard, 8 Ala. 866; Barker v. Bell, 37 Ala. 354; McFadden v. Worthington, 45 Ill. 362; Rooker v. Rooker, 75 Ind. 571; Gifford v. Bennett, 75 Ind. 528; Sparks v. State Bank, 7 Blackf. (Ind.) 469; Orth v. Jennings, 8 Blackf. (Ind.) 420; Routh v. Spencer, 38 Ind. 393; Hampson v. Fall, 64 Ind. 382; Catherwood v. Watson, 65 Ind. 576; Parker v. Pierce, 16 Iowa 227; Evans v. McGlasson, 18 Iowa 150; Gower v. Doheney, 33 Iowa 36; Wood v. Young, 38 Iowa 102; Martin v. Baldwin, 30 Minn. 537; Waldo v. Russell, 5 Mo. 387; Draper v. Bryson, 26 Mo. 108; s. c., 69 Am. Dec. 483; Polk v. Gallant, 2 Dev. & B. Eq. (N. Car.) 395; s. c., 34 Am. Dec. 410; Ross v. Henderson, 77 N. Car. 170; Walke v. Moody, 65 N. Car. 599; Carr v. Fearington, 63 N. Car. 560; Vannoy v. Martin, 6 Ired. Eq. (N. Car.) 169; Jackson v. Town, 4 Cow. (N. Y.) 599; s. c., 15 Am. Dec. 405; Jackson v. Chamberlain, 8 Wend. (N. Y.) 620; Jackson v. Post, 15 Wend. (N. Y.) 588; Voorhis v. Westervelt, 43 N. J. Eq. 642; Den v. Richman, 13 N. J. L. 43; Scribner v. Lockwood, 9 Ohio 184; Fosdick v. Barr, 3 Ohio St. 471; Hester v. Fortner, 2 Binn. (Pa.) 40; s. c., 4 Am. Dec. 417; Stewart v. Freeman, 22 Pa. St. 120; Goepfer v. Gartiser, 35 Pa. St. 130; Kauffelt v. Bower, 7 S. & R. (Pa.) 64; s. c., 10 Am. Dec. 428; Morrison v. Funk, 23 Pa. St. 421; Wilson v. Shoenberger, 34 Pa. St. 121; Hibberd v. Bovier, 1 Grant Cas. (Pa.) 266; Mc-

Knight v. Gordon, 13 Rich. Eq. (S. Car.) 222; s. c., 94 Am. Dec. 164; Ehle v. Brown, 31 Wis. 405.

**Purchaser May Rely on Record.**—Purchasers at sheriff's sale are chargeable with such notice as the public records inform them of; and if a mortgage does not, upon its face, show a lien prior to that of the judgment, the purchaser is not bound to indulge in suspicions touching its fairness.

**Registration of Sheriff's Deed.**—The grantee in a sheriff's deed of real estate sold on execution, on which there was an unrecorded mortgage, in order to bring himself within § 26 of the act concerning conveyances, must show that his conveyance was recorded before the mortgage was. Thomas v. Vanlieu, 28 Cal. 616.

**Purchaser of Judgment Debtor Bound by Latter's Acts.**—A purchaser from a defendant in execution, of the property previously sold upon the execution as defendant's property, stands in no better position than his vendor, and cannot avail himself of want of actual notice of acts or admissions of the vendor which would tend to cure irregularities in the process and make the sale valid. Alexander v. Miller, 18 Tex. 893; s. c., 70 Am. Dec. 314.

A purchaser at judicial sale without notice of a prior unrecorded encumbrance will be protected, although the judgment creditor himself had notice. Miles v. King, 5 S. Car. 146.

4. Woodruff v. Hoard, 9 Ind. 186; Pettingill v. Moss, 3 Minn. 222; s. c., 74 Am. Dec. 747; Winston v. Otley, 25 Miss. 451; Rollins v. Callender, Freem. Ch. (Miss.) 295; Stephens v.



titled to the same protection as any other purchaser.<sup>1</sup>

(1) *When Notice Will Affect the Purchaser.*—There is a difference of opinion as to when the notice of a prior encumbrance must be received in order to charge the purchaser. One class of cases holds that the purchaser must be chargeable with notice at or before the time of the entry of judgment,<sup>2</sup> but there are a number of decisions which hold that notice received at or before the sale will destroy the *bona fides* of a purchaser.<sup>3</sup>

Dennison, 1 Oreg. 19; Williams v. Hollingsworth, 1 Sirobh. Eq. (S. Car.) 103; s. c., 47 Am. Dec. 537; Dillard v. Crocker, Spear's Eq. (S. Car.) 20; Shultz v. Carter, Spear's Eq. (S. Car.) 533; Keeling v. Heard, 3 Head (Tenn.) 592.

Neither an attorney who becomes a purchaser at a judicial sale, made for the benefit of his client, nor his minor children to whom he has conveyed the land thus purchased in consideration of love and affection, are *bona fide* purchasers without notice. Salter v. Dunn, 1 Bush (Ky.) 311.

**Effect of Reversal.**—The assignee of one who purchased under an erroneous decree in his own favor stands in the place of his vendor, and a subsequent reversal defeats his title also; and the judgment or decree being the foundation of the title, the assignee or vendee of such purchaser is bound to take notice of, and therefore is not entitled to protection as a *bona fide* purchaser for value without notice. Marks v. Cowles, 61 Ala. 299.

Subsequent reversal of an erroneous judgment cannot effect the rights of third parties acquired under such judgment. Guiteau v. Wisely, 47 Ill. 433.

**Expense of Sale as New Consideration.**—It is said in Wood v. Chapin, 13 N. Y. 509, that the expenses of levy and sale which the judgment creditor must pay are a new consideration for the property which he secures at the sale, but the contrary view is taken by the court in Hart v. Farmers' etc. Bank, 33 Vt. 252.

1. Hunter v. Watson, 12 Cal. 363; s. c., 73 Am. Dec. 543; Wood v. Chapin, 13 N. Y. 509; s. c., 67 Am. Dec. 62 (*Compare* Wright v. Douglass, 10 Barb. N. Y.) 97; Peck v. Mallams, 10 N. Y. 509; Mann's Appeal, 1 Pa. St. 24; Boynton v. Winslow, 37 Pa. St. 315; Wallace v. Campbell, 54 Tex. 87; Vannice v. Traer, 16 Iowa 574; Evans v. McGlasson, 18 Iowa 150; Moore v. Davey, 1 N. Mex. 303.

"At law or in equity the plaintiff in execution, when a purchaser, is protected, unless the equities of the adverse claimant are so strong and persuasive as to prevent the application of the rule which indisputably obtains as to third persons or strangers to the suit; and that if these are relied upon they must be alleged and proved." Butterfield v. Walsh, 21 Iowa 97. See also Parker v. Pierce, 16 Iowa 227; Vannice v. Bergen, 16 Iowa 555; Vannice v. Traer, 16 Iowa 574; Evans v. McGlasson, 18 Iowa 150; Halloway v. Platner, 20 Iowa 121; s. c., 89 Am. Dec. 517.

2. Fash v. Ravesties, 32 Ala. 451; De Vendell v. Hamilton, 27 Ala. 156; Smith v. Jordan, 25 Ga. 687; Condit v. Wilson, 36 N. J. Eq. 370; Rutgers v. Kingsland, 7 N. J. Eq. 178; Affirmed 658; Coleman v. Barklew, 27 N. J. Law, 357; Wait v. Savage (N. J.), 15 Atl. Rep. 225; Hulings v. Guthrie, 4 Pa. St. 123; Uhler v. Hutchinson, 23 Pa. St. 110; overruling Solms v. McCullough, 5 Pa. St. 473. *Compare* Moyer v. Schick, 3 Pa. St. 242; Stewart v. Freeman, 22 Pa. St. 120; Grace v. Wade, 45 Tex. 522; Wallace v. Campbell, 54 Tex. 87.

If the judgment creditor have no notice of a prior right or encumbrance at the time of the entry of his judgment, the purchaser at the sale will be protected in his purchase, otherwise the judgment creditor would not receive the full benefit of his judgment. Sharp v. Shea, 32 N. J. Eq. 65; Butler v. Maury, 10 Humph. (Tenn.) 420.

3. Gower v. Doheney, 33 Iowa 36; Thomas v. Kennedy, 24 Iowa 397; s. c., 95 Am. Dec. 740; Potter v. McDowell, 43 Mo. 93; Stillwell v. McDonald, 39 Mo. 282; Davis v. Ownsby, 14 Mo. 170; s. c., 55 Am. Dec. 105; Siemon v. Schurck, 29 N. Y. 598.

During the pendency of a suit against the trustee and the heirs of the *cestui que trust* to subject the trust estate to the payment of the debts of the *cestui que trust*, a party buying the land un-

(c) **MORTGAGEE.**—A mortgagee is a purchaser to the extent of his interest, and will be protected in all rights acquired without notice and in good faith.<sup>1</sup>

(d) **SURETY.**—Where a person, about becoming the surety of another for the purchase of lands, stipulates at the time that the vendor shall convey the land directly to him, in order to secure himself against liability as surety, he may defend this title thus acquired as a *bona fide* purchaser for a valuable consideration, and notice of the prior deed or encumbrance, given to the actual vendee, will not affect his right.<sup>2</sup>

(e) **PURCHASER OF EQUITABLE ESTATE.**—The purchaser of a mere equitable estate is not embraced within the definition of a *bona fide* purchaser.<sup>3</sup>

(f) **GRANTEE AGREEING TO SUPPORT GRANTOR FOR LIFE.**—A grantee who agrees, as the consideration for the grant, that he will support the grantor for life is not a *bona fide* purchaser, but is bound by all equities affecting his title.<sup>4</sup>

(g) **GRANTEE IN QUIT CLAIM DEED.**—It is a disputed question whether the grantee in a quit claim deed without notice should be protected as a *bona fide* purchaser. The weight of authority

der his own execution, issued and levied after he had notice, against the heir, cannot be regarded as a *bona fide* purchaser. *Gillespie v. Walker*, 3 B. Mon. (Ky.) 505.

If an appeal in order to set aside a judicial sale is prosecuted before the sale is fully completed by a conveyance offered by the court, and before the collection and disbursement of the purchase money, the court and the purchaser at such sale are chargeable with notice of such appeal, and if, notwithstanding such notice, the court completes the sale, without objection on the part of the purchaser, he cannot be regarded as a *bona fide* purchaser, without notice, but may be compelled to release his title acquired under such sale to the owner of the land, if the sale is set aside. *Miller v. Hall*, 1 Bush (Ky.) 229.

**Verbal Notice at Sale.**—A verbal notice by an owner of the equity of redemption under an unrecorded deed first given at the time of the sale is sufficient to charge the purchaser at such sale. *Hodson v. Treat*, 7 Wis. 263. See also *McClellan v. Scott*, 24 Wis. 81.

**Judgment Creditor Buying with Notice of Prior Right.**—If a mortgagor sells the land to an innocent purchaser, taking from him a mortgage to secure the purchase money, on which he obtains a decree of sale in a foreclosure

suit, at which he, by himself or agent, becomes the purchaser, he is not in a condition to claim the protection afforded to a *bona fide* purchaser, without notice, so as to defeat the mortgage which he has executed to his vendor; for this would be to take advantage of his own wrong. *Smith v. Mobile Bank*, 21 Ala. 125. See also *Harris v. Norton*, 16 Barb. (N. Y.) 264.

**Sufficiency of Notice of Wife's Interest.**—The fact that a wife joins her husband in a deed of land, is not of itself constructive notice to subsequent purchasers, at a sheriff's sale, of a prior unrecorded deed to the wife. *Vassault v. Austin*, 36 Cal. 691.

1. *Broward v. Hoeg*, 15 Fla. 372; *Seevers v. Delashmutt*, 11 Iowa 174; *Pierce v. Faunce*, 47 Me. 507; *Curtis v. Leavitt*, 15 N. Y. 9, 195; *Ledyard v. Butler*, 9 Paige (N. Y.) 132; s. c., 37 Am. Dec. 379; *Murphy v. Briggs*, 89 N. Y. 446.

2. *Wallis v. Cooper*, 24 Miss. 208, 229. See also *Williams v. Shelley*, 37 N. Y. 375. Compare *Mounce v. Byars*, 16 Ga. 469.

3. *Dupont v. Wertheman*, 10 Cal. 354; *Wallis v. Cooper*, 24 Miss. 208; *Chew v. Barnett*, 11 S. & R. (Pa.) 389; *Pinson v. Ivey*, 1 Yerg. (Tenn.) 296.

4. *Woodall v. Kelly*, 85 Ala. 368; *Dow v. Jewell*, 18 N. H. 340; s. c., 45 Am. Dec. 371.

seems to be that he is not, because his deed gives him only such interest as the grantor then has, and the fact that the conveyance is by quitclaim, is held by some courts to be sufficient to put a party on enquiry as to what the interest is.<sup>1</sup> On the other hand, it is maintained that it is not the character of the deed which gives protection to the purchaser, but his equity of having parted with a valuable consideration in good faith, coupled with an apparent legal title.<sup>2</sup>

**2. The Consideration—(a) MUST BE ACTUALLY PAID BEFORE NOTICE.**—To support the plea of a *bona fide* purchaser without notice, the defendant must aver and prove not only that he had no notice of the plaintiff's rights before his purchase, but that the consideration was a valuable one and had been actually paid in full before notice.<sup>3</sup>

1. *Smith v. Mobile Bank*, 21 Ala. 125; *Derrick v. Brown*, 66 Ala. 162; *Miller v. Fraley*, 23 Ark. 735; *Clark v. McElvy*, 11 Cal. 160; *Snow v. Lake*, 20 Fla. 656; s. c., 51 Am. Rep. 625; *Leland v. Isenbeck*, 1 Idaho, N. S. 469; *Raymond v. Morrison*, 59 Iowa 371; *Springer v. Bartle*, 46 Iowa 688; *Watson v. Phelps*, 40 Iowa 482; *Smith v. Dunton*, 42 Iowa 48; *Light v. West*, 42 Iowa 138; *Besore v. Dosh*, 43 Iowa 211; *Coe v. Persons*, 43 Me. 436; *Bragg v. Paulk*, 42 Me. 517; *Hope v. Stone*, 10 Minn. 152; *Everest v. Ferris*, 16 Minn. 26; *Marshall v. Roberts*, 18 Minn. 405; s. c., 10 Am. Rep. 201; *De Veaux v. Foscender*, 57 Mich. 579; *McAdow v. Black*, 6 Mont. 601; *Thorn v. Newsom*, 64 Tex. 161; s. c., 53 Am. Rep. 747; *Oliver v. Platt*, 3 How. (U. S.) 363; *May v. LeClaire*, 11 Wall. (U. S.) 217; *Villa v. Rodriguez*, 12 Wall. (U. S.) 323; *Dickerson v. Colgrove*, 100 U. S. 578; *Gest v. Packwood*, 34 Fed. Rep. 368; *Hastings v. Nissen*, 31 Fed. Rep. 597; *United States v. Sliney*, 21 Fed. Rep. 894; *Runyon v. Smith*, 18 Fed. Rep. 579; *Baker v. Humphrey*, 101 U. S. 494; *Vattier v. Hinde*, 7 Pet. (U. S.) 252; *Morse v. Godfrey*, 3 Story (U. S.) 365.

**Circumstance Showing Notice.**—To entitle an innocent purchaser without notice to protection in equity, the textbooks do not assert, nor has any case been found to adjudge, that he must hold under a general warrantee deed; but it is no doubt the law that where a person bargains for and takes a mere quitclaim or deed without warrantee, it is a circumstance, if unexplained, to show that he had notice of imperfections in the vendor's title, and only

purchased such interest as the vendor might have in the property. *Miller v. Fraley*, 23 Ark. 735. See also *Snowden v. Tyler*, 21 Neb. 199; *Hoyt v. Schuyler*, 19 Neb. 652.

**Of What Quitclaim Deed Is Notice.**—The record of a quit claim deed simply gives notice of the existence and contents of the deed to all subsequent purchasers from the same grantor. It does not give notice to any person that such grantor had any right to the property, nor does it give notice to any person of any prior unrecorded deeds constituting a chain of title to the grantor. *Hutchinson v. Hartmann*, 15 Kan. 133.

2. *Nidever v. Ayers*, 83 Cal. 39; *Graff v. Middleton*, 43 Cal. 341; *Bradbury v. Davis*, 5 Colo. 265; *Chapman v. Sims*, 53 Miss. 168; *Fox v. Hall*, 74 Mo. 315; s. c., 41 Am. Rep. 316; *Willingham v. Hardin*, 75 Mo. 429; *Boogher v. Neece*, 75 Mo. 383; *Munson v. Ensor*, 94 Mo. 504; *Cutler v. James*, 64 Wis. 173; s. c., 54 Am. Rep. 603; *White v. McGarry*, 2 Flip. (U. S.) 572.

3. *Jewett v. Palmer*, 7 Johns. Ch. (N. Y.) 65; s. c., 11 Am. Dec. 401; *De Mott v. Starkey*, 3 Barb. Ch. (N. Y.) 403; *Jackson v. M'Chesney*, 7 Cow. (N. Y.) 360; s. c., 17 Am. Dec. 521; *Warner v. Winslow*, 1 Sandf. Ch. (N. Y.) 430; *Dickerson v. Tillinghast*, 4 Paige (N. Y.) 215; s. c., 25 Am. Dec. 528; *Ells v. Tousley*, 1 Paige (N. Y.) 280; *Christie v. Bishop*, 1 Barb. Ch. (N. Y.) 105; *Harris v. Norton*, 16 Barb. (N. Y.) 264; *Weaver v. Barden*, 49 N. Y. 286; *Curtis v. Hitchcock*, 10 Paige (N. Y.) 399; *Savage v. Hazard*, 11 Neb. 323; *Morse v. Wright*, 60 Cal. 260; *Palmer v. Williams*, 24 Mich. 328; *Blanchard*

(b) WHEN PART OF CONSIDERATION HAS BEEN PAID.—Payment of a part of the purchase money, although not sufficient to invest the purchaser with the character of a *bona fide* purchaser as regards the estate purchased, does give him the right to invoke the aid of the equitable principle, that he who claims equity must do equity and requires reimbursement, from the rightful owner, of all moneys paid before notice, as a condition to granting the first purchaser or encumbrancer relief,<sup>1</sup> and it has been held that pro-

*v. Tyler*, 12 Mich. 339; s. c., 86 Am. Dec. 57; *Stone v. Welling*, 14 Mich. 514; *Warner v. Whittaker*, 6 Mich. 133; s. c., 72 Am. Dec. 65; *Dixon v. Hill*, 5 Mich. 404; *Thomas v. Stone*, Walker's Ch. (Mich.) 117; *Kohl v. Lynn*, 34 Mich. 360; *Fraim v. Frederick*, 32 Tex. 294; *Beaty v. Whitaker*, 23 Tex. 526; *Anderson v. Hubble*, 93 Ind. 570; s. c., 47 Am. Rep. 394; *Rhodes v. Green*, 36 Ind. 7; *Parkinson v. Hanna*, 7 Blackf. (Ind.) 400; *Heck v. Fink*, 85 Ind. 6; *Dugan v. Vattier*, 3 Blackf. (Ind.) 245; s. c., 25 Am. Dec. 105; *Holcroft v. Hunter*, 3 Blackf. (Ind.) 147; *Gallion v. M'Caslin*, 1 Blackf. (Ind.) 90; s. c., 12 Am. Dec. 208; *Lewis v. Phillips*, 17 Ind. 108; s. c., 79 Am. Dec. 457; *Wormley v. Wormley*, 8 Wheat. (U. S.) 421; *Vattier v. Hinde*, 7 Pet. (U. S.) 252; *Wood v. Mann*, 1 Sumn. (U. S.) 506; *Flagg v. Mann*, 2 Sumn. (U. S.) 486; *Boone v. Chiles*, 10 Pet. (U. S.) 177; *Villa v. Rodriguez*, 12 Wall. (U. S.) 323; *Merrill v. Dawson*, Hempst. (U. S.) 563; *Moshier v. Knox College*, 32 Ill. 155; *Keys v. Test*, 33 Ill. 316; *Kiser v. Huston*, 38 Ill. 252; *D'Wolf v. Pratt*, 42 Ill. 210; *Brown v. Welch*, 18 Ill. 343; s. c., 68 Am. Dec. 549; *Kitteridge v. Chapman*, 36 Iowa 348; *Sillyman v. King*, 36 Iowa 207; *Norton v. Williams*, 9 Iowa 528; *Barney v. McCarty*, 15 Iowa 510; s. c., 83 Am. Dec. 427; *English v. Waples*, 13 Iowa 57; *Blight v. Bank*, 6 Mon. (Ky.) 192; s. c., 17 Am. Dec. 537; *Nantz v. McPherson*, 7 Mon. (Ky.) 597; s. c., 18 Am. Dec. 216; *Simms v. Richardson*, 2 Litt. (Ky.) 274; *Halstead v. Bank of Kentucky*, 4 J. J. Marsh. (Ky.) 554; *Wells v. Morrow*, 38 Ala. 125; *Duncan v. Johnson*, 13 Ark. 190; *Minor v. Willoughby*, 3 Minn. 239; *Kilcrease v. Lum*, 36 Miss. 566; *Aubuchon v. Bender*, 44 Mo. 560; *Bishop v. Schneider*, 46 Mo. 472; s. c., 2 Am. Rep. 533; *Paul v. Fulton*, 25 Mo. 156; *Patten v. Moore*, 32 N. H. 382; *Lozey v. Simpson*, 11 N. J. Eq. 246; *Dean v. Anderson*, 34 N. J. Eq. 496; *Wood v. Rayburn*, 22 Pac. Rep. (Oreg.) 521; *Henry v. Raiman*, 25 Pa. St. 354; s. c., 64 Am. Dec. 703; *Hoffman v. Strohecker*, 7 Watts (Pa.) 86; s. c., 32 Am. Dec. 740; *Bush v. Bush*, 3 Strobb. Eq. (S. Car.) 131; s. c., 51 Am. Dec. 675; *McBee v. Loftus*, 1 Strobb. Eq. (S. Car.) 90; *Simpson v. Gibbes*, 1 Desaus. (S. Car.) 145; *Snelgrove v. Snelgrove*, 4 Desaus. (S. Car.) 274; *Williams v. Hollingsworth*, 1 Strobb. Eq. (S. Car.) 103; s. c., 47 Am. Dec. 527; *Pillow v. Shannon*, 3 Yerg. (Tenn.) 508; *Perkins v. Hays*, Cooke (Tenn.) 163; s. c., 5 Am. Dec. 680; *Doswell v. Buchanan*, 3 Leigh (Va.) 362; s. c., 23 Am. Dec. 280; *Kyles v. Tait*, 6 Gratt. (Va.) 44; *Everts v. Agnes*, 4 Wis. 343; s. c., 65 Am. Dec. 314; *Harrison v. Southcote*, 1 Atk. (Eng.) 538; *Story v. Windsor*, 2 Atk. (Eng.) 630; *Hardingham v. Nicholls*, 3 Atk. (Eng.) 304; *Maitland v. Wilson*, 3 Atk. (Eng.) 814; *Molony v. Kernan*, 2 Dr. & War. (Eng.) 31; *Jerrard v. Saunders*, 2 Ves. Jr. (Eng.) 454.  
1. *Baldwin v. Sager*, 70 Ill. 503; *Burton v. Reagan*, 75 Ind. 77; *Lewis v. Phillips*, 17 Ind. 108; s. c., 79 Am. Dec. 457; *Farmers' L. & T. Co. v. Maltby*, 8 Paige (N. Y.) 361; *Peabody v. Fenton*, 3 Barb. Ch. (N. Y.) 451; *Stalker v. McDonald*, 6 Hill (N. Y.) 93; s. c., 40 Am. Dec. 389; *Pickett v. Barron*, 29 Barb. (N. Y.) 505; *Sargent v. Eureka Spund Apparatus Co.*, 46 Hun (N. Y.) 19; *Merritt v. Lambert*, Hoff. Ch. (N. Y.) 165; *Tufts v. Tufts*, 18 Wend. (N. Y.) 621; *Florence S. M. Co. v. Zeigler*, 58 Ala. 225; *Dufphey v. Frenaye*, 5 Stew. & P. (Ala.) 215; *Marchbanks v. Banks*, 44 Ark. 48; *Warner v. Whittaker*, Mich. 132; s. c., 72 Am. Dec. 65; *Thomas v. Stone*, Walk Ch. (Mich.) 117; *Dixon v. Hill*, 5 Mich. 404; *Uhrich v. Beck*, 13 Pa. St. 639; s. c., 16 Pa. St. 499; *Fessler Appeal*, 75 Pa. St. 483; *Youst v. Martin*, 3 S. & R. (Pa.) 423; *Bellas v. McCarty*, 10 Watts (Pa.) 13; *Juvenal v. Jackson*, 14 Pa. St. 519; *Willard v. Ramsburg*, 22 Md. 206; *Lozey v. Simpson*, 11 N. J. Eq. 246;

tection will be given for expenditures made in improvements on the premises before notice.<sup>1</sup>

(c) PLEADING.—In setting up a *bona fide* purchase for value without notice as a defence, the consideration must be stated with a distinct averment that it was *bona fide*, and truly paid, independently of the recital in the deed. Notice, whether charged or not, must be denied previous to and down to the time of paying the money and the delivery of the deed; and, if notice is especially charged, the denial must be of all the circumstances referred to from which notice can be inferred; and the answer or plea show how the grantee acquired title.<sup>2</sup> It has also been

*Haughwout v. Murphy*, 22 N. J. Eq. 548; *Batts v. Scott*, 37 Tex. 63; *Hardin v. Harrington*, 11 Bush (Ky.) 367; *Simms v. Richardson*, 2 Litt. (Ky.) 274; *Paul v. Fulton*, 25 Mo. 156; *Digby v. Jones*, 67 Mo. 104; *Servis v. Beatty*, 32 Miss. 52; *Everts v. Agnes*, 4 Wis. 343; s. c., 65 Am. Dec. 314; *Dresser v. Missouri etc. R. C. Co.*, 93 U. S. 95; *Hardingham v. Nicholls*, 3 Atk. (Eng.) 304; *Maitland v. Wilson*, 3 Atk. (Eng.) 814; *Story v. Windsor*, 2 Atk. (Eng.) 630; *Tourville v. Naish*, 3 P. Wms. (Eng.) 307; *Jones v. Stanley*, 2 Eq. Cas. Abr. 685. *Contra*, *Doswell v. Buchanan*, 3 Leigh (Va.) 365; s. c., 23 Am. Dec. 280.

**Cannot Perfect Entire Claim by Payment of Balance.**—A subsequent purchaser of lands, who has made part payment without notice, leaving a balance unpaid, and who then receives notice of a prior equity, cannot, as against the holder of the prior equity, by afterwards paying the balance, perfect his entire claim as a purchaser without notice. *Wells v. Morrow*, 38 Ala. 125; *Warner v. Whittaker*, 6 Mich. 133; s. c., 72 Am. Dec. 65. *Contra*, *Morris v. Meek*, 57 Tex. 385.

**Partial Payment—Vendor's Lien.**—A second vendee of land without notice, actual or constructive, of a mortgage thereon, for the purchase money to the prior vendor, the title deeds and possession of the land being delivered to him, will be protected in chancery to the extent of the purchase money paid by him before notice of the mortgage. But where no part of the purchase money has been paid by him the lien of the prior vendor for the purchase money due him will prevail. And, on a bill by the prior vendor to enforce his equitable lien, or such mortgage, time will be given to the second vendee to pay the amount due the complainant,

and if not paid within such time, the court will order a sale of the lands, the proceeds to be applied first to the payment of the amount paid by the second vendee, before notice of the prior encumbrance, and then to the satisfaction of the complainant's claim. *Dufphey v. Frenaye*, 5 Stew. & P. (Ala.) 215.

**Liability to Grantee in Unrecorded Deed.**—Where an innocent vendee, who has paid for the land partly in cash and the balance by note and mortgage, receives notice of an unrecorded claim before paying the note, he is liable to the holder of the claim for the purchase price unpaid at the time of notice. *Green v. Green*, 41 Kan. 472.

1. *Baldwin v. Sager*, 70 Ill. 503; *Boggs v. Varner*, 6 W. & S. (Pa.) 469; *Yocum v. Morice*, 4 Phila. (Pa.) 106; *Byers v. Fowler*, 12 Ark. 218; s. c., 54 Am. Dec. 271.

2. *Byers v. Fowler*, 12 Ark. 218; s. c., 54 Am. Dec. 271; *Nolen v. Gwyn*, 16 Ala. 725; *De Vendal v. Malone*, 25 Ala. 272; *Wells v. Morrow*, 38 Ala. 125; *Johnson v. Toulmin*, 18 Ala. 50; s. c., 52 Am. Dec. 212; *Moore v. Clay*, 7 Ala. 742; *Long v. Dollarhide*, 24 Cal. 218; *Seymour v. McKinstry*, 106 N. Y. 230; *Frost v. Beekman*, 1 Johns. Ch. (N. Y.) 288; *Heatley v. Finster*, 2 Johns. Ch. (N. Y.) 158; *Denning v. Smith*, 3 Johns. Ch. (N. Y.) 332; *Gallatin v. Cunningham*, 8 Cow. (N. Y.) 374; *Galatin v. Erwin*, 1 Hopk. Ch. (N. Y.) 56; *Brinkerhoff v. Lansing*, 4 Johns. Ch. (N. Y.) 71; s. c., 8 Am. Dec. 538; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566; *Manhattan Co. v. Everston*, 6 Paige (N. Y.) 457; *Murray v. Winter*, 2 Johns. Ch. (N. Y.) 157; *Grimstone v. Carter*, 3 Paige (N. Y.) 421; s. c., 24 Am. Dec. 230; *Woodruff v. Cook*, 2 Edw. Ch. (N. Y.) 259; *Halsa v. Halsa*, 8 Mo. 303; *Wallace v. Wil-*

held that the plea of a *bona fide* purchaser without notice, must aver that the person who conveyed or mortgaged to defendant was seized in fee or pretended to be, and was in possession.<sup>1</sup>

(d) NEW CONSIDERATION NECESSARY.—There must be some new consideration given, some right abandoned, or something done to the prejudice of the party before notice was received.<sup>2</sup> A pre-existing debt is not such a consideration as will sustain the plea of "*bona fide* purchaser for value," except in the case of negotiable paper, and on this point there is great difference of opinion,<sup>3</sup> but if one relinquishes a security which he held before

son, 30 Mo. 335; *Keys v. Test*, 33 Ill. 316; *Makepeace v. Davis*, 27 Ind. 352; *Gallion v. McCaslin*, 1 Blackf. (Ind.) 91; s. c., 12 Am. Dec. 208; *Baum v. Dubois*, 43 Pa. St. 260; *Lloyd v. Lynch*, 28 Pa. St. 419; s. c., 70 Am. Dec. 137; *Pillow v. Shannon*, 3 Yerg. (Tenn.) 408; *Hugh v. Batte*, 10 Yerg. (Tenn.) 335; *Smitheal v. Gray*, 1 Humph. (Tenn.) 491; s. c., 34 Am. Dec. 664; *Hawley v. Bullock*, 29 Tex. 216; *Mitchell v. Puckett*, 23 Tex. 573; *Boone v. Chiles*, 10 Pet. (U. S.) 177; *Caldwell v. Carrington*, 9 Pet. (U. S.) 86; *Wilson v. Hillyer*, 1 N. J. Eq. 63; *Hoover v. Donally*, 3 Hen. & M. (Va.) 316; *Snelgrove v. Snelgrove*, 4 Desaus. (S. Car.) 274; *Gerard v. Saunders*, 2 Ves. Jr. 454; *Head v. Egerton*, 3 P. Wms. (Eng.) 280; *Jones v. Thomas*, 3 P. Wms. (Eng.) 243; *Tourville v. Naish*, 3 P. Wms. (Eng.) 307; *Hughes v. Garth*, 2 Amb. 421; *Wigg v. Wigg*, 1 Atl. 384; *Story v. Windsor*, 2 Atk. (Eng.) 630.

1. *Havens v. Bliss*, 26 N. J. Eq. 263; *Wood v. Rayburn* (Oreg.), 22 Pac. Rep. 521; *Wallyn v. Lee*, 9 Ves. (Eng.) 24.

"The title purchased must be apparently perfect, good at law, a vested estate in fee simple." *Boone v. Chiles*, 10 Pet. (U. S.) 177.

2. *Webster v. Van Steenbergh*, 46 Barb. (N. Y.) 211; *Cary v. White*, 52 N. Y. 138; *Pickett v. Barron*, 29 Barb. (N. Y.) 505; *Williams v. Shelly*, 37 N. Y. 375; *Wood v. Chapin*, 13 N. Y. 509; s. c., 67 Am. Dec. 62; *Hinds v. Pugh*, 48 Miss. 268; *McLeod v. First Nat. Bank*, 42 Miss. 99; *Rollins v. Callender*, *Freem. Ch. (Miss.)* 295; *Emanuel v. White*, 34 Miss. 56; s. c., 69 Am. Dec. 385; *Pearce v. Jackson*, 61 Tex. 642; *Stone v. Welling*, 14 Mich. 514.

Extending Time of Payment of Antecedent Debt.—"The giving of further time for the payment of an existing debt by a valid agreement for any

period, however short, is a valuable consideration, and is sufficient to support a mortgage as a purchase for a valuable consideration." The same doctrine was enunciated in *Cary v. White*, 52 N. Y. 138, the court saying: 'If there was an extension of time for a single day by a valid agreement as a consideration of the mortgage, there was a valuable consideration within the rule.' This doctrine commends itself to us as sound. We are unable to discover by what rule we could determine what length of time would be sufficient, if one day is not enough. A longer extension might be of greater advantage to the debtor, or of greater disadvantage to the creditor, but neither the advantage nor the disadvantage would be more tangible or real." *Sullivan Sav. Institution v. Young*, 55 Iowa 132; *Hinds v. Pugh*, 48 Miss. 268; *Brown v. Vanlier*, 7 Humph. (Tenn.) 239.

3. *Wells v. Morrow*, 38 Ala. 125; *Glinski v. Zawadski*, 8 Fla. 405; *Chance v. McWhorter*, 26 Ga. 315; *Babcock v. Jordan*, 24 Ind. 14; *Powell v. Jeffries*, 5 Ill. 387; *Davis v. Nolan*, 49 Iowa 683; *Walker v. Abbey*, 77 Iowa 702; *Buffington v. Gerrish*, 15 Mass. 156; s. c., 8 Am. Dec. 97; *Clark v. Flint*, 22 Pick. (Mass.) 231, 243; s. c., 33 Am. Dec. 733; *Boxheimer v. Gunn*, 24 Mich. 380; *Chadwick v. Broadwell*, 27 Mich. 6; *Battershall v. Stephens*, 34 Mich. 67; *Stone v. Welling*, 14 Mich. 514; *Baze v. Arper*, 6 Minn. 220; *Pope v. Pope*, 40 Miss. 516; *Hinds v. Pugh*, 48 Miss. 268; *Harvey v. Pack*, 4 Smed. & M. (Miss.) 255; *Donaldson v. Bank of Cape Fear*, 1 Dev. Eq. (N. Car.) 103; s. c., 18 Am. Dec. 577; *Harris v. Horner*, 1 Dev. & B. Eq. (N. Car.) 455; s. c., 30 Am. Dec. 182; *Pancoast v. Duval*, 26 N. J. Eq. 449; *DeLancey v. Stearns*, 66 N. Y. 157; *Root v. French*, 13 Wend (N. Y.) 570; s. c., 28 Am. Dec. 482; *Padgett v. Lawrence*, 10 Paige (N. Y.) 170; s. c., 40 Am. Dec. 232; *Wood v. Robinson*,

and which cannot be revived so as to place him in the same situation substantially as he was before the purchase, this may be sufficient to protect him;<sup>1</sup> the giving of security for the purchase price will not,<sup>2</sup> though it be under seal;<sup>3</sup> but if some negotiable security has been given which has passed into the hands of third parties, so that the maker is bound, the plea will be good.<sup>4</sup>

22 N. Y. 564; *Dickerson v. Tillinghast*, 4 Paige (N. Y.) 215; s. c., 25 Am. Dec. 528; *Pendleton v. Fay*, 2 Paige (N. Y.) 202; *Evertson v. Evertson*, 5 Paige (N. Y.) 644; *Young v. Guy*, 87 N. Y. 462; *Cary v. White*, 52 N. Y. 138; *Barnard v. Campbell*, 58 N. Y. 73; s. c., 17 Am. Rep. 208; *Stevens v. Brennan*, 79 N. Y. 254; *Manhattan Co. v. Evertson*, 6 Paige (N. Y.) 457; *Barnes v. Camack*, 1 Barb. (N. Y.) 392; *Wiles v. Clapp*, 41 Barb. (N. Y.) 647; *Thompson v. Van Vechten*, 6 Bosw. (N. Y.) 373; 27 N. Y. 568; *Wood v. Chapin*, 13 N. Y. 509; s. c., 67 Am. Dec. 62; *Lewis v. Anderson*, 20 Ohio St. 281; *Jarman v. Farley*, 7 Lea (Tenn.) 141; *Morse v. Godfrey*, 3 Story (U. S.) 364; *Daniel v. Mitchell*, 1 Story (U. S.) 172; *Butler v. Harrison*, Cowp. 565; *McCarthy v. DeCaix*, 1 Russ. & M. (Eng.) 614. *Contra*, *Frey v. Clifford*, 44 Cal. 335.

(For cases on the point as to whether a pre-existing debt is such a consideration as will support the plea of *bona fide* purchaser for value in the case of a promissory note, see 2 Am. & Eng. Encyc. of Law 392.)

A prior debt is a sufficient consideration to protect one holding the legal right against the prior equity of one who has no legal right, when the former had no notice of such equity. *Uhlen v. Semple*, 20 N. J. 288.

1. *Padgett v. Lawrence*, 10 Paige (N. Y.) 170; s. c., 40 Am. Dec. 232; *Ward v. Howard*, 88 N. Y. 76; *Chrysler v. Renois*, 43 N. Y. 209; *McLeod v. First Nat. Bank*, 42 Miss. 99; *Hinds v. Pugh*, 48 Miss. 268; *Newell v. Crider*, 50 Miss. 539; *Love v. Taylor*, 26 Miss. 567; *Perkins v. Swank*, 43 Miss. 349.

**Satisfaction, Releasing the Debtor.**—Satisfaction of the debts of the judgment creditors of the vendor, in such a manner that they thereupon released the vendor, is a payment which will render the person who makes it *bona fide* a purchaser for value. *Henderson v. Pilgrim*, 22 Tex. 464.

2. *Kitteridge v. Chapman*, 36 Iowa 348; *Weaver v. Barden*, 49 N. Y. 286; *Jewett v. Palmer*, 7 Johns. Ch. (N. Y.) 65; s. c., 11 Am. Dec. 401; *Jackson v.*

*Cadwell*, 1 Cow. (N. Y.) 622; *Spicer v. Waters*, 65 Barb. (N. Y.) 227; *Harria v. Norton*, 16 Barb. (N. Y.) 264; *Schroeder v. Gurney*, 10 Hun (N. Y.) 417; *McBee v. Loftus*, 1 Strobh. Eq. (S. Car.) 90; *Vandoren v. Todd*, 3 N. J. Eq. 397; *Losey v. Simpson*, 11 N. J. Eq. 246; *Campbell v. Campbell*, 11 N. J. Eq. 268; *Mingus v. Condit*, 23 N. J. Eq. 313; *Hogan v. Jacques*, 19 N. J. Eq. 133; s. c., 97 Am. Dec. 644; *Baldwin v. Johnson*, 1 N. J. Eq. 441; *Doswell v. Buchanan*, 3 Leigh (Va.) 365; s. c., 23 Am. Dec. 280; *Brown v. Welch*, 18 Ill. 343; s. c., 68 Am. Dec. 549; *Thomas v. Stone*, Walk. Ch. (Mich.) 117; *Dixon v. Hill*, 5 Mich. 404; *Blanchard v. Tyler*, 12 Mich. 339; s. c., 86 Am. Dec. 57; *Minor v. Willoughby*, 3 Minn. 225; *Patten v. Moore*, 32 N. H. 382; *Donaldson v. Bank of Cape Fear*, 1 Dev. Eq. (N. Car.) 103; s. c., 18 Am. Dec. 577; *Dresser v. Missouri etc. R. Co.*, 93 U. S. 95; *Hardingham v. Nicholls*, 3 Atk. (Eng.) 304; *Maundrell v. Maundrell*, 10 Ves. (Eng.) 246.

Where the grantee in a deed absolute, which is held to constitute a mortgage, devises the land, for no other consideration than natural love and affection, the devisee is not in the position of a *bona fide* purchaser of the land for value. *Jackson v. Lynch*, 129 Ill. 72; *Black v. Thornton*, 31 Ga. 641.

3. *Weaver v. Barden*, 49 N. Y. 286; *Westbrook v. Gleason*, 79 N. Y. 23; *Warner v. Whittaker*, 6 Mich. 132; s. c., 72 Am. Dec. 65; *Thomas v. Stone*, Walk. Ch. (Mich.) 117; *Union Canal Co. v. Young*, 1 Whart. (Pa.) 410; s. c., 30 Am. Dec. 212; *Wells v. Morrow*, 38 Ala. 125; *Wood v. Rayburn*, 22 Pac. Rep. (Oreg.) 521; *Dresser v. Missouri etc. R. Const. Co.*, 93 U. S. 95; *Tourville v. Naish*, 3 P. Wms. (Eng.) 307; *Story v. Windsor*, 2 Atk. (Eng.) 630.

4. *Frost v. Berkman*, 1 Johns. Ch. (N. Y.) 288; *Green v. Slayter*, 4 Johns. Ch. (N. Y.) 38; *Freeman v. Deming*, 3 Sandf. Ch. (N. Y.) 327; *Thomas v. Stone*, Walk. Ch. (Mich.) 117; *Dixon v. Hill*, 5 Mich. 404; *Digby v. Jones*, 67 Mo. 104; *Baldwin v. Sager*, 70 Ill. 503; *Partridge v. Chapman*, 81 Ill. 137;

**3. Legal Title Must be Acquired Before Notice.**—One who claims the protection of a court of equity as a *bona fide* purchaser, must show that he had acquired the legal title before notice or knowledge of facts equivalent to notice.<sup>1</sup>

**4. Bona Fide Purchaser Protected**—(See FRAUDULENT SALES.)—A *bona fide* purchaser for value and without notice is protected, not only against all prior equities, but against all adverse proceedings in equity, whether instituted to compel the purchaser to surrender what he has bought, or to make a discovery which might be used to his prejudice in a court of law.<sup>2</sup> But the vendee of one

Newlin v. Osborne, 6 Jones L. (N. Car.) 128; s. c., 72 Am. Dec. 566.

1. Vattier v. Hinde, 7 Pet. (U. S.) 252; Boone v. Chiles, 10 Pet. (U. S.) 177; Heck v. Fink, 85 Ind. 6; Walker v. Cox, 25 Ind. 271; Blight v. Banks, 6 B. Mon. (Ky.) 192; s. c., 17 Am. Dec. 136; Nantz v. McPherson, 7 B. Mon. (Ky.) 597; s. c., 18 Am. Dec. 216; Thomas v. Stone, Walk. Ch. (Mich.) 117; Kilcrease v. Lum, 36 Miss. 569; Grimstone v. Carter, 3 Paige (N. Y.) 421; s. c., 24 Am. Dec. 230; Jewett v. Palmer, 7 Johns. Ch. (N. Y.) 65; s. c., 11 Am. Dec. 401; Dickerson v. Tillinghast, 4 Paige (N. Y.) 215; s. c., 25 Am. Dec. 528; Snelgrove v. Snelgrove, 4 Desaus. (S. Car.) 274; Brown v. Wood, 6 Rich. Eq. (S. Car.) 155; Pillow v. Shannon, 3 Yerg. (Tenn.) 508; Perkins v. Hays, Cooke (Tenn.) 163; s. c., 5 Am. Dec. 680; Womack v. Smith, 11 Humph. (Tenn.) 478; Doswell v. Buchanan, 3 Leigh (Va.) 365; s. c., 23 Am. Dec. 280; Tourville v. Naish, 3 P. Wms. 307; Story v. Windsor, 2 Atk. (Eng.) 630; Moore v. Mayhew, 2 Freem. 175; Jones v. Stanley, 3 Eq. Cas. Abr. 685; Wigg v. Wigg, 1 Atk. 384.

Where a bill is filed by one who has the legal title, but under such circumstances that he cannot be completely redressed at law, it is no defence for the purchaser to plead that he purchased for valuable consideration without notice. Such plea will only protect the honest purchaser, after he has got the legal title. Jones v. Zollicoffer, Term. (N. Car.) 212.

2. Moore v. Clay, 7 Ala. 742; Munday v. Pitts, 14 Ala. 84; Sadler v. Lewers, 42 Ark. 148; Andrews v. Cox, 42 Ark. 473; s. c., 48 Am. Rep. 68; Learned v. Tritch, 6 Colo. 432; McFarran v. Knox, 5 Colo. 217; Cressy v. Phelps, 2 Root (Conn.) 420; Kearnes v. Hill, 21 Fla. 185; Stewart v. Mathews, 19 Fla. 752; Collins v. Heath, 34 Ga. 443; Hern-

don v. Kimball, 7 Ga. 432; s. c., 1 Am. Dec. 406; Colquitt v. Thomas, 8 Ga. 258; Fleming v. Townsend, 6 Ga. 103; s. c., 50 Am. Dec. 318; Howard v. Snelling, 32 Ga. 204; Black v. Thornton, 31 Ga. 640; Lee v. Cato, 27 Ga. 637; s. c., 73 Am. Dec. 746; Truluck v. Peeples, 3 Ga. 446; Slocum v. Slocum, 9 Ill. App. 142; Spicer v. Robinson, 73 Ill. 519; Choteau v. Jones, 11 Ill. 300; s. c., 50 Am. Dec. 460; Scarlett v. Gorham, 28 Ill. 319; Dennis v. McCagg, 32 Ill. 429; Willis v. Henderson, 5 Ill. 13; s. c., 38 Am. Dec. 120; Prevo v. Walters, 5 Ill. 35; Dunlap v. Wilson, 32 Ill. 517; Rupert v. Mark, 15 Ill. 540; Jenkins v. Rosenberg, 105 Ill. 157; Kiser v. Heuston, 38 Ill. 252; Pitts v. Cable, 44 Ill. 103; Nitche v. Earle, 88 Ind. 375; Smith v. Lowry, 113 Ind. 37; Wainwright v. Flanders, 64 Ind. 306; Scott v. Purcell, 7 Blackf. (Ind.) 66; s. c., 39 Am. Dec. 453; Curme v. Rauh, 100 Ind. 247; Beckett v. Bledsoe, 4 Ind. 256; Lewis v. Phillips, 17 Ind. 108; 79 Am. Dec. 457; Crane v. Buchanan, 29 Ind. 570; Lunt v. Neeley, 67 Iowa 97; Jordan v. Brown, 56 Iowa, 281; Bell v. Evans, 10 Iowa 353; Barney v. McCarty, 15 Iowa 510; s. c., 83 Am. Dec. 427; Baker v. Woolston, 27 Kan. 185; Ashbrook v. Roberts, 82 Ky. 298; Boyce v. Waller, 2 B. Mon. (Ky.) 91; Owings v. Joint, 2 A. K. Marsh. (Ky.) 380; Lemon v. Brown, 4 Bibb (Ky.) 308; Moore v. Dodd, 1 A. K. Marsh. (Ky.) 140; Bradford v. Trustees of Lexington, 1 A. K. Marsh. (Ky.) 175; Morrill v. Carr, 2 La. An. 807; Desha v. Jones, 6 La. An. 741; Hancock v. Beverly, 6 B. Mon. (Ky.) 531; Erskine v. Decker, 39 Me. 467; Brackett v. Ridlon, 54 Me. 426; Stone v. Bartlett, 46 Me. 438; Hoffman v. Noble, 6 Met. (Mass.) 68; s. c., 39 Am. Dec. 711; Rowley v. Bigelow, 12 Pick. (Mass.) 307; Sleeper v. Chapman, 121 Mass. 404; Somes v. Brewer, 2 Pick. (Mass.) 184; s. c., 13 Am. Dec. 406;



Hubbell v. Currier, 10 Allen (Mass.) 333; Loomis v. Brush, 36 Mich. 40; Heffron v. Flanigan, 37 Mich. 278; Hollister v. Loud, 2 Mich. 313; Smith v. Gibson, 15 Minn. 89; Harper v. Bibb, 34 Miss. 472; s. c., 69 Am. Dec. 397; Fury v. Kempin, 79 Mo. 477; Skinner v. Oakes, 10 Mo. App. 45; Matthews v. Lecompte, 24 Mo. 545; Wineland v. Coonce, 5 Mo. 296; s. c., 32 Am. Dec. 320; Howe v. Waysman, 12 Mo. 169; s. c., 49 Am. Dec. 126; Durant v. Crowell, 97 N. Car. 467; McCorkle v. Earnhardt, Phill. L. (N. Car.) 300; Freeman v. Eatman, 3 Ired. Eq. (N. Car.) 81; s. c., 40 Am. Dec. 444; Potts v. Blackwell, 4 Jones Eq. (N. Car.) 58; Wilson v. Parshall, 7 N.Y. Supp. 479; Dickerson v. Tillinghast, 14 Paige (N.Y.) 215; s. c., 25 Am. Dec. 528; Whittick v. Kane, 1 Paige (N.Y.) 202; Moyer v. McIntyre, 43 Hun (N.Y.) 58; King v. Wilcomb, 7 Barb. (N.Y.) 268; Riley v. Hoyt, 29 Hun (N.Y.) 114; Jackson v. Henry, 10 Johns. (N.Y.) 185; s. c., 6 Am. Dec. 328; Anderson v. Roberts, 18 Johns. (N.Y.) 515; s. c., 9 Am. Dec. 235; Juliland v. Rathbone, 39 Barb. (N.Y.) 103; Seymour v. Wilson, 19 N.Y. 417; Ledyard v. Butler, 9 Paige (N.Y.) 132; Clark v. Mackin, 30 Hun (N.Y.) 411; s. c., 37 Am. Dec. 379; Galatian v. Erwin, Hopk. (N.Y.) 48; Fassett v. Smith, 23 N.Y. 252; Malcom v. Loveridge, 13 Barb. (N.Y.) 372; Fort v. Burch, 5 Den. (N.Y.) 193; Viele v. Judson, 15 Hun (N.Y.) 332; Wood v. Chapin, 13 N.Y. 520; s. c., 67 Am. Dec. 62; Bush v. Lathrop, 22 N.Y. 549; Jackson v. Henry, 10 Johns. (N.Y.) 185; s. c., 6 Am. Dec. 328; Jackson v. Van Valkenburgh, 8 Cow. (N.Y.) 260; Hoyt v. Sheldon, 3 Bosw. (N.Y.) 267; Stoddard v. Rotton, 5 Bosw. (N.Y.) 378; Hogarty v. Lynch, 6 Bosw. (N.Y.) 138; Ely v. Scofield, 35 Barb. (N.Y.) 330; Whittemore v. Bean, 6 N. H. 47; Booraem v. Wells, 19 N. J. Eq. 87; Danbury v. Robinson, 14 N. J. Eq. 213; s. c., 82 Am. Dec. 244; Letson v. Letson, 17 N. J. Eq. 103; Hogan v. Jaques, 19 N. J. Eq. 123; s. c., 97 Am. Dec. 644; Ludlow v. Kidd, 3 Ohio 541; Swift v. Holdridge, 10 Ohio 230; s. c., 36 Am. Dec. 85; Wilkins v. Irvine, 33 Ohio St. 138; Pancake v. Cauffman, 114 Pa. St. 113; Scott v. Burton, 2 Ashm. (Pa.) 312; Hoffman v. Strobecker, 7 Watts (Pa.) 86; s. c., 32 Am. Dec. 740; Hood v. Fahnestock, 8 Watts (Pa.) 489; s. c., 34 Am. Dec. 489; Shaw v. Read, 47 Pa. St. 96; Mott v. Clark, 9 Pa. St. 399; s. c., 49 Am. Dec. 566; Tillinghast v. Champlin, 4 R. I. 173; s. c., 67 Am. Dec. 510; Wamburpee v. Kennedy, 4 Desaus. (S. Car.) 474; Lewis v. Taylor, Riley (S. Car.) 179; London v. Youmans, 31 S. Car. 147; Turner v. Petigrew, 6 Humph. (Tenn.) 438; Perkins v. Hays, Cooke (Tenn.) 163; s. c., 5 Am. Dec. 680; Coleman v. Satterfield, 2 Head (Tenn.) 259; Byrd v. Wilcox, 8 Baxt. (Tenn.) 65; Worley v. State, 7 Lea (Tenn.) 382; Woodward v. Suggett, 59 Tex. 619; Allday v. Whittaker, 66 Tex. 669; Garrison v. Crowell, 67 Tex. 626; Sydnor v. Roberts, 13 Tex. 593; s. c. 65 Am. Dec. 84; Wethered v. Boon, 17 Tex. 143; Watson v. Chalk, 11 Tex. 89; McKee v. Sulterfuss, 61 Tex. 325; Preston v. Nash, 76 Va. 1; Carter v. Allen, 21 Gratt. (Va.) 248; Love v. Braxton, 5 Call. (Va.) 537; Moore v. Hunter, 6 Ill. 317; Hunter v. Lawrence, 11 Gratt. (Va.) 111; s. c., 62 Am. Dec. 640; Massie v. Greenhow, 2 Patt. & H. (Va.) 255; Hoult v. Donahue, 21 W. Va. 294; Atkinson v. Hewitt, 63 Wis. 396; Crocker v. Bellange, 6 Wis. 645; s. c., 70 Am. Dec. 489; Hall v. Delaplaine, 5 Wis. 206; s. c., 68 Am. Dec. 57; Lamont v. Stimson, 5 Wis. 443; Wynn v. Carter, 20 Wis. 107; Hoyt v. Jones, 31 Wis. 389; Everts v. Agnes, 4 Wis. 356; s. c., 65 Am. Dec. 314; Gibleough v. Norfolk etc. R. Co., 1 Hughes (U.S.) 410; Sedgwick v. Place, 1 Blatchf. (U.S.) 163; Foreman v. Bigelow, 4 Cliff. (U.S.) 508; Dexter v. Harris, 2 Mason (U.S.) 531; Wood v. Mann, 1 Sumn. (U.S.) 506; Fletcher v. Peck, 6 Cranch (U.S.) 87; Lea v. Polk Copper Co., 21 How. (U.S.) 493; Astor v. Wells, 4 Wheat. (U.S.) 466; Bridge v. Beadon, L. R., 3 Eq. 604.

**Suspicion of Notice.**—A suspicion that one claiming to be a *bona fide* purchaser had notice is not sufficient to procure the interference of a court of equity. Knowledge must be clearly shown. *Miller v. Fraley*, 23 Ark. 735.

Obtaining a patent for land, and selling to a purchaser for a valuable consideration, does not preclude enquiry as to adverse claims founded on an equity arising previous to the patent, and of which the purchaser had no notice. *Gonzalus v. Hoover*, 6 S. & R. (Pa.) 118.

**When the Doctrine is Applicable.**—The doctrine that a purchaser without notice, for a valuable consideration, is entitled to the protection of the court, is only applicable to a case where there is prior equitable title; but where there is prior legal title, the rule is *caveat emptor*. *Daniel v. Hollingshead*, 16 Ga. 190. See *Taylor v. Stone*, 3 Munf. (Va.) 314.

who never had the legal title will not be protected against the holder of the legal title, though such vendee be a purchaser for value and without notice.<sup>1</sup>

5. Can Convey Good Title to One with Notice.—When property comes into the hands of one having no notice of prior equities, he obtains a complete *jus disponendi* and his want of notice is a protection to all subsequent grantees, though they have notice:<sup>2</sup> with this exception, that a prior owner charged with

The doctrine of *bona fide* purchasers has no application when either one or the other of the parties has both the legal and equitable title, and the dispute is as to which has it. *Wells v. Walker*, 29 Ga. 450.

The defence of a defendant, that he is a purchaser for value without notice, is only available where the plaintiff is seeking to take something away from the defendant which he already has. *Barnard v. Hunter*, 39 Eng. L. & Eq. 569.

There is no distinction between a "purchaser in good faith," under the recording act, and a *bona fide* purchaser within the decisions of the court of equity in other cases. *Grimstone v. Carter*, 3 Paige (N. Y.) 421; s. c., 24 Am. Dec. 230.

**Evidence.**—Whether a party, prejudiced by an unrecorded deed, be a *bona fide* purchaser, for a valuable consideration, without notice, is a question for the jury. *Chiles v. Conley*, 2 Dana (Ky.) 21.

1. *Bryan v. Walton*, 14 Ga. 185; *Sampeyreac v. United States*, 7 Pet. (U. S.) 222; *Oakley v. Ballard*, 1 Hempst. (U. S.) 475.

2. "For if either of those persons took and recorded the conveyance to himself in good faith, and in ignorance of the prior grant, his title was not only good, but he could confer a like perfect title upon one who had a full knowledge of such prior conveyance. 'If this were otherwise,' as CHANCELLOR WALTHORTH says, in *Varick v. Briggs*, 'a *bona fide* purchaser might be deprived of the power of selling his property for its full value.'" *Simon v. Kaliske*, 1 Sweeny (N. Y.) 304. See also *Lacustrine Fertilizer Co. v. Lake Guano & F. Co.*, 82 N. Y. 484; *Wood v. Chapin*, 13 N. Y. 509; s. c., 67 Am. Dec. 62; *Kinney v. McCullough*, 1 Sandf. Ch. (N. Y.) 376; *Varick v. Briggs*, 6 Paige (N. Y.) 323; *Sweet v. Green*, 1 Paige (N. Y.) 476; s. c., 19 Am. Dec. 442; *Webster v. Van Steenbergh*, 46 Barb. (N. Y.) 211; *Colquitt v. Thomas*, 8 Ga. 258;

*Lee v. Cato*, 2 Ga. 637; s. c., 73 Am. Dec. 746; *Truluck v. Peeples*, 3 Ga. 446; *Brown v. Budd*, 2 Ind. 442; *Lindsey v. Rankin*, 4 Bibb (Ky.) 482; *Blight v. Banks*, 6 B. Mon. (Ky.) 192; s. c., 17 Am. Dec. 136; *Bartlett v. Varner*, 56 Ala. 580; *Pierce v. Faunce*, 47 Me. 507; *Glidden v. Hunt*, 24 Pick. (Mass.) 221; *Trull v. Bigelow*, 16 Mass. 406; s. c., 8 Am. Dec. 444; *Boynton v. Rees*, 8 Pick. (Mass.) 329; s. c., 19 Am. Dec. 326; *Godfroy v. Disbrow*, Walk. Ch. (Mich.) 260; *Shotwell v. Harrison*, 22 Mich. 410; *Lusk v. McNamer*, 24 Miss. 58; *Funkhouser v. Lay*, 78 Mo. 458; *Taylor v. Kelly*, 3 Jones Eq. (N. Car.) 240; *Bell v. Twilight*, 18 N. H. 159; s. c., 45 Am. Dec. 367; *Filby v. Miller*, 25 Pa. St. 264; *Church v. Church*, 25 Pa. St. 278; *Bracken v. Miller*, 4 W. & S. (Pa.) 102; *Meehan v. Williams*, 48 Pa. St. 238; *East v. Pugh*, 71 Iowa 162; *Suiter v. Turner*, 10 Iowa 517; *Barber v. Richardson*, 57 Vt. 408; *Day v. Clark*, 25 Vt. 397; *Ashby v. Harrison*, 1 Patt. & H. (Va.) 1; *Jones v. Hudson*, 23 S. Car. 494; *Dopson v. Harley*, reported in note to *Brown v. Wood*, 6 Rich. Eq. (S. Car.) 176; *McKnight v. Gordon*, 13 Rich. Eq. (S. Car.) 222; s. c., 94 Am. Dec. 164; *Holmes v. Stout*, 10 N. J. Eq. 419; *Card v. Patterson*, 5 Ohio St. 319; *The D. M. French*, 1 Low. (U. S.) 43; *Platt v. Vattier*, 1 McLean (U. S.) 146; *Runyan v. Smith*, 18 Fed. Rep. 579.

**Partition by Tenants in Common.**—A, B and C, in equal shares, owned land in common, a portion of which was charged, as against them, with an equitable encumbrance not appearing on record. A sold out his undivided interest to D, who purchased without notice, in good faith and for full value, and B subsequently sold out his undivided interest to E, a purchaser with notice, though for full value. C, D and E subsequently made an amicable and equal partition of the land (D still having no notice of the encumbrance) by an exchange of deeds, the part set to E including the whole of the encumbered

notice cannot procure a retransfer to himself, and claim protection on the ground that his second grantor had no notice.<sup>1</sup>

**6. Burden of Proof.**—There is one line of decisions which hold that, where a party has failed to record the instrument under which he claims, and a subsequent purchaser has acquired a title, which he has duly recorded, the burden of proof is upon the first purchaser to show that the holder of the subsequent right is chargeable with notice of the encumbrance.<sup>2</sup> On the other hand, it is held that where a fraud has been proven, the party whose title is derived through such a transaction must prove his own good faith and want of notice,<sup>3</sup> or, if there be no fraud shown, still the holder under the prior conveyance is the owner against all ex-

portion, and being estimated at its full value without allowance for the encumbrance. Upon a bill in equity brought against E to establish the encumbrance it was held that he could not take advantage of the want of notice on the part of D to protect his title to the part now owned by him in severalty. *Blatchley v. Osborn*, 33 Conn. 226.

**Knowledge of Real Party in Interest.**—If real estate, at the time of a purchase by a mother as an advancement for her daughter, is subject to the lien of an unrecorded mortgage, of which the daughter had knowledge, the mother cannot, from her payment of the purchase money, be considered a purchaser without notice, nor can the daughter defend under her as such, in an ejectment for the land, brought by a purchaser at sheriff's sale, under proceedings upon the mortgage. *Murphy v. Nathans*, 46 Pa. St. 508.

**Fraud on Part of Grantee With Notice.**—Though a purchaser with notice from one without notice takes the latter's rights, yet if, confederating with the original vendee, he has procured the purchase under a foreclosure sale, to be made by the innocent purchaser, intending to purchase from him and to defeat the vendor's lien, he shall take nothing by his fraud. *Chance v. McWhorter*, 26 Ga. 315.

**Part Remaining in Hands of One With Knowledge.**—A bill in equity to establish rights in land should be dismissed as to a *bona fide* purchaser of a portion of it who had no notice of complainant's equities; but if his grantor is charged with notice the amount remaining in his hands may properly be charged with the whole amount of complainant's lien. *Holcomb v. Mosher*, 50 Mich. 252.

**Purchaser with Notice at Foreclosure Sale.**—A purchaser at a sale under a

mortgage having actual notice of an outstanding equity, may nevertheless take advantage of the want of notice on the part of the mortgagee, since otherwise the mortgage would be a worthless security. *Cahalan v. Monroe*, 56 Ala. 303.

**Announcement of Defect Unknown to Mortgagee Made at Sale.**—Where the mortgagee is not chargeable with notice of outstanding equities against the mortgagor's title, the purchaser at the sale under the power in the mortgage is not chargeable by reason of an announcement first made at the sale. *Whitfield v. Riddle*, 78 Ala. 99.

1. *Church v. Church*, 25 Pa. St. 278, *Bumpus v. Platner*, 1 Johns. Ch. (N. Y.) 213.

**When Party Without Notice Is Only Nominal Purchaser.**—The sale will be set aside, although the nominal purchaser was ignorant of the facts of the case, when he took the property only as security for his advance of the purchase money, and he has since, his debt being paid, conveyed the premises to the real purchaser, who was fully acquainted with the circumstances of the sale. *Runkle v. Gaylord*, 1 Nev. 123.

2. *Center v. Planter's etc. Bank*, 22 Ala. 743; *Bartlett v. Varner*, 56 Ala. 580; *Pollak v. Davidson*, 87 Ala. 551; *Bush v. Golden*, 17 Conn. 594; *Ryder v. Rush*, 102 Ill. 338; *Brown v. Welch*, 18 Ill. 343; s. c., 68 Am. Dec. 549; *Rogers v. Wiley*, 14 Ill. 65; s. c., 56 Am. Dec. 491; *Spofford v. Weston*, 29 Me. 140; *Newton v. McLean*, 41 Barb. (N. Y.) 285; *Morris v. Daniels*, 35 Ohio St. 406.

3. *Sillyman v. King*, 36 Iowa 207, *Davis v. Nolan*, 49 Iowa 683; *Throckmorton v. Ryder*, 42 Iowa 84; *Light v. West*, 42 Iowa 138; *Berry v. Whitney*, 40 Mich. 65; *Letson v. Reed*, 45 Mich.

cept those purchasing in good faith and for value, and the burden is upon one setting up such a claim.<sup>1</sup>

**7. Buying in Paramount Legal Title.**—Where one has acquired a right in good faith, and subsequently learns of a prior right, he may buy in a paramount legal title after notice, and avail himself of that.<sup>2</sup>

**NOTICE TO PRODUCE PAPERS**—(See also PRODUCTION OF DOCUMENTS).

- I. In General, 843.
- II. To Whom Given, 844.
- III. When Necessary, 845.
- IV. When Not Necessary, 847.
- V. Sufficiency as to Contents, 851.

- VI. Sufficiency as to Time, 853.
- VII. Effect of Producing Papers Pursuant to Notice, 855.
- VIII. Effect of Not Producing Papers After Notice Has Been Given, 857.

**I. IN GENERAL.**—The object of giving the adverse party notice to produce at the trial of a cause, books or papers material to the issue and in his possession, is to let the party giving the notice into proof of their contents, upon his showing that they were in the possession of the opposite party, and of putting it in his power to produce the best evidence which the nature of the case will admit.<sup>3</sup> The party giving the notice must show that the paper is in the hands of, or under the control of, the adverse party.<sup>4</sup>

27; *Bolton v. Jackes*, 6 Rob. (N. Y.) 166; *Mann v. Falcon*, 25 Tex. 271.

1. *Landers v. Bolton*, 26 Cal. 393; *Long v. Dollarhide*, 24 Cal. 218; *Shotwell v. Harrison*, 23 Mich. 410; *Williams v. Shelley*, 37 N. Y. 375.

2. *Gjerness v. Mathews*, 27 Minn. 320; *Hoult v. Donahue*, 21 W. Va. 294; *Camden v. Harris*, 15 W. Va. 554; *Boone v. Chiles*, 10 Pet. (U. S.) 211.

3. *Reid v. Colcock*, 1 Nott & M. (S. Car.) 592; s. c., 9 Am. Dec. 729; *Dwyer v. Collins*, 7 Exch. 639; 16 Jur. 569; 21 L. J. Exch. 225.

It must be shown to be material to the issue. *Sinclair v. Gray*, 9 Fla. 71; *McKellep v. McIlhenny*, 4 Watts (Pa.) 317; s. c., 28 Am. Dec. 711.

A party is not obliged to produce a paper unless the adverse party has given him notice to do so. *Waring v. Warren*, 1 Johns. (N. Y.) 340.

4. *Birckbeck v. Tucker*, 2 Hall (N. Y.) 121; *Sinclair v. Gray*, 9 Fla. 71.

It is sufficient if it is shown that it was last seen in his hands. *Norton v. Heywood*, 20 Me. 359; *Davidson v. Lowry*, 20 Barb. (N. Y.) 532. Or if it is in the hands of his agent. *Baldney v. Ritchie*, 1 Stark. 338; *Sinclair v. Stephenson*, 1 Carr. & P. 582. But where it is in the hands of a third person his rights must be such that he

would have a right to retain it. *Parry v. May*, 1 M. & Rob. 279.

Secondary evidence of the contents of a paper is admissible where the party offering it is not entitled to its custody, but its custody rightfully belongs to the opposite party, and who has disclaimed all knowledge of it when notified to produce it. *Jones v. Jones*, 38 Cal. 584.

**Instances Where the English Cases Hold the Paper to be in the Hands of the Adverse Party, or Sufficiently Under His Control to be Produced.**—Where a check was drawn by the party served with notice to produce, and was paid by his banker and in his hands. *Partridge v. Coates*, R. & M. 156; 1 Carr. & P. 434. And he need not call on the banker's clerk to produce it. *Burton v. Payne*, 2 Carr. & P. 520. A document proved to be in the hands of a party to an action, or in the possession of his attorney in another action, when the notice was served on the attorney. *Irwin v. Lever*, 2 F. & F. 296. A document deposited in a court of equity by a party to a suit and scheduled in his answer, but which remains in the hands of an officer of that court after an order to deliver it to the party. *Bush v. Peacock*, 2 M. & Rob. 162. When a sheriff's warrant to levy execution had

Cogent evidence of this, however, is not necessary,<sup>1</sup> for the party notified to produce the paper may show that it is not in his possession or under his control;<sup>2</sup> and it is for the judge to decide whether sufficient ground has been laid for the admission of secondary evidence as to its contents.<sup>3</sup>

**II. TO WHOM GIVEN.**—The notice to produce may be directed to or served on either the party or his attorney, on the attorney as of course, if the party has gone away, leaving the cause in the attorney's hands.<sup>4</sup>

been returned by the bailiff to the under sheriff after the levy, while the sheriff was yet in office, and the bailiff, upon being called as a witness, did not produce it, it was held that notice to the sheriff's attorney was sufficient. *Taplin v. Atty.* 3 Bing. 164; 10 Moore 564. Where, in an action against the directors of an intended company, it was shown that four months before the trial the late secretary had the books in a desk at the office of the company, and that he then gave up the key of the desk to the manager of the company, it was held that this was sufficient. *Bell v. Francis*, 9 Carr. & P. 66. In an action against a sheriff, after the expiration of his year of office, a notice served on his attorney to produce a warrant returned to the deputy sheriff of London, during the sheriff's year of office, was held sufficient. *Suter v. Burrell*, 2 H. & N. 867; 27 L. J. Exch. 193. Where a bill of exchange was the consideration upon which the action was brought, it was held that it must be produced upon notice, or that secondary evidence might be given, although the party holding it had discounted it with his banker before notice. *Wright v. Bungard*, 2 F. & F. 193.

Where an action was brought against two executors, and one of them suffered judgment to be taken against him by default, and the probate of the will was produced and notice had been served on both of them to produce a receipt given to the one in default, it was held that, if it was not produced, secondary evidence of its contents might be given, and that it made no difference that the one to whom the receipt had been given had suffered default. *Beckwith v. Benner*, 6 Carr. & P. 681. It is sufficient if there is merely evidence to go to the jury that the document is in the party's possession on whom notice has been served to produce. *Robb v. Starkey*, 2 Carr. & K. 143.

**English Cases Holding the Paper Not**

**to be in the Possession or Under the Control of the Party Who Had Been Served with Notice to Produce.**—Where an action was brought upon a lease executed on behalf of the lessor under a power of attorney, and no subpoena *duces tecum* had been served on the party who executed the lease, it was held that the power of attorney was the property of the party who executed the lease under its authority, and that secondary evidence of its contents could not be given. *Hibberd v. Knight*, 2 Exch. 11; 17 L. J. Exch. 119.

Notice to produce is not sufficient to admit secondary evidence of a paper in the hands of a stakeholder between the party in the action and a third party. *Parry v. May*, 1 M. & Rob. 279.

1. *Robb v. Starkey*, 2 Carr. & K. 143.

2. *Harvey v. Michell*, 2 M. & Rob. 356.

3. *Harvey v. Michell*, 2 M. & Rob. 356.

4. *Greenleaf on Ev.*, § 560.

Notice served on the attorney is sufficient. *Simington v. Kent*, 8 Ala. 691; *Brown v. Littlefield*, 7 Wend. (N. Y.) 454; *Lagow v. Patterson*, 1 Blackf. (Ind.) 327.

It was held sufficient notice to permit copies of deeds to be given in evidence where the notice to produce the originals was served on defendant's attorney, who was proved to have had them in his possession as the attorney for another defendant in an action brought by the plaintiffs for a part of the same premises, although it was not proved that the original deeds were ever in the possession of the defendant. *Den v. McAllister*, 7 N. J. L. 46.

Though the party of record is but a nominal party, notice to the attorney in the suit is sufficient; notice to the real party is not necessary. *Brown v. Littlefield*, 7 Wend. (N. Y.) 454; *Lagow v. Patterson*, 1 Blackf. (Ind.) 327; *Simington v. Kent*, 8 Ala. 691.

**III. WHEN NECESSARY.**—Notice to produce is an indispensable prerequisite to the introduction of secondary evidence of the contents of the instrument,<sup>1</sup> and the fact of the giving of the notice

In *Alabama* the statute makes service on the attorney of the party valid and legal to all intents and purposes as if served on the party personally. *Simington v. Kent*, 8 Ala. 691.

Where the testimony tended to prove that the paper sought to be produced was last seen in the hands of the real party in interest, although not a party to the record, it was held that under the circumstances the copy proved to have been correctly taken was properly admitted. *Norton v. Heywood*, 20 Me. 359.

Notice to produce a mortgage is sufficient to call for the production of the note which the mortgage secures, if the notice is given to the plaintiff, who has brought suit on the note. *Downer v. Button*, 26 N. H. 338.

A notice duly served on the party personally is not invalidated by a subsequent bad service of notice on his attorney. *Hughs v. Budd*, 8 D. P. C. 315; 4 Jur. 150.

Notice served on a party's agent or attorney in penal actions is sufficient. *Cates v. Winter*, 3 T. R. 306.

Where the attorney in a cause has been changed, notice to produce served on the first attorney before the change is sufficient. *Doe d. Martin v. Martin*, 1 M. & Rob. 242.

1. *Grimes v. Fall*, 15 Cal. 64; *State v. Lockwood*, 5 Blackf. (Ind.) 145; *Jones v. Robinson*, 11 Ark. 504; s. c., 54 Am. Dec. 212; *Anderson Bridge Co. v. Applegate*, 13 Ind. 339; *Patterson v. Linder*, 14 Iowa 414; *Dupez v. Ashby*, 2 A. K. Marsh. (Ky.) 11; *Williams v. Benton*, 12 La. Ann. 91; *Kennedy v. Fowke*, 5 Har. & J. (Md.) 63; *Robertson v. Parks*, 3 Md. Ch. 65; *Com. v. Emery*, 2 Gray (Mass.) 80; *Bourne v. Boston*, 2 Gray (Mass.) 494; *Lewin v. Dille*, 17 Mo. 64; *Farmers' & Mechanics' Bank v. Lonergon*, 21 Mo. 46; *Ford v. Munson*, 4 N. J. L. 93; *Carland v. Cunningham*, 37 Pa. St. 228; *Weeks v. Lyon*, 18 Barb. (N. Y.) 530; *Rogers v. Van Hoesen*, 12 Johns. (N. Y.) 221; *Farnsworth v. Sharp*, 5 Sneed (Tenn.) 615; *Kimble v. Joslin*, 1 Overt (Tenn.) 380; *Dean v. Border*, 15 Tex. 208; *United States v. Winchester*, 2 McLean (U. S.) 135; *Potter v. Barclay*, 15 Ala. 439; *Bank of South Carolina v. Brown*, *Dudley* (Ga.) 63;

*Jefferson v. Conaway*, 5 Harr. (Del.) 16; *Ferguson v. Hemingway*, 38 Mich. 159; *Webster v. Clark*, 30 N. H. 245; *Com. v. Parker*, 2 Cush. (Mass.) 212; *Ledbetter v. Morris*, 1 Jones (N. Car.) 545; *Central Branch U. P. R. Co. v. Walters*, 24 Kan. 504; *Grant v. Pendery*, 15 Kan. 236; *Milliken v. Barr*, 7 Pa. St. 23; *Marlow v. Marlow*, 77 Ill. 633; *Harris v. Whitcomb*, 4 Gray (Mass.) 433; *Draper v. Hatfield*, 124 Mass. 53; *Olive v. Adams*, 50 Ala. 373; *McPherson v. Rathbone*, 7 Wend. (N. Y.) 216; *Farmer v. Simpson*, 6 Tex. 303; *Newsom v. Davis*, 20 Tex. 410; *Murchison v. McLeod*, 2 Jones (N. Car.) 239; *Alexander v. Coulter*, 2 S. & R. (Pa.) 494; *Holbrook v. Township Trustees*, 22 Ill. 539; *Bank of Kentucky v. McWilliams*, 2 J. J. Marsh. (Ky.) 260; *Cooper v. Granberry*, 33 Miss. 117; *Webster v. Clark*, 30 N. H. 245; *Clark v. Farmers' Woolen Mfg. Co.*, 15 Wend. (N. Y.) 256; *Bate v. Kinsey*, 1 C. M. & R. 38; 4 Tyr. 662.

Where an action and plea are joint, it is sufficient if notice to produce is given to the attorney of one of the defendants. *Schnebley v. Brooks*, 1 Am. L. J. 321.

When a party desires the possession of a paper for the purpose of using it in evidence, he must give notice to produce it. *Bronson v. Kensey*, 3 McLean (U. S.) 180.

In order to admit secondary evidence as to the contents of a paper in the adverse party's possession, notice to produce it must be given previous to the trial, although the adverse party admits that the paper is lost. *Burlington Lumber Co. v. Whitebreast Coal & Min. Co.*, 66 Iowa 292.

This rule applies to letters. *Ferguson v. Hemingway*, 38 Mich. 159; *Foster v. Newbrough*, 58 N. Y. 481.

Where the necessary demand required to be made of a railroad company in order to entitle a party to recover under the Kansas railroad stock-killing law of 1874 was made in writing, it was held that the court erred in allowing a copy of the demand to be introduced in evidence without accounting for the nonproduction of the original, or giving notice to the company to produce it. *Central Branch U. P. R. Co. v. Walters*, 24 Kan. 504.

must be proved before such secondary evidence may be offered.<sup>1</sup>

In an action brought by a bank against an endorser of a note discounted by the bank, the defendant was not allowed to give secondary evidence of the fact that it was the custom of the bank to reserve unlawful interest in discounting notes, where notice to produce the books of the bank had not been given. *Bank of Utica v. Hillard*, 5 Cow. (N. Y.) 153.

A copy of an instrument cannot be given in evidence without proof of a previous notice to produce the original. *Carland v. Cunningham*, 37 Pa. St. 228.

A purchaser of personal property may establish his title to the property by parol evidence without putting his bill of parcels in evidence. If the adverse party desires to have the bill produced at the trial, he must give notice to produce it. *Blood v. Harrington*, 8 Pick. (Mass.) 552.

Secondary evidence is not admissible to prove that the plaintiff's name was on the voting list in an action against selectmen for not receiving his vote, without giving notice to produce the list. *Harris v. Whitcomb*, 4 Gray (Mass.) 433.

Where an action was brought on a promissory note, the complaint alleged that the note was given in part for the purchase of land, and that the plaintiff had given the defendant his bond for the conveyance of the land, and prayed for the enforcement of his lien by sale of the land to pay the note. *Held*, that it was error to give parol evidence of the sale of the land, as under the statute of frauds nothing but written evidence of a sale would be admissible, and that the bond ought to have been produced; or if notice had been given to produce it and it was not produced, then parol evidence of its contents would have been admissible. *Farmer v. Simpson*, 6 Tex. 303.

A letter-press copy of a letter cannot be introduced in evidence unless notice has been given the opposite party to produce the letter. *Burlington Lumber Co. v. Whitebreast Coal & Min. Co.*, 66 Iowa 292; *Cable v. Paine*, 3 McCrary (U. S.) 168.

**Deeds.**—Parol evidence of the contents of a deed in the possession of the opposite party cannot be given unless notice to produce the original has been served. *Gist v. McJunkin*, 2 Rich. (S. Car.) 154.

Where notice to produce a deed was given to the defendant, and it was proved that the deed had been executed and delivered to the plaintiff's mother (the plaintiff being an infant) for safe-keeping, and that the defendant married the plaintiff's mother ten years afterwards, *held* sufficient to admit proof of the contents of the deed by secondary evidence. *Bethal v. McCall*, 3 Ala. 449.

Where it was shown that a deed was delivered to a plaintiff's ancestor, and this fact remained unexplained, held to be sufficient presumption that it was in his power to produce it, and that the defendant was entitled to prove its contents by parol after notice to produce. *Newsom v. Davis*, 20 Tex. 419.

In *Massachusetts*, a registry copy of a deed of land cannot be introduced in evidence against the grantee unless notice to produce the original has been given him. *Com. v. Emery*, 2 Gray (Mass.) 80; *Bourne v. Boston*, 2 Gray (Mass.) 494.

1. *Weeks v. Lyon*, 18 Barb. (N. Y.) 530; *Carland v. Cunningham*, 37 Pa. St. 228; *Patterson v. Linder*, 14 Iowa 416; *Horseman v. Todhunter*, 12 Iowa 230; *Kennedy v. Fowke*, 5 Har. & J. (Md.) 63; *Milliken v. Barr*, 7 Pa. St. 23; *Anderson Bridge Co. v. Applegate*, 13 Ind. 339; *Gaskell v. Morris*, 7 W. & S. (Pa.) 32; *Holbrook v. Township Trustees*, 22 Ill. 539.

Notice was given a plaintiff to produce at the trial certain letters written to him by the defendant. The letters were not produced, and the defendant, in laying a foundation for the admission of the copies, stated that they were mailed to the plaintiff, but on being cross-examined said, "I generally carried them to the office, but I cannot say that they were put in the office positively. I believe they were." It was held that the court made no error in excluding the copies. *Phillips v. Scott*, 43 Mo. 86.

Where an endorser brought an action against the drawer, it was held to be immaterial where the endorser neglected to produce his books for the purpose of showing that the endorsement was made after maturity, where no notice was given to him that he would be required to prove the consideration of the transfer, and where the notice was not in writing. *Epler v. Funk*, 8 Pa. St. 468.

If this is not done, the admission of secondary evidence objected to for this reason is ground for reversal.<sup>1</sup>

**IV. WHEN NOT NECESSARY.**—The general rule which requires that a party shall have notice to produce a written instrument in his possession before its contents can be proved by secondary evidence, does not apply where, from the nature of the suit or prosecution or the form of the pleadings, he must know that he is charged with the possession of the instrument;<sup>2</sup> where it is necessary to

Evidence showing that a demand was made before the commencement of the action that a certain written instrument should be delivered up, is not sufficient to let in parol evidence of its contents without notice to produce it is given, although the action was brought on such refusal. *Muller v. Hoyt*, 14 Tex. 49.

1. *Patterson v. Linder*, 14 Iowa 416; *Horseman v. Todhunter*, 12 Iowa 230; *Kennedy v. Fowke*, 5 Har. & J. (Md.) 63; *Com. v. Emery*, 2 Gray (Mass.) 80; *Bourne v. Boston*, 2 Gray (Mass.) 494; *Carland v. Cunningham*, 37 Pa. St. 228; *Weeks v. Lyon*, 18 Barb. (N. Y.) 530; *Atwell v. Miller*, 6 Md. 10; s. c., 61 Am. Dec. 294.

In *Pennsylvania*, where a party cannot be found after diligent enquiry, a copy of a paper may be given in evidence without notice to produce. *Carland v. Cunningham*, 37 Pa. St. 228.

The mere fact that a party, offering to prove by parol the contents of a mortgage of which he was not the proper custodian, did not know where the mortgage was at the time he made the offer, and had not given notice to the proper party to produce it, is not sufficient foundation for the admission of such proof. *Horseman v. Todhunter*, 12 Iowa 230. Nor is inconvenience an excuse for omitting this notice. Nor is the absence of the party from the State bound to give it. *Carland v. Cunningham*, 37 Pa. St. 228.

2. *State v. Mayberry*, 48 Me. 218; *Rose v. Lewis*, 10 Mich. 482; *Gray v. Kernahan*, Mill Const. (S. Car.) 65; *People v. Holbrook*, 13 Johns. (N. Y.) 90; *Edwards v. Bonneau*, 1 Sandf. (N. Y.) 610; *Hays v. Riddle*, 1 Sandf. (N. Y.) 248; *Hotchkiss v. Mosher*, 48 N. Y. 478; *Pickering v. Meyers*, 2 Bailey (S. Car.) 113; *Hamilton v. Rice*, 15 Tex. 382; *Neally v. Greenough*, 25 N. H. 325; *Hart v. Robinett*, 5 Mo. 11; *Hammond v. Hopping*, 13 Wend. (N. Y.) 505; *Story v. Patten*, 3 Wend. (N. Y.) 486; *Hardin v. Kretsinger*, 17 Johns. (N. Y.)

293; *People v. Smith*, 20 Johns. (N. Y.) 63; *Wilson v. Gale*, 4 Wend. (N. Y.) 623; *Forward v. Harris*, 30 Barb. (N. Y.) 338; *Lawson v. Bachman*, 81 N. Y. 616; *Howell v. Huyck*, 2 Abb. App. Dec. (N. Y.) 423; *Hooker v. Eagle Bank*, 30 N. Y. 83; 86 Am. Dec. 351; *Morrill v. Boston etc. R. Co.*, 58 N. H. 68; *Carland v. Cunningham*, 37 Pa. St. 228; *Bissel v. Drake*, 19 Johns. (N. Y.) 66; *Com. v. Messinger*, 1 Binn. (Pa.) 273; s. c., 2 Am. Dec. 441; *Scioto Valley R. Co. v. Cronin*, 38 Ohio St. 122.

In an action of trover for a bond or note, parol evidence of the existence and contents of the instrument may be given, although no notice has been given to produce it. *Rose v. Lewis*, 10 Mich. 482; *Scott v. Jones*, 4 Taunt. 865; *How v. Hall*, 14 East 274; *Hays v. Riddle*, 1 Sandf. (N. Y.) 248; *McClellan v. Hertzog*, 6 S. & R. (Pa.) 154; *Bissel v. Drake*, 19 Johns. (N. Y.) 66; *People v. Holbrook*, 13 Johns. (N. Y.) 90; *Hammond v. Place*, Peake's Add. Cas. 90; *Colling v. Treweek*, 6 Barn. & C. 394.

Where papers are proper matters of defence, or where the adverse party must have understood that they must necessarily come in question at the trial, notice to produce them may well be dispensed with. *Kellar v. Savage*, 20 Me. 199; *Lockett v. Clark*, Litt. Sel. Cas. (Ky.) 178.

The same rule applies in criminal cases, where a person is prosecuted for stealing an instrument. *Rex v. Aikles*, 1 Leach 436; or for stealing bank notes. *Com. v. Messinger*, 1 Binn. (Pa.) 273; s. c., 2 Am. Dec. 441; *Ross v. Bruce*, 1 Day (Conn.) 100. But the indictment must charge the accused with the possession of the instrument. *Henderson v. State*, 14 Tex. 503.

In *State v. Gurnee*, 14 Kan. 111, it was held that in criminal trials sufficient foundation is laid for the introduction of a copy of a paper which is competent evidence, where it was made out in duplicate and one copy lost and the other in the possession of the accused.



It was decided in *Armitage v. State*, 13 Ind. 441, where a person was indicted for forgery, for having in his possession counterfeit bank notes, that the prosecution could not prove the contents of the notes by parol without first giving the defendant notice to produce them; and in *Williams v. State*, 16 Ind. 461, it was decided that on the trial of an indictment for stealing a pocketbook containing bank notes, where the defendant was charged by one count with larceny and in another with robbery, the State could not give parol evidence of the contents of the bank notes without first giving the defence notice to produce them. But this case was overruled in *McGinnis v. State*, 24 Ind. 500, where the indictment was for larceny and the property stolen was bank notes. In this case the court expressly held, that where the possession of bank notes or other written instruments was charged by the indictment to be in the possession of the accused, parol evidence might be given of their contents without notice to produce; but in case of an indictment for forgery the court said: "These reasons apply, perhaps with equal force, in cases of prosecutions for forgery as well as those for larceny; but it is not our intention in this opinion to pass upon or question the correctness of the rule as laid down in *Armitage v. State*, 13 Ind. 441, as applicable to prosecutions for forgery, as there are reasons why a distinction between the two classes of cases in this rule of evidence may be drawn."

So, where the plaintiff is deprived of the written instrument upon which the suit is brought by a fraudulent and forcible act of the defendant. *Gray v. Kernahan*, 2 Mill Const. (S. Car.) 65; *Morgan v. Jones*, 24 Ga. 155; *Neally v. Greenough*, 25 N. H. 325.

A party may show by parol what was considered in making up an award, where the award is in the possession of the adverse party, without giving notice to produce it. The award is the best evidence of what it contains, but not of matters taken into consideration in making it up. *Scott v. Baker*, 37 Pa. St. 330.

Where the controversy on a second trial was whether the plaintiff had rightfully paid D, a third party, a certain sum of money in behalf of the defendant, and the plaintiff had stated, in his grounds of appeal from the first trial, that the defendant had given a bond to D, on which the plaintiff was surety,

and that he paid it, it was held that this did not prevent the plaintiff from giving parol evidence of the point in controversy, although he had not given the defendant notice to produce the bond. *Lott v. Macon*, 2 Strobb. (S. Car.) 178.

Notice to produce is not necessary where the action is brought upon a written contract which is fully described in the complaint. *Dana v. Conant*, 30 Vt. 246.

Under this rule a defendant is always entitled to the production of all papers which formed any part of the contract under which the cause of action arose.

So also where it was alleged that the written instrument upon which the suit was brought was either lost, destroyed or in the possession of the defendant. *Cross v. Williams*, 72 Mo. 577.

Nor is it necessary to give notice where the action is brought to recover the amount of a forged bank note which had been returned to the defendant. *Luckett v. Clark*, Litt. Sel. Cas. (Ky.) 178.

It was held that where the defendant in his answer charged the plaintiff that the original papers were in his possession, no notice to produce was necessary in order to give secondary evidence of their contents, and that it came within the rule that where, from the nature of the action, the party has notice that his adversary intends to charge him with the possession of the instrument, notice to produce is necessary. *Hamilton v. Rice*, 15 Tex. 382; *Newsom v. Davis*, 20 Tex. 419.

Where it was claimed by a defendant that he should be credited with a draft drawn by a third party on the plaintiff and in favor of the defendant, and was passed over to the plaintiff who promised to give the defendant credit for it, it was held that as the defendant did not give the plaintiff notice to produce it or make any allegation in his answer that the draft was thus passed over to the plaintiff, he could not give secondary evidence of its contents. *Dean v. Border*, 15 Tex. 298.

Where an answer denied that a duplicate of an agreement was ever made by the plaintiff, or that such copy was ever delivered to or received by the defendant (as charged in the complaint), it was held that if it was error to admit parol proof of the contents of the instrument without notice to produce, it was error without prejudice. *Gilpin Co. Min. Co. v. Drake*, 8 Colo. 586.

falsify the evidence of the other party;<sup>1</sup> or when a party makes a voluntary offer to produce it;<sup>2</sup> or where an instrument is proven to be lost;<sup>3</sup> or is beyond the jurisdiction of the court, and cannot be presumed to be in the possession of the opposite party.<sup>4</sup>

A question arose upon the trial of an action for trespass, as to the plaintiff's rights under an alleged lease of the premises by the defendant corporation. The plaintiff offered evidence of a parol contract of lease. The defendant objected to this evidence on the ground that there was a record of such contract made by them at the time in the books of the corporation. The trial court sustained the objection on the ground that the plaintiff should have produced the record or given the defendant notice to do so before offering parol proof. On appeal this was held to be error. *Brown v. Commissioners*, 63 N. Car. 514.

Parol evidence of the contents of a deed was held properly allowed where the party to the suit made affidavit that the deed was in his possession, but it had been surreptitiously taken from him by the adverse party, and seen in the possession of his counsel. *Morgan v. Jones*, 24 Ga. 155.

Where it is necessary to give notice to produce the original deed before a copy of it can be read in evidence, proof of evasion of notice and avoidance of the production of the original may be sufficient to dispense with actual service of notice. *Bright v. Pennywit*, 21 Ark. 130.

Where a deed relates to a collateral circumstance, and an inference is deducible from its existence and execution, and not from its contents, parol evidence is admissible without notice to produce. *Gist v. McJunkin*, 2 Rich. (S. Car.) 154.

In *Illinois*, a certified copy of record of a deed is admissible in evidence without notice to the adverse party, provided the party offering it makes oath that the original is not in his possession or control. *Bowman v. Wettig*, 39 Ill. 416; *Mariner v. Saunders*, 10 Ill. 113; *Ferguson v. Miles*, 8 Ill. 358; s. c., 44 Am. Dec. 702.

In *Missouri* it may be introduced without the oath. *Barton v. Murrain*, 27 Mo. 235; s. c., 72 Am. Dec. 259; *Avery v. Adams*, 39 Mo. 603.

In *North Carolina*, under the act of 1846, a party may put in evidence a registered copy of a deed to the other party without giving notice to produce

the original in the same manner as he could a copy of a deed to himself. *Carson v. Smart*, 12 Ired. (N. Car.) 369.

A copy of a title bond furnished by one party in his bill of particulars delivered to his opponent in an ejectment suit, according to the practice in such suits in the State of Mississippi, may be read in evidence against the party furnishing it without previous notice to produce the original.

*Griffin v. Sheffield*, 38 Miss. 359; s. c., 77 Am. Dec. 646.

1. As for example, in *Story v. Patten*, 3 Wend. (N. Y.) 486, it was held that notice to produce an execution was not necessary in an action against a constable for not returning the process and paying over the money, the execution and judgment on which the execution issued being fully described in the declaration. See also *Hardin v. Kretzinger*, 17 Johns. (N. Y.) 293; *Hammond v. Hopping*, 13 Wend. (N. Y.) 505; *People v. Holbrook*, 13 Johns. (N. Y.) 90; *People v. Smith*, 20 Johns. (N. Y.) 63; *Wilson v. Gale*, 4 Wend. (N. Y.) 623; *Dana v. Conant*, 30 Vt. 246; 1 Camp. 143; *How v. Hall*, 14 East 293; *Scott v. Jones*, 4 Taunt. 865.

2. *Dwinell v. Larrabee*, 38 Me. 464.

But if the party fails to find the paper on a search and makes no suggestion that he would be able to find it by having further time allowed him for that purpose, the basis for the introduction of the contents of the instrument is laid. *Dwinell v. Larrabee*, 38 Me. 464.

3. *M'Creary v. Hood*, 5 Blackf. (Ind.) 316; *McAulay v. Earnhart*, 1 Jones (N. Car.) 502. See *LOST PAPERS*, 13 Am. & Eng. Encyc. of Law 1059.

Where the maker of notes receives them by giving the notes of third persons in payment of his notes, and several years afterwards there is a controversy over the substituted notes, the presumption that the notes delivered up to the maker are either lost or otherwise cancelled is sufficient to let in parol proof of their contents without notice to produce the originals. *Pond v. Lockwood*, 8 Ala. 669.

4. *Shepard v. Giddings*, 22 Conn. 282; *Cheatham v. Riddle*, 8 Tex. 162.

It has been held where an instrument went into the possession of a person.

And where a book or paper is not within the control of the parties and is out of the reach of the process of the court, and is evidently such a document as the party in possession of it would not willingly part with, it would seem that these circumstances ought to constitute a sufficient foundation for admitting secondary evidence of its contents. Such being the best evidence which the party could possibly produce, it ought, from necessity, to be received. At all events, he should be bound to go no farther than to show that the party in possession refused to deliver it,<sup>1</sup> or where an instrument relates to a collateral circumstance and an inference favorable to the party arises out of the fact of its execution and existence, and not out of its particular contents, parol evidence is admissible without notice to produce the original.<sup>2</sup> And on cross-examination, in order to test the credibility of a witness, the contents of a paper may be enquired into where it relates to an incidental and collateral matter and in nowise affects the merits of the controversy between the parties, although notice to produce it was not given.<sup>3</sup> It is not necessary to give the adverse party notice to produce a notice in order to prove its contents.<sup>4</sup>

who left the State, and no evidence was given that it had been lost or destroyed, that giving notice to the opposite party to produce it at the trial was not sufficient grounds upon which to introduce secondary evidence of its contents. *McCracken v. McCrary*, 5 Jones (N. Car.) 399.

1. *Bonner v. Home Ins. Co.* 13 Wis. 677.

Where the counsel for the plaintiff and the party against whom an instrument had been produced found it, with some other papers not marked, filed in the court room when the trial had taken place. He took the lease and instead of returning it to the defendant to whom it belonged, he attached it to a *dedimus* and sent it to California, the residence of the witness whose testimony he wished to take to be read at the trial in the circuit court (to which the cause had been appealed). Of this he subsequently informed the defendant's counsel, stating at the same time that he had no doubt it would be back in time for trial. The commission was not returned at the time of the trial, and consequently the lease was not produced. *Held* that the circuit court properly admitted secondary evidence of its contents, and, under the circumstances, even very strict proof of that should not have been required. *Mitchell v. Jacobs*, 17 Ill., 235.

2. *Gist v. McJunkin*, 2 Rich. (S. Car.)

154; *Lowry v. Pinson*, 2 Bailey (N. Car.) 324; s. c., 23 Am. Dec. 140. *Spiers v. Willison*, 4 Cranch (U. S.) 398; *Hooker v. Eagle Bank*, 30 N. Y. 83; 86 Am. Dec. 351.

3. *Klein v. Russell*, 19 Wall. (U. S.) 433; *Leavitt v. Sims*, 3 N. H. 14; *Edwards v. Bonneau*, 1 Sandf. (N. Y.) 610; *Moses v. Ela*, 43 N. H. 557; s. c., 82 Am. Dec. 175; *Brown v. Booth*, 66 Ill. 419; *Williams v. German Mut. F. Ins. Co.*, 68 Ill. 387.

4. *Morrow v. Commonwealth*, 48 Pa. St. 305; *Faribault v. Ely*, 2 Dev. (N. Car.) 67; *Christy v. Horne*, 24 Mo. 242. In *Eisenhart v. Slaymaker*, 14 S. & R. (Pa.) 153, GIBSON, J., said: "Every written notice is, for the best of reasons, to be proved by a duplicate original; for if it were otherwise, the notice to produce the original could be proved only in the same way as the original itself, and thus a fresh necessity would be constantly arising, *ad infinitum*, to prove notice of the preceding notice."

When a notice is sent by mail the address on the envelope is regarded as a portion of the notice, showing to whom it was directed. *Williams v. German Mut. F. Ins. Co.*, 68 Ill. 387.

A notice to the endorser of a negotiable instrument may be given in evidence without notice to produce the notice. *Atwell v. Grant*, 11 Md. 101; *Central*

When the maker of an instrument has torn a part of it off by violence, it will be presumed that he sought the paper, not to keep it as a valid instrument, but to avoid it, and the party holding the instrument is at liberty to produce the mutilated contract at the trial, and supply the part torn off by parol evidence without giving notice to produce it.<sup>1</sup> A mere memorandum containing a quantity of figures and calculations is not a contract, agreement or writing which can be proved by its production. It does not fall within the reason or rule of law requiring the production of documentary evidence, and as to a mere calculation of amounts any witness may testify if he has seen and remembers them.<sup>2</sup>

**V. SUFFICIENCY AS TO CONTENTS.**—The notice must be as explicit as possible, and should distinctly point out the papers required;<sup>3</sup> but it is sufficiently specific if, under the circumstances, it fairly shows what particular papers are wanted.<sup>4</sup> Notice once given applies to

*Bank v. Allen*, 16 Me. 41; *Eagle Bank v. Chapin*, 3 Pick. (Mass.) 180; *Falkner v. Beers*, 2 Doug. (Mich.) 117; *Smyth v. Hawthorn*, 3 Rawle (Pa.) 355; *Gaskell v. Morris*, 7 W. & S. (Pa.) 32; *Morrow v. Commonwealth*, 48 Pa. St. 305.

The contents of a written notice to pay money may be proved by parol evidence with proof of notice to produce. *Gaskell v. Morris*, 7 W. & S. (Pa.) 32.

1. *Scott v. Pentz*, 5 Sandf. (N. Y.) 572.

2. *Weaver v. Crocker*, 49 Ill. 461; *First Nat. Bank v. Priest*, 50 Ill. 321; *Fuller v. Hoyt*, 14 Tex. 49.

At a settlement between two persons, one of them produced a paper which purported to contain a statement of the amounts and accounts and calculations in the settlement. This was shown to a third person who was present at the settlement and requested that he should see if the calculations were properly made. In a suit between the parties to the settlement it was held that the person to whom the paper was shown might testify as to his memory of the calculations of amounts the paper contained without notice being given to produce the paper. *Weaver v. Crocker* 49 Ill. 461.

Where a party sold property on commission through a third person and received the proceeds of the sale, and in response to an enquiry by the owner of the property he was shown a written account of the sales returned by the person who sold the property, it was held, in an action brought by the owner to recover the proceeds, that he might

orally testify as to the amount appearing to be due him from the account of the sale shown him without giving the adverse party notice to produce it. *First Nat. Bank v. Priest*, 50 Ill. 321.

3. *Thomas v. Hodgson*, 4 Whart. (Pa.) 492.

A notice to produce should, besides the title of the cause, contain a particular description of the books, papers or documents required to be produced; and it is usual at the end of the notice to require the production of all other papers, books, documents, letters and writings whatsoever in the control of the party that contain any entry, memorandum or other matter that in any way relates to the matters in question in the case; and also to state that, in the default of producing it, secondary evidence of its contents may be given on the trial. *Stalker v. Gaunt*, 12 N. Y. Leg. Obs. 124.

4. *Walden v. Davison*, 11 Wend. (N. Y.) 65; s. c., 25 Am. Dec. 602; *Bogart v. Brown*, 5 Pick. (Mass.) 18; *Frank v. Manny*, 2 Daly (N. Y.) 92; *Burke v. Laforge*, 12 Cal. 403; *Duvall v. Farmers' Bank*, 2 Bland (Md.) 686.

Notice to produce a letter covers the envelope of the letter. *United States v. Duff*, 19 Blatchf. (U. S.) 9; 6 Fed. Rep. 45; *Morris v. Hannen*, Carr. & M. 29; *Morris v. Hauser*, 2 M. & Rob. 392; *Jacob v. Lee*, 2 M. & Rob. 33.

The notice does not describe the bill with perfect accuracy; but we think it impossible for the defendant to have doubted what bill of lumber was intended. It does not appear, nor is it suggested, that there was any other bill of lumber in which the plaintiff has

a trial postponed to another day or another term. A repetition of the notice is not necessary.<sup>1</sup>

any interest excepting the one the contents of which were proved at the trial. We think, therefore, the notice was sufficient and the parol testimony rightly admitted. *Bemis v. Charles*, 1 Met. (Mass.) 440.

A notice calling for "all letters received by you between 1837 and 1841, both inclusive, by and from the defendants, or either of them, during the time aforesaid, or by or to any person on their or your behalf, respectively," is sufficient. *Morris v. Hannen, Carr. & M.* 29; *Morris v. Hauser*, 2 M. & Rob. 392. Or in an action for labor a notice calling for "all accounts relating to the matter in question in this cause." *Rogers v. Custance*, 2 M. & Rob. Or a notice to produce a letter which refers to the enclosed account is sufficient. *Engal v. Druce*, 9 W. R. 536, C. P.

But a notice falling for "all letters, papers and documents, touching or concerning the bill of exchange mentioned in the declaration and the debt sought to be recovered," is too general. *France v. Lucy*, 1 R. & M. 341; *Jones v. Edwards, McClel. & Y.* 139.

Notice was given to a party to produce an original contract of partnership, of which a copy was annexed to the notice. (This was done for the purpose of proving a co-partnership between the party served with the notice and another person.) The party did not produce the original contract, and in order to prove its contents several witnesses were called and testified that this party had admitted that there was an original agreement in his possession, the terms of which 'corresponded with those contained in the copy annexed to the notice in every particular except one. The counsel for the party served with the notice objected to the admission of this testimony, and contended that, as the plaintiffs had in their notice set forth a copy of the document to be produced, ought in their evidence be confined literally to the terms of their copy. *Held*, that the accuracy and precision which is required in pleading cannot be necessary in a notice of this kind, and that there is a manifest difference between a notice to quit and a notice the only object of which is to inform the adverse party that he is required to produce a document. *Bogart v. Brown*, 5 Pick. (Mass.) 18.

Where a notice to produce books and papers is too extensive in range and, as to a part of it, too vague in description, the court, after holding the notice good in part and bad in part, may decline to require an immediate answer, and may continue the cause to give time to answer so much of the notice as has been judged sufficient. *Parish v. Weed Sewing Machine Co.*, 79 Ga. 682.

A notice to produce "all papers appertaining to the co-partnership," includes any deed he may have making him a partner. *Jones v. Parker*, 20 N. H. 31.

A notice entitled in the wrong court, unless it misleads a party, may be considered a sufficient notice. *Lawrence v. Clark*, 14 M. & W. 250.

A notice entitled in the wrong action, and merely filed in the action that it was intended for, without proof of service on the party, raises no presumptions or inferences against the party to whom it was addressed. *Alender v. Vestry of Trinity Church*, 3 Gill (Md.) 166.

In an action brought by L and M, as assignees of D and E, a notice to produce a document entitled L and M, assignees of D and E and A, was held insufficient, although L and M were in fact assignees of D and E. *Harvey v. Morgan*, 2 Stark. 17.

Notice to the opposite party to produce at the trial papers relating to moneys received by him under the award of the commissioners under the Florida treaty, was held sufficiently specific, as they were described by their subject matter. *Vass v. Mifflin*, 4 Wash. (U. S.) 519.

Where the opposite party is required to produce his books on a particular subject, it is not necessary that the entries on those books should be stated in the notice. It has always been deemed sufficient to describe the paper or book required by expressing its general purport and to state its materiality to the case in some degree. *United States v. Burr*, 2 Burr's Trial 534.

1. *Gilmore v. Wale*, Anth. N. P. (N. Y.) 64; *Jackson v. Shearman*, 6 Johns. (N. Y.) 19; *State v. Kimbrough*, 1 Dev. (N. Car.) 431; *Rawson v. Knight*, 73 Me. 340; *Frank v. Manny*, 2 Daly (N. Y.) 92; *Hope v. Beadon*, 17 Q. B.

**VI. SUFFICIENCY AS TO TIME.**—Notice must be given within a reasonable time before the trial.<sup>1</sup> As to what constitutes a reasonable time depends upon the circumstances of the case,<sup>2</sup> and is a

509; 2 L. M. & P. 593; 16 Jur. 80; 21 L. J. Q. B. 25.

So, when the cause was first tried before a justice and then removed to the common pleas. *Wilson v. Gale*, 4 Wend. (N. Y.) 623.

But the rule that compels a party who receives and inspects a paper produced in response to a notice to put the paper in evidence, if material to the issue, is not extended to a new trial of the case unless notice is again given and the paper inspected. *Ellison v. Cruser*, 40 N. J. L. 444.

1. *Barton v. Kane*, 17 Wis. 37; s. c., 84 Am. Dec. 728; *Durkee v. Leland*, 4 Vt. 612; *De Witt v. Prescott*, 51 Mich. 208; *Buckner v. Morris*, 2 J. J. Marsh. (Ky.) 121; *Cody v. Hough*, 20 Ill. 43; *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296; *McPherson v. Rathbone*, 7 Wend. (N. Y.) 216.

A party is to have reasonable notice according to the circumstances of each particular case. *Hammond v. Hopping*, 13 Wend. (N. Y.) 504.

2. *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296; *Gorham v. Gale*, 7 Cow. (N. Y.) 739; *M'Dowell v. Hall*, 2 Bibb (Ky.) 610.

Notice given in court is not sufficient or reasonable notice, unless the instrument is in court at the time. *Durkee v. Leland*, 4 Vt. 612; *Hastings v. Power*, 1 Tyler (Vt.) 272; *Barker v. Barker*, 14 Wis. 131; *Barton v. Kane*, 17 Wis. 37; s. c., 84 Am. Dec. 728; *Atwell v. Miller*, 6 Md. 10; s. c., 61 Am. Dec. 294; *Gorham v. Gale*, 7 Cow. (N. Y.) 739; s. c., 17 Am. Dec. 549; *McPherson v. Rathbone*, 7 Wend. (N. Y.) 216; *Lowell v. Flint*, 20 Me. 401; *The Osceola, Olc. Adm.* 450; *Chapin v. Siger*, 4 McLean (U. S.) 378; *Board of Justices v. Fennimore*, 1 N. J. L. 242; *Downer v. Button*, 26 N. H. 338; *Anonymous*, Anth. N. P. (N. Y.) 199; *Chadwick v. United States*, 3 Fed. Rep. 750; *Hammond v. Hopping*, 13 Wend. (N. Y.) 505; The Illinois statutes give the court power to compel the production of books and papers which contain evidence pertinent to the issue upon good and sufficient cause, and upon reasonable notice being given, and when the papers are in court no notice is necessary. *Field v. Zemansky*, 9 Ill. 479; *Dwyer v. Collins*, 7 Exch.

639; 16 Jur. 569; 21 L. J. Exch. 225. Or, if elsewhere, within easy access. *Atwell v. Miller*, 6 Md. 10; s. c., 61 Am. Dec. 294; *Board of Justices v. Fennimore*, 1 N. J. L. 242; *Buckner v. Morris*, 2 J. J. Marsh. (Ky.) 121; *Hammond v. Hopping*, 13 Wend. (N. Y.) 505; *Lowell v. Flint*, 20 Me. 401; *Morrison v. Whiteside*, 17 Md. 452; s. c., 79 Am. Dec. 661.

Where a party was notified at the bar, during the trial, to produce a receipt, and he lived not more than fifty yards from the court house, but objected to the notice for want of time, and insisted upon being indulged until the next day, it was held that it was not error in the court to consider his objection unreasonable, and to permit parol testimony to be given of the contents of the paper. *Buckner v. Morris*, 2 J. J. Marsh. (Ky.) 121.

Where the paper is in court or so near the place where the court is sitting that it can be obtained without delaying the trial, and without material inconvenience to the party, a notice given after the trial has commenced is sufficient, and when, from the nature of the instrument, or from its connection with the cause, it may be fairly presumed to be in the possession of the party or his counsel in court, he ought affirmatively deny the fact, or the notice should be held good. *Hammond v. Hopping*, 13 Wend. (N. Y.) 505.

If it is impossible to produce a paper between the time of giving notice and the trial, that fact should be made to appear. *Burke v. Laforge*, 12 Cal. 403.

Notice as to time must be reasonably sufficient to enable the party to produce the paper. *Downer v. Button*, 26 N. H. 338.

In *Kerr v. McGuire*, 28 N. Y. 486, it was held that the general rule of practice requiring a written notice to produce papers, had reference to the preliminary preparations for trial, and that the reason of the rule did not apply to a notice given in the presence and hearing of the court while the trial was in progress from day to day, and the materiality of the document was apparent, and each party was presumed to have present all papers bearing on the case. *Kerr v. McGuire*, 28 N. Y. 446.

In *Morrison v. Whiteside*, 17 Md.

452; s. c., 79 Am. Dec. 661, the rule was laid down as follows, viz: The general rule is that the party desiring the production of an original entry or paper has the right to demand it at any time before the trial is concluded, and the refusal to present the one or the other gives the demandant the right to offer secondary evidence of the contents. This rule is subject to the exception that if the paper is shown to be in a place too remote from that of the trial that it cannot be produced at the trial between the time when the notice is given and the conclusion of the evidence, such notice will not be deemed sufficient to authorize the party giving the notice to offer secondary evidence of its contents.

**When Served in Time.**—In *Cody v. Hough*, 20 Ill. 443, it was held that it was not necessarily error to admit secondary evidence where the notice was given to counsel the day before the trial, and the paper was in the possession of the party himself, who was eighty miles away and who was not present at the trial, it not appearing that by means of the telegraph or railroad the paper might not have been produced in time.

In *Jackson v. Marsh*, 1 Cal. Cas. (N. Y.) 153, it was held that a notice of nine days was enough to produce a paper one hundred and eighty miles away. In *Barker v. Barker*, 14 Wis. 131, secondary evidence was held to have been properly received on the ground that the court was justified in assuming from the facts that the party had the paper with him in court. In *State v. Hester*, 2 Jones (N. Car.) 83, notice to a prisoner in close custody was held sufficient, having been given four days before his trial, and his residence being four miles away.

In *Divers v. Fulton*, 8 Gill & J. (Md.) 202, notice served on the attorney two days before the trial was held sufficient, though the attorney did not see his client until the day before the trial. In *Jefford v. Ringgold*, 6 Ala. 544, a notice served several days before trial was held sufficient, though the party resided out of the State. In *Shreve v. Dulaney*, 1 Cranch (C. C.) 499, a notice given the evening before the trial was held sufficient; and so in *United States v. Duff*, 6 Fed. Rep. 45.

In *Warner v. Campbell*, 26 Ill. 282, a notice served on the attorney two days before the trial was held sufficient. In *McDonald v. Carson*, 95 N. Car.

378, it was adjudged that "due notice" under the North Carolina statute meant time sufficient to allow the party to have the document ready to produce when called for.

In *Drabble v. Donner*, 1 Carr. & P. 188, four days' notice was held sufficient. In *Bryan v. Wagstaff*, 8 D. & R. 208, notice served on the attorney the evening before the trial was adjudged good, though the party was abroad, the circumstances leading to the presumption that the attorney was in possession of the paper. In *Rowlandson v. Wainwright*, 5 Ald. & E. 520, fourteen days' notice was held sufficient, and in *Slurne v. Jeffres*, 2 Carr. & K. 442, notice given the evening before the trial was adjudged sufficient, the parties being in the town.

**When Not Served in Time.**—In *De Witt v. Prescott*, 51 Mich. 298, the court said that a notice which allowed time to the attorney to communicate with his client only by telegraph, was insufficient, in the absence of a showing of a peculiar exigency. In *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296, it was held that neither the party nor his attorney was bound to leave court during the trial and go for papers or books to a distance. So in *Gorham v. Gale*, 7 Cow. (N. Y.) 739; s. c., 7 Am. Dec. 549.

In *Bushnell v. Bishop Hill Colony*, 28 Ill. 204, it was adjudged that two days' notice was not sufficient where the paper was in another State. In *Loibel v. Strampfer*, 16 L. T., N. S. 720, four days' notice to procure from Vienna a letter for use in a London trial was held insufficient.

Notice served on the attorney in a cause the day before trial, and at a distance from the place of business, was held bad in *Hughes v. Budd*, 8 D. P. C. 315; 4 Jur. 150. Notice served on Sunday was held bad in *Hughes v. Budd*, 8 D. P. C. 315.

Notice to produce letters in the county served in London, on the day of the trial in London, was held too late in *Coombs v. Bristol etc. R. Co.*, 1 F. & F. 206. Notice served in town on the attorney on the evening before trial, too late for the attorney to communicate with his client, was held too late in *Bryne v. Harvey*, 2 M. & Rob. 89.

Notice served on an attorney at five o'clock on the commission day of the assizes was held insufficient, the attorney having left home for the assize town,

matter resting largely in the discretion of the court.<sup>1</sup> If the instrument is in court, notice previous to the trial need not have been given, a demand made at the trial being sufficient. There are authorities, most of them old English authorities, holding that the fact that the instrument is in court does not preclude the necessity of a previous formal notice, in order that an opportunity to furnish testimony to support or impeach the instrument may be afforded;<sup>2</sup> but this is not the law at present.<sup>3</sup> Where there is an objection to the sufficiency of a notice, in point of time, and the objection is overruled, if it is intended to insist upon the objection, the party notified must decline to produce the paper and except to the admission of secondary evidence of its contents. For by producing the paper at the trial, he will be deemed to have waived objection to the sufficiency of the notice.<sup>4</sup>

**VII. EFFECT OF PRODUCING PAPERS PURSUANT TO NOTICE.**—A paper is not made evidence simply by being produced pursuant to a notice; whether it becomes evidence, must be determined from its legal bearing upon the subject matter of the suit.<sup>5</sup> If the party

nine miles distant, and the party who served the notice having refused to furnish the attorney with a conveyance. *George v. Thompson*, 4 D. P. C. 656. Notice served on an attorney at seven P. M. of the day before trial to produce a tradesman's book was held too late. *Atkins v. Meredith*, 4 D. P. C. 658. When an attorney's client was absent in Scotland, notice served on Saturday at nine P. M. to produce books at the trial in London on Wednesday was held too late. *Vice v. Anson*, 3 Carr. & P. 19; *M. & M.* 96. Also notice served on Saturday to produce papers at the trial of the cause on the following Monday. *Houseman v. Roberts*, 5 Carr. & P. 394. Where notice was served on the defendant's attorney in Essex on Saturday, the commission day of the assize being Monday, and the attorney went to London and brought the deeds, and on Monday another notice was served to produce another deed, and the attorney offered to go and bring it if the party who served the notice would pay the expense of sending for it, and no offer was made to do this, at the trial on Thursday it was held that the party giving the notice was not entitled to give secondary evidence of the contents of the last mentioned deed. *Doe d. Curtis v. Spity*, 3 Barn. & Ad. 182. A notice served on the defendant's attorney at his residence twenty miles from the place of trial at 8 P. M. the day before the trial, the defendant residing in the same town as the attorney, but not

being at home on that evening until twelve o'clock, was held too late. *Howard v. Williams*, 9 M. & W. 725; 1 D. U. S. 877; 6 Jur. 585.

1. *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296; *Hammond v. Hopping*, 13 Wend. (N. Y.) 505; *Cummings v. McKinney*, 5 Ill. 57; *Burke v. Laforge*, 12 Cal. 403.

2. *Doe v. Grey*, 1 Stark. 283; *Knight v. Waterford*, 4 Y. & Col. 284; *Millikin v. Barr*, 7 Pa. St. 83; *Durkee v. Le-land*, 4 Vt. 612.

3. *Dwyer v. Collins*, 7 Exch. 639; *Brandt v. Klein*, 17 Johns. 335; *Anonymous*, Anth. (N. Y.) 199; *McPherson v. Rathbone*, 7 Wend. (N. Y.) 216; *Atwell v. Miller*, 6 Md. 10; *Choteau v. Ralitt*, 20 Ohio 132; *Dana v. Boyd*, 2 J. J. Marsh. (Ky.) 587; *Brown v. Isbell*, 11 Ala. 1009; *Griffin v. Sheffield*, 38, Miss. 359; *Wharton on Ev.*, § 155. See also *Greenleaf on Ev.* (4th ed.), § 561, n. a.

4. *Willard v. Germer*, 1 Sandf. (N. Y.) 50.

5. *Hylton v. Brown*, 1 Wash. (U. S.) 343; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224; s. c., 33 Am. Dec. 656; *Austin v. Thompson*, 45 N. H. 113; *Com. v. Davidson*, 1 Cush. (Mass.) 33; *Stalker v. Gaunt*, 12 N. Y. Leg. Obs. 124; *Rhoades v. Selin*, 4 Wash. 719; *Smith v. Coleman*, 2 Cranch (C. C.) 237; *Willings v. Consequa*, Pet. (C. C.) 301; *Blight v. Ashley*, Pet. (C. C.) 15.

Papers produced in response to a call in a complaint become evidence in



calling for it offers it in evidence, he must prove it in the same manner as if he had produced it himself, unless the party producing it is a party to it, or claims a beneficial interest under it.<sup>1</sup> But if it is a competent and is put in evidence, the party so using it may not impeach it.<sup>2</sup> Although a party calls for the production of a paper, he is not obliged to put it in evidence;<sup>3</sup> but if he examines it, he takes it as testimony, and it becomes evidence for both parties.<sup>4</sup> But the party calling for the paper will not be

the case, but not necessarily conclusive evidence of the facts sought to be established by them. *Tarleton v. Goldtwaitte*, 23 Ala. 346; s. c., 58 Am. Dec. 297.

1. *Rhoades v. Selin*, 4 Wash. (U. S.) 715. Where a party who produces a deed or instrument is a party to it *prima facie*, it is sufficient proof of its execution. *Betts v. Badger*, 12 Johns. (N. Y.) 223; s. c., 7 Am. Dec. 309; *McPherson v. Rathbone*, 7 Wend. (N. Y.) 216. And if the party producing it is a party to the instrument, or claims a beneficial interest under it, it is not necessary for the party who called for it to prove its execution; but in other cases its execution must be regularly proved. *Jackson v. Kingsley*, 17 Johns. (N. Y.) 158; *Campbell v. Roberts*, 66 Ga. 733. And where the instrument is mutilated (and there is no evidence that the party producing it mutilated it) it does not absolve the party, who called for it, from the necessity of proving the handwriting of the party who executed it. *Jackson v. Kingsley*, 17 Johns. (N. Y.) 158.

Where a party, under notice to produce a deed, produced a copy and claimed under it, it was held that, as to him, no proof of its correctness or of its execution was necessary. *Herring v. Rogers*, 30 Ga. 615.

A deed produced by the opposite party on notice to produce may be read without further proof of its execution. *Frantz v. Harman*, 2 Yeates (Pa.) 473. And where an agreement between the parties to an action is produced by the defendant on notice from the plaintiff, it is not necessary to prove the plaintiff's signature to the instrument in order to read it to the jury. *Balliet v. Fink*, 28 Pa. St. 266.

2. *Hulbert v. Hammond*, 41 Mich. 343. But where an account is produced pursuant to a notice, the mere fact that it is produced and read to the jury is not conclusive of its correctness. *Gracy v. Bailee*, 16 S. & R. (Pa.) 126.

3. *Waller v. Stewart*, 4 Cranch (U. S.) 532; *Coote v. Bank of United States*, 3 Cranch (C. C.) 50; *Blight v. Ashley*, Pet. (C. C.) 15; *Kenney v. Clarkson*, 1 Johns. (N. Y.) 385; *State v. Wisdom*, 8 Port. (Ala.) 511; *Morrison v. Whiteside*, 17 Md. 452; s. c., 79 Am. Dec. 661.

4. This is the English rule, and the rule maintained by most American courts. In support of the rule, see 2 *Tidd's Practice* 804; *Calvert v. Flower*, 7 C. & P. 386; *Wharam v. Routledge*, 5 Esp. 235; *Blake v. Russ*, 33 Me. 360; *Penobscot Boom Co. v. Lamson*, 4 Shep. (Me.) 224; *Anderson v. Root*, 8 S. & M. (Mass.) 362; *Randel v. Chesapeake etc. Canal Co.*, 1 Harr. (Del.) 233; *Jordan v. Wilkins*, 2 Wash. (U. S.) 282; *Withers v. Gillespy*, 7 S. & R. (Pa.) 14; *Reed v. Anderson*, 12 Cush. (Mass.) 481; *Clark v. Fletcher*, 1 Allen (Mass.) 53; *Long v. Drew*, 144 Mass. 77; *Ellison v. Cruiser*, 4 N. J. L. 444; *Saunders v. Duval*, 19 Tex. 467; *Morrison v. Whiteside*, 17 Md. 452; s. c., 79 Am. Dec. 661; *Wharton on Ev.*, § 156. *Contra*, *Austin v. Thompson*, 45 N. H. 113.

In discussing this question in *Com. v. Davidson*, 1 Cush. (Mass.) 33, *Dewey, J.*, says: "Merely calling for books, although in answer to such call they are produced, will not make them evidence. It would not by the English rule, as stated in 1 *Phill. on Ev.* 440, where it is said, 'if one party calls for books in possession of another, but declines to use them when produced, the mere calling for them will not make them evidence; but if the party calling for them inspects them, he thereby does make them evidence, although he does not introduce them.' The result of the examination of the cases seem, to be—  
1. That all the authorities agree that mere calling for the books is not enough to make them evidence. 2. That whether calling for the books of the opposite party, and inspecting them, and doing nothing more, makes the

allowed to waive the reading of the paper in evidence, and give secondary evidence of its contents.<sup>1</sup> Nor can he, after the paper has been produced and its execution shown, place it in the hands of a witness for further identification, and to explain the circumstances attending its execution. If he does anything with it, he must put it in evidence.<sup>2</sup> Where a paper produced pursuant to a notice is different from the one called for, the party is not precluded from showing this, and from proving the contents of the one withheld.<sup>3</sup> But if the paper produced is the one called for and the party calling for it does not put it in evidence, the party who produced it may read it in evidence, without proving its execution.<sup>4</sup>

**VIII. EFFECT OF NOT PRODUCING PAPERS AFTER NOTICE HAS BEEN GIVEN.**—Where reasonable notice has been given a party to produce at the trial a paper or book in his possession, and he fails or refuses to produce it, the party giving the notice may, after proving its existence, and that reasonable notice has been given, give secondary evidence of its contents,<sup>5</sup> and in doing so may read a counter-

book evidence, is a mooted point. 3. That the books when produced upon notice, if inspected by the party calling for them, and actually used as evidence by him, are thereby made evidence for the other party."

Where books are produced pursuant to a notice, and entries in them are read by the party who called for them, the party who produced them may read other entries that are necessarily with those read by the opposite party, provided they were made prior to the commencement of the suit. *Withers v. Gillespy*, 7 S. & R. (Pa.) 10; *Boggs v. Miles*, 8 S. & R. (Pa.) 407.

When a defendant produces books in response to a notice from the plaintiff, he cannot use them to prove a set-off of which he has not given notice. *Lahemer v. Hogdon*, 5 S. & R. (Pa.) 514.

It is unimportant when books have been produced on notice by the opposite party that the party who produced them has been allowed to examine a witness who stated that he had examined them and could find in them no entry of a certain note and check which were the subject of the controversy. *Coote v. Bank of United States*, 3 Cranch (C. C.) 95.

When books and papers are brought in under a notice to produce them, they must be furnished unconditionally to be used as evidence or not as the party calling for them may see fit, or else parol evidence of their contents is com-

petent. *Carr v. Gale*, 3 Woodb. & M. (U. S.) 38.

1. *Stitt v. Huidekoper*, 17 Wall. (U. S.) 384.

2. *Hotchkiss v. Germania F. Ins. Co.*, 5 Hun (N. Y.) 90.

3. *Gilmore v. Whitchee*, 6 Allen (Mass.) 113.

Where a paper produced in response to a notice to produce does not answer the description of the one called for in all particulars, and the party producing it states to the court that he had not in his possession such an instrument as that described in the notice, and that the only instrument of writing he had received from the opposite party, or had in his possession similar to the one described in the notice, was one which he there produced to the court, such statement is not evidence for the jury to consider. *Anderson v. Root*, 16 Miss. 362.

Where the plaintiffs gave the claimant notice to produce a certain invoice, it was held that the claimant could not require the plaintiffs to state whether they would take it with or without a letter attached to it, which the plaintiffs never had seen, but that the claimant must produce the invoice without including the letter. *United States v. Twenty-five Cases of Cloth*, 1 Crabb (U. S.) 356.

4. *Kinney v. Clarkson*, 1 Johns. (N. Y.) 385; s. c., 3 Am. Dec. 336.

5. *Riggs v. Tayloe*, 9 Wheat. (U. S.) 483; *Bright v. Young*, 15 Ala. 112;

party, except in the case of spoliation or equivalent suppression when the rule is that *omnia præsumuntur contra spoliatores*.<sup>1</sup> Where it is apparent that books or papers in one's possession would establish facts, whereof the burden of proof is on him, his refusal to produce and attempt to establish such facts by other evidence raises a strong presumption that the books or papers, if produced, would operate against him.<sup>2</sup> But some general evidence of such parts of their contents as are applicable to the case must first be given before any foundation is laid for any inference or intendment on account of their nonproduction.<sup>3</sup> Where a party parts with the possession of a document after notice given him to produce it, he should apprise his adversary, so that he may know where to look for it. If it does not appear by what means it left his possession, it will, for the purposes of the notice, be considered as under his control and in his possession.<sup>4</sup> After a party has refused to produce a paper in his possession, and his adversary has proved its contents by secondary evidence, the party will not be permitted to contradict this secondary evidence by secondary evidence,<sup>5</sup> or by putting the paper itself in evidence.<sup>6</sup>

**NOTICE TO QUIT.**—See LANDLORD AND TENANT, 12 Am. & Eng. Encyc. of Law 757t.

1. Life & Fire Ins. Co. v. Mechanics' F. Ins. Co., 7 Wend. (N. Y.) 33; Hanson v. Eustace, 2 How. (U. S.) 653; Merwin v. Ward, 15 Conn. 377; Hunt v. Collins, 4 Iowa 56; Spring Garden Mut. Ins. Co. v. Evans, 9 Md. 1; s. c., 66 Am. Dec. 308; Jewell v. Center, 25 Ala. 498.

Where a party reads to the jury a deposition taken by the adverse party, who refuses to read it, he makes it his evidence and cannot impeach it. Jewell v. Center, 25 Ala. 498.

The refusal of a party to produce books or papers at the trial does not establish a fraudulent disposition of the books to deceive the other party. Burr v. American Spiral Spring Butt Co., 81 N. Y. 175.

In an action for damages for an injury received by a passenger while on a train it appeared that the ticket issued to him was a commutation ticket between two points, and that a part of the route was over another company's track. Both companies were made defendants. It was admitted that their relations to each other were defined by written contracts, but they refused to produce them on notice. Held, that as they knew the truth and omitted to speak, every inference warranted by the evidence should be indulged against them. Wylde v. Northern R. Co., 53 N. Y. 156.

Where a person willfully fails and refuses to produce a document after notice, all things touching its contents and execution will be presumed against him which the case fairly admits of under the maxim *contra spoliatores omnia præsumuntur*. Benjamin v. Ellinger, 80 Ky. 492.

2. The Luminary, 8 Wheat. (U. S.) 407; Clifton v. United States, 4 How. (U. S.) 242; Merwin v. Ward, 15 Conn. 377.

The nonproduction of papers after notice is a circumstance that the jury may consider; and it may be commented upon by counsel in argument. Tobin v. Shaw, 45 Me. 331; s. c., 71 Am. Dec. 547.

3. Life & Fire Ins. Co. v. Mechanic F. Ins. Co., 7 Wend. (N. Y.) 31; Hanson v. Eustace, 2 How. (U. S.) 653.

4. Jackson v. Shearman, 6 Johns. (N. Y.) 19.

5. Bogart v. Brown, 5 Pick. (Mass.) 18; Wharton Ev., § 157.

6. Wharton Ev., § 157; Bogart v. Brown, 5 Pick. (Mass.) 18; Doon v. Donaher, 113 Mass. 151; Doe v. Hodgson, 12 Ad. & El. 135. In Moulton v. Mason, 21 Mich. 363 is a dictum to the contrary, but this dictum appears to be opposed to the weight of authority. See also Thompson on Trials, §§ 789, 790.

**NOTIFY**—(See also NOTICE).—In legal proceedings and in respect to public matters, the word “notify,” generally, if not universally, imports notice by some person whose duty it is to give it, in some manner prescribed, and to some person entitled to receive it.<sup>1</sup>

**NOTORIOUS**.—Generally known and talked of by the public; universally believed to be true; manifest to the world.<sup>2</sup>

**NOTWITHSTANDING**.—See note 3.

**NOXIOUS**—NUISANCE.—See note 4.

**NOURISHING**.—See note 5.

1. Potwine's App., 31 Conn. 384. See also *Minard v. Douglass Co.*, 9 Oreg. 210; *Castner v. Farmers' Mut. L. Ins. Co.*, 50 Mich. 277; *Vinton v. Builders' etc. Assoc.*, 109 Ind. 353, in which latter case it was held that “notify” did not signify a notice in writing.

2. Webster's Dict., followed in *Straus v. Imperial Ins. Co.*, 94 Mo. 182. See also *Seay v. Walton*, 5 T. B. Mon. (Ky.) 368.

**Notorious Possession**.—See PRESCRIPTION, 1 Am. & Eng. Encyc. of Law 228, n.

“**Notorious Resistance to Lawful Authority**.”—These words occurring in a clause in a fire insurance policy providing that the company shall not be liable for any damage by fire occasioned by persons engaged in “notorious resistance to lawful authority,” were held to mean the resistance of many persons and widely known at the time, and not to that of a few persons, the results of which become notorious. *Straus v. Imperial Ins. Co.*, 94 Mo. 182.

3. “‘Anything in this act to the contrary notwithstanding,’ is equivalent to saying that the act shall be no impediment to the measure, and precisely corresponds to the words in the second saving of the Stat. of Uses, 27 H. VIII, ch. 10, ‘as if this act had not been made.’” *Dwar. 683*, citing *Cheinic's Case*; *Cecil's Case*, 7 Rep. 20.

4. Noxious not only means “hurtful

and offensive to the smell,” but it is also the translation of the very technical term “nocious.” *Rex v. White*, 1 Burr. 337.

**Noxious Thing**.—See ABORTION, 1 Am. & Eng. Encyc. of Law 29, n.

The *New Jersey* statute requires proof that the thing administered was noxious or hurtful in some degree, though it does not require, by its terms, that the thing should be capable of producing a miscarriage. *State v. Gedicke*, 43 N. J. L. 86. A “noxious thing,” within 24 and 25 Vict., ch. 100, §§ 58, 59, means anything which is harmful as administered, although not necessarily harmful *per se*. *Reg. v. Cramp*, 49 L. J. R., M. C. 44.

**Noxious Substance**.—As used in section 216 of the California Penal Code, relating to the administration of poisons, etc., with intent to kill: “The noxious or destructive substance or liquid mentioned in the statute is not merely such as might, when administered, be hurtful and injurious, but, like a poison, it must be capable of destroying life.” *People v. Van Deleer*, 53 Cal. 149.

5. An injunction to restrain the use by the defendants upon their trade label of the term “nourishing stout,” which plaintiff had previously used, refused, on the ground that “nourishing” was a mere English word denoting quality. *Raggett v. Findlater*, L. R., 17 Eq.

**NOVATION.**—See also DEBTOR AND CREDITOR, 5 Am. & Eng. Encyc. of Law 179; PAYMENT.

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**I. DEFINITION.**—Novation is the substitution of a new obligation for an existing one. Novation is made: 1. By the substitution of a new obligation between the same parties with intent to extinguish the old obligation; 2. By the substitution of a new debtor in place of the old one, with intent to release the latter; or, 3. By a substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former. Novation is made by contract, and is subject to all the rules concerning contracts in general.<sup>1</sup>

1. This definition is the language of the Civil Code of California which seems to state the law accurately in §§ 1530 to 1532. See also Civil Code of Dakota, § 863. The Civil Code of Louisiana states the principles of novation so fully that its provisions are added (arts. 2185-2194):

Art. 2185—Novation is a contract consisting of two stipulations; one to extinguish an existing obligation, the other to substitute a new one in its place.

Art. 2186—To constitute a novation, there must be, at the time it is made, a

valid obligation on which it can operate; if the first obligation, which it is intended to replace by the new one, be void, or, if there be no such obligation, then the new obligation is of no effect.

Art. 2187—The pre-existent obligation must be extinguished, otherwise there is no novation; if it be only modified in some parts, and any stipulation of the original obligation be suffered to remain, it is no novation.

Art. 2188—All kinds of legal obligations are subject to novation.

Art. 2189—Novation takes place in three ways: 1. When a creditor con-

tracts a new debt to his creditor, which new debt is substituted to the old one which is extinguished.

2. When a new debtor is substituted to the old one, who is discharged by the creditor.

3. When, by the effect of a new engagement, a new creditor is substituted to the old one, with regard to whom the debtor is discharged.

Art. 2190—Novation can be made only by persons capable of contracting; it is not presumed; the intention to make it must clearly result from the terms of the agreement, or by a full discharge of the original debt.

Art. 2191—Novation by the substitution of a new debtor may take place without the concurrence of the former debtor.

Art. 2192—The delegation by which a debtor gives to the creditor another debtor who obliges himself toward such creditor, does not operate as a novation, unless the creditor has expressly declared that he intends to discharge his debtor who has made the delegation.

Art. 2193—The creditor who has discharged the debtor by whom a delegation has been made, has no recourse against the debtor, if the person delegated becomes insolvent, unless that act contains an express reservation to that purpose, or unless the delegated person was in a state of open failure or insolvency at the time of the delegation.

Art. 2194—The mere indication made by a debtor of a person who is to pay in his place does not operate as a novation. The same is to be observed of the mere indication made by the creditor of a person who is to receive for him. "The term *novation*," says Parsons, "has not been much used in American or English law, but may be found in some late English cases; and the thing itself, or this form of contract, may be found in many cases, both in *England* and this country." "A novation is a transaction whereby a debtor is discharged from his liability to his original creditor, by contracting an obligation in favor of a new creditor by the order of his original creditor. Thus, A owes B and B owes C; at the request of C, B orders A to pay his debt to C. A consents, and B discharges him from all obligation to him. A thus contracts a new obligation to C, and his original obligation to B is at an end." By the civil law, any new contract entered into for the purpose and with

the effect of dissolving an existing contract was regarded as a novation, and in the above case the civil law would recognize two sorts of contracts of novation—the contract by which A was discharged from his liability to B by contracting a new obligation to C, and the novation by which B would be discharged from his obligation to C by procuring A as a new debtor. This distinction has not been preserved in the common law." 1 Parsons Contr. (7th ed.) \*217.

*Compare* LORD JUSTICE JAMES' remarks in *Grain's Case*, L. R., 1 Ch. Div. 332, who says: "Possibly the deeds were not sufficiently considered in some former cases in which the thing was treated as a mere question of 'novation,' a word which was unfortunately introduced into these cases, and which has led to a considerable amount of expense, which must fall upon some of those who are concerned."

Novation, in its strict sense, has been defined as follows: "Novation is the substitution of a new obligation for an old one, which is thereby extinguished. . . . Where there is a substitution of a new contract for an old one, the new contract must be a valid one upon which the creditor can have his remedy." *Guichard v. Brande*, 57 Wis. 534.

Novation means that, there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be), or between different parties—the consideration mutually being the discharge of the old contract. A common instance is in partnership cases when the members of the new firm take over the liabilities of the old firm. Per SELBORNE, L. C. *Scarfe v. Jardine*, 7 L. R., App. Cas. 361; 51 L. J., Q. B. Div. 612; 47 L. T., N. S. 258; 30 W. R. 893.

"The facts testified to tended to make out a case of novation. Weller was indebted to the plaintiffs. Defendants were indebted to Weller. By Weller's request, defendants promised to pay the one hundred dollars, which they owed Weller, to plaintiffs instead of to Weller. Plaintiffs relinquished their claim upon Weller in consideration of defendant's promise to them, and defendant charged the amount to Weller on its books. Such a transaction is valid and rests on a sufficient consideration." *Mulcrone v. American Lumber Co.*, 55 Mich. 622; *Tinan v. Babcock*, 58 Mich. 301.

**II. REQUISITES OF NOVATION.**—In order to constitute a novation of a contract, in its strict sense, the following essential elements must co-exist:

1. **Parties.**—The parties must be legally capable of contracting; hence, minors, married women (except by statute), etc., cannot make a novation.<sup>1</sup>

2. **Validity of Prior Obligation.**—The previous obligation of which novation is sought must be a valid one.<sup>2</sup>

3. **Extinguishment of Prior Obligation.**—The original agreement of which novation is sought must be absolutely extinguished, and the new agreement substituted for it.<sup>3</sup>

"A *novation* under the rules of the civil law, whence the term has been introduced into the modern nomenclature of our common-law jurisprudence, was a mode of extinguishing one obligation by another—the *substitution*, not of a *new paper* or note, but of a *new obligation*, in lieu of an old one, the effect of which was to pay, discharge or otherwise dissolve it." *McDonnell v. Alabama Gold L. Ins. Co.*, 85 Ala. 401; *McClellan v. Robe*, 93 Ind. 298; *Parsons v. Tillman*, 95 Ind. 452; *Foster v. Paine*, 63 Iowa 85; *Adams v. Power*, 48 Miss. 451.

**Civil Law.**—By the civil law, a novation arose when any new contract was entered into with the intent to dissolve the former engagement, or a new debt was substituted for an old one. The old contract or debt was held to be extinguished by the new one contracted in its stead; whence a novation was included by civilians amongst the different modes in which obligations were extinguished and discharged. Inst. lib. 3, tit. 30, De Novatione; Cod., lib. 8, tit. 42, § 8; Dig., lib. 46, tit. 2, De Novationibus.

"Another kind of novation is that which takes place by the intervention of a new debtor, where another person becomes debtor in my stead, and is accepted by the creditor who, thereupon, discharges me from it. The person thus rendering himself debtor to another, who is in consequence discharged, is called *expromisor*, and this kind of novation is called *ex promissio*." Pothier Contr., pt. 3, c. 2, art. 1.

Novation is fully discussed by various German writers on the Civil Law: Gneist, *Die Formellen Verträge* (1845); Fein, *Beiträge zu der Lehre von der Novation und Delegation* (1855); Kniess, *Einfluss der bedingten Novation auf die ursprüngliche Obligation* (1860);

Römer, *Die bedingte Novation* (1863); Salpius, *Novation and Delegation* (1864); Salkauski, *Zur Lehre von der Novation* (1866).

1. "The consent which the creditor gives to the novation of the debt being equivalent, so far as regards the extinction of the debt, to a payment of it, it follows that only those to whom a valid payment may be made can make a novation of the debt. And for this reason those persons who were under legal inability, minors, married women, etc., cannot make a novation; and apply to this principle of the common law, that guardians, trustees, administrators and executors, cannot change the character of the trust funds held by them, without an order from a court of chancery jurisdiction, they, too, it would seem, should not be allowed to make a novation of an old debt for a new one. *Scott v. Atchison*, 36 Tex. 76; *Conquest's Case*, L. R., 1 Ch. Div. 334; *Clark v. Billings*, 59 Ind. 508; *Spycher v. Werner*, 74 Wis. 456.

2. *Clark v. Billings*, 59 Ind. 509, *Bristol Milling etc. Co. v. Probasco*, 64 Ind. 413.

3. *Fairlie v. Denton*, 8 B. & C. 395; *Cuxon v. Chadley*, 3 B. & C. 591; *Charles v. Amos*, 10 Colo. 272; *Caswell v. Fellows*, 110 Mass. 52; *Chaffee v. Railroad Co.*, 53 Vt. 345; *McKinney v. Alvis*, 14 Ill. 33; *Pfeiffer v. Adler*, 37 N. Y. 164; *Mallon v. Gillett*, 21 N. Y. 412; *Jaudon v. Randall*, 47 N. Y. Sup. Ct. 374; *Preston v. Young*, 46 Mich. 103; s. c., 41 Am. Rep. 148; *Yale v. Edgerton*, 14 Minn. 194; *Black v. De Camp*, 78 Iowa 718; *Adams v. Power*, 48 Miss. 450; *Bristol Milling etc. Co. v. Probasco*, 64 Ind. 406; *Goodrich v. Stanley*, 24 Conn. 613; *Butterfield v. Hartshorn*, 7 N. H. 345; s. c., 26 Am. Dec. 741; *Warren v. Batchelder*, 15 N. H. 129; *Waggoner*

**4. Consideration.**—This extinguishment of the original obligation constitutes the consideration for the new one.<sup>1</sup>

*v. Gray*, 2 Hen. & M. (Va.) 603; *Styron v. Bell*, 8 Jones L. (N. Car.) 222; *Jones v. Ballard*, 2 Const. (S. Car.) 113; *Stewart v. Campbell*, 58 Me. 439; s. c., 4 Am. Rep. 296; *McLaren v. Hutchinson*, 22 Cal. 187; s. c., 83 Am. Dec. 59; *Scott v. Atchison*, 36 Tex. 76; *Brewer v. Winston*, 46 Ark. 163; *Bonnesner v. Negrete*, 16 La. An. 474 s. c., 35 Am. Dec. 217.

In *Wharton v. Walker*, 4 B. & C. 164. BAYLEY, J., said: "If, by agreement between the three parties, the plaintiff had undertaken to look to the defendant and not to his original debtor, that would have been binding, and the plaintiff might have maintained an action on the agreement; *but in order to give him that right of action, there must have been an extinguishment of the intermediate debt.*"

"Novation means simply the substitution of one debtor by mutual agreement for another. It is a necessary incident of the transaction that the old debt shall have been discharged by the new arrangement. The discharge of the old debt must be contemporaneous with, and result from the consummation of the arrangement with the new debtor." *Kelso v. Fleming*, 104 Ind. 180.

In this case the purchaser of real estate agreed to assume a mortgage debt upon the land. *Held* there was no novation even though the holder of the note subsequently agreed to accept the purchaser as his debtor and release the maker of the note.

To constitute a novation of parties there must be an extinguishment of the old debt by a mutual agreement between all parties, whereby it becomes the obligation of a new debtor. "The discharge of the old debt must be contemporaneous with and result from the consummation of a new arrangement with the new debtor." *Cornwell v. Megins*, 39 Minn. 407.

"In every novation there are four essential requisites; first, a previous valid obligation; second, the agreement of all the parties to the new contract; third, the extinguishment of the old contract; and, fourth, the validity of the new one." *Clark v. Billings*, 59 Ind. 508.

In an action to recover a debt of 500*l.*, a plea as to 339*l.*, that before action the

plaintiff was indebted to S. in 339*l.*; that the defendant, at the request of the plaintiff, agreed with S. to pay him the 339*l.*, and S. agreed to accept the defendant as his debtor instead of the plaintiff, for that sum; and that the defendant was still liable to pay that sum to S., is no answer to the plaintiff's claim, inasmuch as the plea does not show that the plaintiff's liability to S. was discharged. *Cochrane v. Green*, 9 C. B., N. S. 448; 30 L. J., C. P. 97; 9 W. R. 124; 3 L. T., N. S. 475. But see *Middleton v. Pollock*, 44 L. J. Ch. 584.

A debtor's promise to pay a note given by his creditor to a third party, and thus pay his own debt, does not release the debtor from his own debt, and is no defence to a suit on it unless he can show that he has paid the debt assumed. *Irwin v. Atkins*, 7 Ill. App. 17.

The new promise must be clear—mere loose statements are not enough. *In re Sullenberger*, 72 Cal. 549.

1. "An agreement for the substitution of one debtor for another is void unless it has sufficient consideration. If C, the creditor, for instance, simply says, 'I agree to take S (the substitute) in place of O (the original debtor), this is void; and so if S simply says, 'I agree to take O's place and become debtor to C,' this, without a consideration, does not bind S. But it is not necessary that such a consideration should in any degree be proportional to the interest involved. The adequacy of the consideration is a question the courts do not undertake to determine. It is enough if the promisor makes the promise on which he is charged as a compensation for some surrender, no matter how slight, by the promisee. Thus if C, the original creditor, says to the substitute, 'If you will take his place, I will release D,' the original debtor, this binds C; and if S, the substitute says to C, 'If you will release D, I will take his place,' this is a sufficient consideration so far as concerns S. The extinction of intermediate original liabilities is in itself a sufficient consideration to sustain the new contract, by which the parties to the reconstructed contract become bound to each other in original privity. C, the creditor, suffers detriment by surrendering D,



the original debtor. S says, 'If you will submit to this contract by letting D go, I will take his place.' This detriment to E is a sufficient consideration for S's promise to C. An extension of time also may be a consideration for the substitution of a new security. The creditor suffers the detriment of a postponement of payment, and in consideration a better secured note is given him." 2 Whart. Cont., § 858.

"The consideration appears in the release of one party and the substitution of another." Bacon v. Daniel, 37 Ohio St. 279; Barringer v. Warden, 12 Cal. 311.

Struble v. Hake, 14 Bradw. (Ill.) 546 ("Discharge of the old debt").

"The plaintiff in a suit on the new contract must prove the release of the intermediate, as that is the consideration for the promise of the defendant." Gyle v. Shoemaker, 23 Cal. 538; Underwood v. Lovelace, 61 Ala. 155; Delph v. Bartholomay Brewing Co., 123 Pa. St. 42.

D was indebted to F for slaves bought of him, and F owed T the same amount. By agreement among the parties, D gave his note to T. Held, that this was a novation. The debts due by D to F and by F to T were extinguished by the transaction, and the consideration of the new contract being, on the part of D, the satisfaction of his debt to F, he could not avoid payment of the note on the ground that the consideration thereof was a slave. Dever v. Akin, 40 Ga. 423; Gresham v. Morrow, 40 Ga. 487.

"Coming to us through the civil law, three kinds of novation are recognized: First, When the debtor and creditor remain the same, but a new debt takes the place of the old one. Second, Where the debt remains the same, but a new debtor is substituted. Third, Where the debt and debtor remain, but a new creditor is substituted. In each of these cases the extinguishment of the old debt constitutes the consideration for the new obligation, and has always been held to be sufficient." Parsons v. Tillman, 95 Ind. 452.

Here a firm became indebted to one of its members and gave notes. These notes were surrendered and new notes substituted payable to the daughter of the creditor partner. Held there was a novation of the third class here. LORD TENTERDEN, C. J., in Fairlie v. Denton, 8 B. & C. 395 says: "It has been

held that where it has been admitted and agreed beyond dispute that a defined and ascertained sum is due from A to B, and that a larger sum is due from C to A, and the three agree that C shall be B's debtor, instead of A, and C promises to pay B the amount owing to him by A, an action will lie by B against C."

Where the original debtor does not assent to the novation, a willingness by the creditor to release him is no consideration. Johnson v. Rumsey, 38 Minn. 531.

W gave an order to the plaintiff for all that was due him on the defendants, and it was accepted by them. Held, that the payee could maintain an action in his own name, and that the giving of the order by W, the receiving and presenting by the plaintiff and the acceptance by the defendants constituted a novation, the agreement of each party was a consideration for the agreements of the others. W agreed to the delegation; the plaintiff agreed to be substituted as payee, and the defendant agreed to pay the plaintiff. Bacon v. Bates, 53 Vt. 30.

"There is no difference between a debtor promising to pay his creditor directly so much money which he owes him, and promising his creditor to pay a third person the same sum by agreement between the three. The last promisor is paying his own debt and creating his own obligation, not assuming another's. This has been often decided, and is too obvious to require authority or further illustration to make the proposition evident. Moreover, the promise to pay the six hundred dollars is averred to be a promise made to plaintiff, in consideration of plaintiff's discharge of Woolsey, his original debtor; and this is a sufficient consideration to support a promise made directly from promisor to promisee." Barringer v. Warden, 12 Cal. 311.

Where the declaration alleged that J. S., being indebted to the plaintiff, made and delivered to him an order in writing, directed to the defendant, to deliver to the plaintiff or bearer a certain quantity of wood; and that the defendant, being indebted to J. S., in consideration thereof, accepted said order and promised to deliver the wood, it was held on demurrer that the defendant's promise to deliver the wood was without consideration. Ford v. Adams, 2 Barb. (N. Y.) 349.

**5. Assent of Parties.**—All the parties, not only to the new contract, but also to the one for which the new contract is substituted, must consent to the novation; the parties to the original contract must consent in order to have that extinguished, and the parties to the new contract in order to have a valid obligation substituted for the old.<sup>1</sup>

1. "It stands to reason that the substitution of a new contract in place of an old requires the assent of all the parties to the old contract, and of all the parties to the new contract. Unless all the parties to the old contract consent it cannot be rescinded; unless all the parties to the new contract consent, it cannot be created." 2 Whart. Cont., § 855.

Hodgson v. Anderson, 3 B. & C. 842; Crawfoot v. Gurney, 9 Bing. 372; Williams v. Everett, 14 East 582; Yates v. Bell, 3 B. & Ald. 643; Wilson v. Coupland, 5 B. & Ald. 228; Wharton v. Walker, 4 B. & C. 163; Israel v. Douglas, 1 H. Bl. 239; Hutchinson v. Heyworth, 9 Ad. & El. 375; Walker v. Rostron, 9 M. & W. 411; Enthoven v. Hammond, 22 Eng. L. & Eq. 476; Gibson v. Minet, 1 C. & P. 247; Harris v. Robertson, 6 Allen (New Bruns.) 496; Wedlake v. Hurley, 1 Cr. & J. 83; Scott v. Porcher, 3 Mer. 652; Charles v. Amos, 10 Colo. 272; Short v. New Orleans, 4 La. An. 281; Gails v. Sch'r Osceola, 14 La. An. 54; Ford v. Adams, 2 Barb. (N. Y.) 349; Van Epps v. McGill, Hill & D. Supp. (N. Y.) 109; Kelley v. Roberts, 40 N. Y. 432; Lee v. Porter, 18 Mo. App. 377; Mercer v. Miles (Neb. 1889), 44 N. W. Rep. 109; Murphy v. Hanrahan, 50 Wis. 485; Spycher v. Werner, 74 Wis. 456; Boston Ice Co. v. Potter, 123 Mass. 28; s. c., 25 Am. Rep. 9.

**Rescission.**—And any party may withdraw and rescind at any time before all parties have assented. Owen v. Bowen, 4 C. & P. 93; Lee v. Porter, 18 Mo. App. 377; McCarthy v. Colvin, 9 Ad. & El. 607; Howard College v. Pace, 15 Ga. 486; Trimble v. Strother, 25 Ohio St. 378; Durham v. Bischof, 47 Ind. 211; Canty v. Shire of Stannell, 2 Vict. Law Rep. (Australia) 181.

Defendant was indebted to T for building a house, and agreed to pay the amount of the debt to the plaintiffs, in consideration of the release of the contract on the house. The plaintiffs were informed of this agreement by T, and requested payment of the defendant, who refused until the job was finished.

The defendant obtained a release of all liability to T, and it was held that the plaintiffs could not then recover from the defendant. Wood v. Moriarty, 15 R. I. 518.

Where by the terms of a composition agreement, the creditors agree to accept notes endorsed by T and G, and G dying, a circular letter is sent to all the creditors suggesting T as a substitute, and stating: "Should you deem his endorsement sufficient, please advise me promptly;" held, that a creditor who did not signify his intention until notes endorsed by T had been accepted by the other creditors was not bound to accept such notes, and having refused to do so, is at liberty to sue on his original cause of action. Danzig v. Gumersell, 27 Fed. Rep. 185.

**Consent.**—"Sweet is not proved ever to have said, 'I will take you, Robert, as my debtor, and discharge James;' he is not proved ever to have said or done that which would have the effect of discharging James." ABBOTT, C. J., in Cuxon v. Chadley, 3 B. & C. 591.

If the several classes of creditors of a corporation execute an agreement with the officers of the corporation, the effect of which is to substitute for all the debts and securities which exist against the corporation a mortgage under which bonds are to be issued to the creditors for the amount of their debts respectively, and thus place all the creditors on a common footing, but, in carrying out this agreement, there is a substantial departure from its terms and provisions, creditors who have executed the agreement are not bound to accept bonds under it, but are at liberty to stand on their original rights under previous mortgages. Miller v. Rutland etc. Co., 40 Vt. 399; s. c., 94 Am. Dec. 414.

The original parties to a contract absolutely assigned, and since assignment varied by arrangement with the assignees, brought suit thereon for the benefit of the assignees. There was no evidence of consent of the plaintiffs to the variation. Held, that they could

**6. Presumption.**—Novation is never presumed and must be clearly established by a full discharge of the original debt, the

not maintain the suit. *Litchfield v. Garrett*, 10 Mich. 426.

Whether there has been a consent by all parties is a question for the jury. *Dean v. Board of Education*, 73 Mich. 165.

"Under the pleadings and the evidence, we think that the vital controverted question of fact in the case is, whether by mutual agreement between all parties, Kerns and Bruley, or the committee, were substituted for the defendants, as debtors to the plaintiff in respect to the demand upon which this action was brought. That question was not submitted to the jury, but they were told that it was immaterial. For this error the judgment of the circuit court must be reversed." *Lynch v. Austin*, 51 Wis. 287.

An oral acceptance of a written order is not sufficient. *Rogers v. Union Stone Co.*, 130 Mass. 581; s. c., 39 Am. Rep. 478.

On an agreement to extinguish the defendant's debt by transfer of a debt due from the plaintiff to a third party, the agreement being in writing, and it being intended that the defendant's should be so, *held*, that the arrangement was not complete until he had signed. *Webber v. Mowbray*, 2 F. & F. 310.

In *California*, the assent of the creditor to the new contract may be subsequent to the arrangement between the parties to the original contract. *McLaren v. Hutchinson*, 22 Cal. 187; s. c., 83 Am. Dec. 59. But in this State the assent of the creditor is not necessary to enable him to take advantage of an agreement for his benefit.

**Examples.**—Cowan and Knowles, hauled logs for the defendants by the thousand and incurred several bills including the plaintiffs. Cowan and Knowles sold out all their "fixings" in the woods to the defendants who promised to pay the said bills. The plaintiffs called on the defendants who said the bill was good and they would pay it as they had agreed with Cowan and Knowles. *Held*, the defendants were bound. *Maxwell v. Haynes*, 41 Me. 559.

The defendant bought goods of plaintiff for use in his mill. Afterwards the mill was leased to the superintendent, and the plaintiff was so

notified, and later the superintendent gave the plaintiff a note for the amount signed "Old Dominion Paper Mills, by A. B., Manager." *Held* novation, but the defendant still remained liable. *Smith v. Watson*, 82 Va. 712.

Where the plaintiff agreed to sell property to A and the defendant, taking an assignment of the contract from A, accepted the conveyance from the plaintiff and agreed to fulfil the original contract, the defendant was estopped to deny the assent of A to the assignment. *Texas etc. Co. v. Gentry*, 69 Tex. 625.

A mere agreement by a purchaser of goods to pay the seller's debt to the plaintiff by giving a note does not constitute a novation where no note was given, although such purchaser may have made several cash payments to the plaintiff on account of the debt. *Rising v. Cummings*, 47 Vt. 345.

If a debtor deposit money for his creditor with a third person, and the creditor assents thereto and gives the depository a new credit on the footing of such deposit, the original debtor is discharged. *Swift v. Hathaway*, 1 Gall. (U. S.) 417.

Where one represents that he owes to the debtor of another a debt of equal amount, substitutes himself in place of the debtor by parol agreement with the creditor, fixes a time for payment and thus induces the creditor to discharge the debtor and trust exclusively to him, his undertaking to pay is not collateral, but original, and performance may be enforced whether he ever in fact owed anything to the debtor in whose stead he agreed to be bound or not. *Edenfield v. Canady*, 60 Ga. 456; *cf. Torbett v. Worthy*, 1 Heisk. (Tenn.) 107.

After all the parties have assented the novation is complete, and none of the parties can withdraw. *Williams v. Little*, 35 Vt. 323; *Surtees v. Hubbard*, 4 Esp. 203; *Hodges v. Eastman*, 12 Vt. 358; *Moert v. Moessard*, 1 M. & P. 8; *Bassett v. Hughes*, 43 Wis. 319; *Clement v. Clement*, 8 N. H. 472; *Holly v. Rathbone*, 8 Johns. (N. Y.) 148; *Ainslie v. Boynton*, 2 Barb. (N. Y.) 258; *Crowfoot v. Gurney*, 8 Bing. 372.

express terms of the agreement, or the acts of the parties, whose intention must be clear.<sup>1</sup>

**7. Performance.**—When the novation is established it is immaterial whether the substituted contract is ever performed or not, so far as the discharge of the original contract is concerned.<sup>2</sup>

1. *Parker v. Alexander*, 2 La. An. 188; *Cockrill v. Johnson*, 28 Ark. 193; *Chandler v. Herrick*, 19 Johns. (N. Y.) 132; *Short v. New Orleans*, 4 La. An. 281; *Goldschmidt v. Mayor etc. of New Orleans*, 5 La. An. 436; *Marsh v. Perry*, 6 La. An. 669; *Patterson v. Creditors*, 9 La. An. 228; *Overend v. Robinson*, 10 La. An. 728; *Rachel v. Rachel*, 11 La. An. 687; *Meyer v. Atkins*, 29 La. An. 586; *Levy v. Ford*, 41 La. An. 873. But *cf.* *Grover v. Sims*, 5 Blackf. (Ind.) 498; *Haydon v. Christopher*, 1 J. J. Marsh. (Ky.) 382.

"Nor will the courts apply the doctrine of presumption, to make out a novation or delegation that does not clearly appear. And, says Pothier, the reason of this law is, that a person shall not easily be presumed to abandon the rights which belong to him. And as a novation implies an abandonment by the creditor of the first claim to which the second is substituted, it is not to be easily presumed, and the parties ought expressly to state it." *Scott v. Atchison*, 36 Tex. 76; *Sharp v. Fly*, 9 Baxt. (Tenn.) 4.

"The *onus* is on the defendants, to show that the taking of the new policy was in discharge of the contract evidenced by the first policy, or that it was a *novation*, the whole question being one of intention to be established by facts." *McDonnell v. Alabama Gold L. Ins. Co.*, 85 Ala. 491; *Lee v. Green*, 83 Ala. 491; *Chaffee v. Railroad Co.*, 53 Vt. 345; *Keel v. Larkin*, 72 Ala. 493; *Marshall v. Marshall*, 42 Ala. 151.

Where a new firm assumes the obligations of a prior firm, slight circumstances only are necessary to presume a novation against a creditor who has knowledge of the transaction. *Register v. Dodge*, 61 How. Pr. (N. Y.) 107.

2. "An agreement to make a new contract, and that the new contract shall be accepted in satisfaction of the original one, if carried into effect, is an accord executed, and discharges the original cause of action, whether the new contract is ever performed or not. But there is no presumption of law, that where parties make a new contract the creditor shall receive his pay at a dif-

ferent time, or place, or in a different way from that originally stipulated, that the parties agree to accept the new contract in discharge of the old. The party who alleges such agreement for the discharge of the old debt is bound to prove a distinct agreement to that effect." *Woodward v. Miles*, 24 N. H. 289; *Morris v. Harveys*, 75 Va. 726; *Babcock v. Hawkins*, 23 Vt. 561.

"An acceptance in satisfaction of a debt of an accord or agreement, with mutual promises to perform, on which the party has a legal remedy for its nonperformance, is a good satisfaction of such debt although such promises are not performed." *Goodrich v. Stanley*, 24 Conn. 613. This principle has been repeatedly and fully sanctioned by modern cases—*Good v. Chessman*, 2 B. & Ad. 328; *Smith's Leading Cas.* 150; *Evans v. Powis*, 1 Wels. Hurl. & Gor. 601, where *PARKE B.*, says that for the new agreement to be a defence to the original debt, the plaintiff should have "agreed to accept the agreement itself, and not the performance of it, as a satisfaction for his debt, so that if it was not performed, his only remedy would be by an action for the breach of it, and not a right to recur to the original debt." The state of the accounts between the plaintiff and the party discharged by the novation is of no consequence after the novation. *Keller v. Beaty*, 80 Ga. 815.

**Trustee Process.**—The original debt cannot be reached by trustee process after the novation is complete. *Clough v. Giles*, 64 N. H. 73.

A being indebted to B, and C being indebted to A, it was agreed between all three that C should pay B the amount he owed A, unless on going to his office he should find that he had been summoned as the garnishee of A. After A left, C requested B to procure A's written order of payment. C went to his office and found no garnishee process had been served, but such process was served before B presented to C the written order of A. *Held* that the novation was complete when the condition prescribed by C was fulfilled, and the garnishee process did not im-

**III. NOVATION BETWEEN THE SAME PARTIES—1. Substitution of Contracts.**—The making of a new contract and the substitution thereof in the place and stead of the original contract before the breach of the latter, may operate as a discharge and extinguishment of the original contract, and so a novation of it.<sup>1</sup> The

pair B's right. *Edgell v. Tucker*, 40 Mo. 523.

**Insolvency of Debtor.**—The creditor assumes the risk of the insolvency of the new debtor. *Cadens v. Teasdale*, 53 Vt. 469; s. c., 38 Am. Rep. 607; *vide Drake v. Hill*, 53 Iowa 37; *Shaffer v. McKanna*, 24 Kan. 22; *Flanagin v. Hambleton*, 54 Md. 222.

1. *Chrisman v. Hodges*, 75 Mo. 413; *Lawrence v. Dale*, 3 Johns. Ch. (N. Y.) 23; *Flanagin v. Hambleton*, 54 Md. 222; *McDonough v. Kane*, 75 Ind. 181. And see *Flanders v. Day*, 40 Vt. 316; *Lister v. Clark*, 48 Iowa 168; *Roberts v. Wilkinson*, 34 Mich. 129; *Church v. Florence Iron Works*, 45 N. J. L. 129; *Burkham v. Mastin*, 54 Ala. 122; *Maxfield v. Terry*, 4 Del. Ch. 618; *Juilliard v. Chaffee*, 92 N. Y. 529; 2 *Addison on Contr.* \*1226; *Taylor v. Hilary*, 1 C. M. & R. 741.

Creditors of a railroad for money loaned to pay wages and overdue coupons took bonds in payment *Held*, this was a novation of their preferred debt and postponed it to prior mortgages. *Fidelity Ins. etc. Co. v. Shenandoah Valley R. Co.*, 86 Va. 1; s. c., 38 Am. & Eng. R. Cas. 559.

If a subsequent contract includes, and goes beyond, the terms of the first contract, the latter is superseded, and no action can be maintained thereon. *Munford v. Wilson*, 15 Mo. 540.

Where the parties to a contract disagree as to a part of the work to be done, and enter into a new agreement with respect to it, such new agreement is binding, and so much is taken out of the first contract. *Stewart v. Keteltas*, 36 N. Y. 388; *Howard v. Wilmington etc. R. Co.*, 1 Gill (Md.) 311.

Prior contracts are merged in and superseded by a subsequent contract on the same subject, which, as the last act of the parties, must be held to contain and express their true meaning and intention. *Stow v. Russell*, 36 Ill. 18; *Hargrave v. Conroy*, 19 N. J. Eq. 281. *Rhodes v. Thomas*, 2 Ind. 638; *Hadden v. Dimick*, 13 Abb. Pr., N. S. (N. Y.) 135.

A contract to erect a building was entered into and partially performed,

when the original contract was "revised," and a new one entered into for the erection of the same building. *Held*, under the circumstances, that the new one was designed to take the place of the first one, and to embody the whole agreement of the parties. *Mather v. Butler Co.*, 28 Iowa 253.

Where one contract has been made between two persons, and at a subsequent period, another contract (having reference to the same subject matter, but changing the relations of the first contract) is entered into, the last contract controls or rescinds the first (as the case may be), though there be no such effect expressed in the last contract. *Reed v. M'Grew*, 5 Ohio 375.

The complaint, after setting forth a contract, stated that it was afterwards modified by the parties, and in lieu thereof "a final contract" was executed by the parties, which final contract the complaint then set forth. *Held*, that by the terms of the complaint the first contract was *functus officio*, and could not form the basis of any cause of action, and must be struck out. *Chesbrough v. New York etc. R. Co.*, 26 Barb. (N. Y.) 9; s. c., 13 How. Pr. (N. Y.) 557.

Where the parties to a verbal agreement for the payment of a sum of money in a certain contingency passed a note for the amount, payable without condition, the condition, in the absence of fraud, will be held to be waived. *Swank v. Nichols*, 24 Ind. 199.

Plaintiffs were authorized by defendant and others to contract for certain grading, but the sum originally subscribed proving insufficient, notice was sent defendant of a meeting to make a new contract, which meeting he did not attend, and he was held liable only on the original contract to which he subscribed. *Berchorman v. Murken*, 2 E. D. Smith (N. Y.) 98.

One who receives partial compensation for articles furnished by him, and also subsequently accepts a new agreement, changing the mode of payment in satisfaction of his claim, cancelling at the same time the original agreement, cannot justify a trespass committed for the purpose of recovering

cancellation of the old contract is the consideration for the new one;<sup>1</sup> but the acceptance of another contract on the same consideration does not necessarily discharge a prior valid contract, unless there is an agreement to that effect, either express or implied.<sup>2</sup> One deed may be substituted for another, or a simple

such articles upon default of payment, on the ground that the original agreement was procured by fraud. *Sparks v. Leavy*, 1 Robt. (N. Y.) 530.

A defence of novation was allowed in a suit on a promissory note given for furniture where the plaintiff had entered into a written agreement to wait for payment until a certain contingency, or to take back the furniture. *Cannon v. Ford*, 1 Menzies (Cape of Good Hope) 95.

**Written contract** as to the effect of a parol agreement on a prior written one, *cf.* the following cases:

It is competent for the parties to a written agreement, not within the statute of frauds, at any time before breach of it, by a new contract not in writing, in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted on what will then be left of the written contract. *Hewitt v. Brown*, 21 Minn. 163.

A liability evidenced by a written contract cannot be discharged by an executory parol agreement. *Walker v. Greene*, 22 Ala. 679.

A railroad owed wages and other privileged debts, and also overdue coupons. C & Co. held a large amount of these coupons, and furnished the corporation money to pay portions of said debts, taking its note therefor. This indebtedness was funded and income bonds were issued, of which C & Co. took enough, at 60 cents on the dollar, to equal the amount of their claim. These bonds were issued, "to pay and provide for the floating indebtedness," and the interest thereon was guaranteed by another railway corporation. No express agreement was made as to whether the former claims of C & Co. should be extinguished. C & Co. also took prior mortgage bonds as collateral security for the payment of their income bonds. *Held*, that the acceptance of the bonds constituted a novation of the debt, and that the debt of C & Co. was postponed to those of the prior mortgagees. *Fidelity Ins. etc. Co. v. Shenandoah Val-*

*ley R. Co.*, 86 Va. 1; *cf.* *Gibert v. Washington etc. R. Co.*, 33 Gratt. (Va.) 586.

**1. Consideration.**—*Cutter v. Cochran*, 116 Mass. 408; *Rollins v. Marsh*, 128 Mass. 116; *Little v. Dist. of Columbia*, 19 Ct. of Cl. 323; *Thornton v. Guice*, 73 Ala. 321; *Bronson v. Fitzhugh*, 1 Hill (N. Y.) 186; *Marine etc. Min. etc. Co. v. Bradley*, 105 U. S. 175; *Farrar v. Toliver*, 88 Ill. 408; *Windham v. Doles*, 59 Ga. 265; *Shaffer v. McKanna*, 24 Kan. 22; *Perkins v. Hoyt*, 35 Mich. 506; *Lee v. Davis*, 70 Ind. 464; *Perry v. Buckman*, 33 Vt. 7; *Connelly v. Devoe*, 37 Conn. 570; *Calhoun v. Calhoun*, 37 Miss. 668; *Spann v. Baltzell*, 1 Fla. 301; s. c., 46 Am. Dec. 346; *Thurston v. Ludwig*, 6 Ohio St. 1; s. c., 67 Am. Dec. 328.

The defendants, intending to end a contract with the plaintiffs, proposed to pay a certain sum for a release from the contract. In an action by the plaintiffs for the breach of the original contract, *held*, that the proposition was an offer of a compromise which was not binding unless accepted. That, if accepted, the consideration which gave it validity as an agreement was the release of the former contract. That, if the plaintiffs intended to hold the defendants to the terms of the offer, they should have sued on the agreement of compromise, if an agreement was concluded; and that they could not sue on the original contract, and use the offer of the defendants as a liquidation of the damages they had sustained by a breach of the original contract. *Union Locomotive etc. Co. v. Erie R. Co.*, 37 N. J. L. 23; *Bishop v. Busse*, 69 Ill. 403.

An agreement to make a new contract, and that the new contract shall be accepted in satisfaction of the original one, if carried into effect, is an accord executed, and discharges the original cause of action, whether the new contract is ever performed or not. *Woodward v. Miles*, 24 N. H. 289.

**2. Consent.**—*Palmer v. Yager*, 20 Wis. 91; *Meshke v. Van Doren*, 16 Wis. 319; *Eastman v. Porter*, 14 Wis. 39; *Hobson v. Davidson's Syndic*, 8 Martin (La.) 422; s. c., 13 Am. Dec. 294.

contract may be substituted for a sealed instrument.<sup>1</sup>

Where the consideration of a specialty has failed, and by the agreement of the parties, a new consideration is substituted, such agreement should be clearly proved; and payments on the specialty, after the consideration has failed, will not, unexplained, be evidence of such agreement. *Belk v. Perry*, 1 Rich. (S. Car.) 5.

But the new contract may supersede the old one to prevent recovery on it by the necessary implication of terms. *Patmore v. Colburn*, 1 C. M. & R. 65; *Munford v. Wilson*, 15 Mo. 540; *Chesborough v. New York etc. R. Co.*, 26 Barb. (N. Y.) 9; *Reed v. McGrew*, 5 Ohio 375.

"Before the breach of the first agreement, a new agreement is entered into, varying the contract in an essential part, the time of payment. The latter, then, is a substituted contract, and is an answer to an action upon the former. The plea is not a plea of accord and satisfaction, and does not require an averment of performance." *Taylor v. Helary*, 1 C. M. & R. 741.

Plaintiff and defendant entered into a written contract for the building of a house. The plaintiff began work and was paid for the work done. And then certain changes were decided upon and a new contract drawn up fixing a new price. *Held*, that the second contract was a substitution for the first, and evidence that it was not so intended by the parties is inadmissible. *Mather v. Butler Co.*, 28 Iowa 253.

A compromise between debtor and creditor by which the amount, term and mode of payment, rate of interest and nature of security of the old debt is changed, is not a novation unless such intent is clearly expressed. *Baker v. Frellsen*, 32 La. An. 822.

1. This is the modern and more approved doctrine. *Chesapeake etc. Canal Co. v. Ray*, 101 U. S. 522; *Brown v. Brine*, L. R., 1 Ex. D. 5; *Herzog v. Sawyer*, 61 Md. 344; *White v. Walker*, 31 Ill. 422; *McGraun v. North Lebanon R. Co.*, 29 Pa. St. 82; *Law v. Forbes*, 18 Ill. 568; *Baird v. Blagrove*, 1 Wash. (Va.) 170; *Phelps v. Seely*, 22 Gratt. (Va.) 573; *Bolt v. Dawkins*, 16 S. Car. 198; *Byrd v. Bertrand*, 7 Ark. 321.

Where a sealed contract is followed by one not under seal, relative to the same subject matter, if both can be exe-

cuted together, the one is not substituted for the other.

Where there is in fact a substitution of a contract not under seal, for one that is under seal, the substitution operates as an abandonment of the sealed contract, except as matter of reference for the terms of the parol contract which has suspended it.

Where a contract under seal is altered by parol it all becomes parol; but a mere additional parol agreement, not changing or modifying the one under seal, will not have this effect, nor will a stipulation releasing or waiving part performance. *Lawall v. Rader*, 2 Grant Cas. (Pa.) 426; *Vaughn v. Ferris*, 2 W. & S. (Pa.) 46; *Whiting v. Heslep*, 4 Cal. 327; *Hydeville Co. v. Eagle R. & Slate Co.*, 44 Vt. 395; *French v. New*, 28 N. Y. 147; *Acker v. Blender*, 33 Ala. 230.

The old common law doctrine that is still followed in some States was that a sealed executory contract cannot be released or rescinded by a parol agreement. *Dela Croix v. Bulkley*, 13 Wend. (N. Y.) 71; *Sinnard v. Patterson*, 3 Blackf. (Ind.) 353; *Harper v. Hampton*, 1 Har. & J. (Md.) 622; *Barnett v. Barnes*, 73 Ill. 216; *Huine v. Taylor*, 63 Ill. 43; *Perry v. Clymore*, 3 McCord L. (S. Car.) 245; *Miller v. Washburne*, 117 Mass. 371; *Harris v. Goodwin*, 2 M. & Gr. 405; *Doe v. Gladwin*, 6 Q. B. 593; *Rawlinson v. Clarke*, 14 M. & W. 187. And *cf.* *Brookshire v. Brookshire*, 8 Ired. L. (N. Car.) 74; s. c., 47 Am. Dec. 341; *Pickler v. State*, 18 Ind. 226; *Woodberry v. Duvall*, 15 Ind. 164.

A subsequent executory contract, to be operative as a defeasance or modification of a previous contract by specialty, must be under seal, whether it have a consideration or not, and whether it be made before or after a breach of the previous contract. *Eddy v. Graves*, 23 Wend. (N. Y.) 82.

A subsequent parol contract cannot be admitted to control or defeat a deed, or attach a condition or defeasance to it; nor can a sealed executory contract be released or rescinded by a parol executory contract. *Miller v. Hemphill*, 9 Ark. 488.

A subsequent agreement under seal, written upon and referring to a former agreement not under seal, which imposes a penalty in case the original contract should not be performed, does not

**2. Payment by Note—(a) General Rule.**—A novation of this class takes place when a note of a debtor is taken in payment of a pre-existing debt; here the original obligation is extinguished, and a new liability on the note substituted. It must be expressly understood between the parties, however, that the note is taken in payment; otherwise the right of action on the original debt is merely suspended,<sup>1</sup> and the intent of the parties is a

convert such original contract into a deed. *Waughop v. Weeks*, 22 Ill. 350.

1. Story Prom. Notes, §§ 404, 438; 2 Daniel Neg. Inst., § 1260; 2 Randolph Bills Notes, § 750; 2 Am. Lead. Cas., *Tobey v. Barker* (4th ed.), p. 247; *Good v. Cheesman*, 2 B. & Ad. 328; *Kearslake v. Morgan*, 5 T. R. 513; *Currie v. Misa*, L. R., 10 Exch. 153; *Baker v. Walker*, 14 M. & W. 465; *Belshaw v. Bush*, 11 C. B. 191; *Chamberlain v. Perkins*, 55 N. H. 237; *Ward v. Howe*, 38 N. H. 35; *Seymour v. Darrow*, 31 Vt. 122; *Bill v. Porter*, 9 Conn. 23; *Webster v. Howe Machine Co.*, 54 Conn. 394; *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *New York State Bank v. Fletcher*, 5 Wend. (N. Y.) 85; *Thayer v. Peck*, 93 Ill. 357; cf. *Morrison v. Smith*, 81 Ill. 221; *Smith v. Bettger*, 68 Ind. 254; s. c., 34 Am. Rep. 256; and cf. *Krutsinger v. Brown*, 72 Ind. 466; *Hughes v. Israel*, 73 Mo. 538; *Brown v. Olmstead*, 50 Cal. 162; *The Kimball*, 3 Wall. (U. S.) 37; *Peter v. Beverly*, 10 Pet. (U. S.) 532; *Allen v. King*, 4 McLean (U. S.) 128; *Hunter v. Moul*, 98 Pa. St. 13; s. c., 42 Am. Rep. 610; *Haines v. Pearce*, 41 Md. 221; *Poole v. Rice*, 9 W. Va. 73; *Feamster v. Withdraw*, 12 W. Va. 611; *Gordon v. Price*, 10 Ired. L. (N. Car.) 385; *Mars v. Conner*, 9 S. Car. 70; *Commercial Bank v. Bobo*, 9 Rich. L. (S. Car.) 31; *May v. Gamble*, 14 Fla. 467; *Myatts v. Bell*, 41 Ala. 222; *Day v. Thompson*, 65 Ala. 269; *Foster v. Hill*, 36 N. H. 526; *Johnson v. Cleaves*, 15 N. H. 332 (*held* not payment as no agreement was found); *Clark v. Savage*, 20 Conn. 258; *Dougal v. Cowles*, 5 Day (Conn.) 511 (not payment); *Feldman v. Beier*, 78 N. Y. 293; *Walsh v. Lennon*, 98 Ill. 27; s. c., 38 Am. Rep. 75; *Hoodless v. Reid*, 112 Ill. 105; *Belleville Sav. Bank v. Bornman*, 124 Ill. 200; *Howard v. Jones*, 33 Mo. 583; *Welch v. Allington*, 23 Cal. 322; *Wallace v. Agry*, 4 Mason (U. S.) 342; *League v. Waring*, 85 Pa. St. 244; *Brown v. Scott*, 51 Pa. St. 357; *Glenn v. Smith*, 2 Gill & J. (Md.) 493; s. c., 20 Am. Dec. 452; *Lewis v. Davison*, 4 M. & W. (Eng.) 654; *Lee v. Green*, 83 Ala. 491; *Guion v. Doherty*,

43 Miss. 538; *Parlee v. Bedford*, 51 Miss. 84; *Wadlington v. Covert*, 51 Miss. 631; *Henry v. Conley*, 48 Ark. 267; *Brugman v. McGuire*, 32 Ark. 733; cf. *Carlton v. Buckner*, 28 Ark. 66; *Emerine v. O'Brien*, 36 Ohio St. 491; *Riverside Iron Works v. Hall*, 64 Mich. 165; *Case v. Seass*, 44 Mich. 195; *Breitung v. Lindauer*, 37 Mich. 217; *Matteson v. Ellsworth*, 33 Wis. 488; s. c., 14 Am. Rep. 766; *Mehlberg v. Tisher*, 24 Wis. 607; *Farwell v. Grier*, 38 Iowa 83; *Edwards v. Trulock*, 37 Iowa 244; *Mims v. McDowell*, 4 Ga. 182; *Middlesex v. Thomas*, 20 N. J. Eq. 39; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *Fry v. Patterson*, 49 N. J. L. 612.

"To whatever cause the doctrine of the present day may be attributed, we think the doctrine itself amounts to this: that a bill of exchange is not, in general, to be considered as a satisfaction of a precedent debt, unless it be paid and accepted as such, or in case it be conditionally paid; unless it appear that an injury has resulted to the debtor, who pays the bill in consequence of the laches of the creditor, who receives it; as, for instance, if, in the meantime, the drawers fail; or if the recourse of the person from whom the bill is received, against the drawer, or the endorsers, be thereby lost." *Gallagher v. Roberts*, 2 Wash. (U. S.) 191.

"Upon this subject, the general rule seems to be that if one indebted to another by simple contract, give his creditor a promissory note, drawn by himself, for the same amount, without any new consideration, the new note shall not be deemed a satisfaction of the original debt, unless so intended and accepted by the creditor." *Weakly v. Bell*, 9 Watts (Pa.) 273; s. c., 36 Am. Dec. 116.

The giving a creditor a bill of exchange, in compliance with an award of arbitrators, *held*, not to be a renewal of the original debt. *Ware v. Willis*, 45 Ala. 120.

A creditor who has agreed to accept a promissory note in payment of a debt cannot, by returning the note, rescind



question for the jury;<sup>1</sup> the burden of proof is on the party alleg-

the contract, for the purpose of suing upon the original cause of action. *Kappes v. White etc. Lumber Co.*, 1 Ill. App. 280.

In a transaction by which a draft is substituted in place of a note, to constitute a novation of the debt, it must be established clearly that it was the intention of the parties that the draft should be taken in absolute payment of the note. *Helme v. Middleton*, 14 La. An. 484.

Where a party receives back a draft given by him in payment, upon an agreement to replace it by an equivalent, no novation takes place if he fails to do so. *Taylor v. Simon*, 14 La. An. 351.

The execution by an endorser of his own note, which is given and accepted in full payment of the note on which he is liable as endorser, constitutes a novation under Civil Code Cal., § 1530, providing that "novation is the substitution of a new obligation for an existing one," and is made (section 1531) "by the substitution of a new obligation between the same parties with intent to extinguish the old obligation;" and the maker of the first note becomes liable to the endorser, though the holder, instead of cancelling it, endorsed it without recourse to the endorser. *Stanley v. McElrath* (Cal. 1889), 22 Pac. Rep. 673.

The note is payment if transferred. *Donnelly v. Dist. of Columbia*, 119 U. S. 339; *Harris v. Johnston*, 3 Cranch (U. S.) 311; *Clark v. Young*, 1 Cranch (U. S.) 181; *Holmes v. D'Camp*, 1 Johns. (N. Y.) 33; s. c., 3 Am. Dec. 293; *McNeil v. McCamley*, 6 Tex. 163; *Wilbur v. Jernegan*, 11 R. I. 113; *Union Bank v. Smiser*, 1 Sneed (Tenn.) 501; *Heath v. White*, 2 Utah 474; *Young v. Hibbs*, 5 Neb. 433; *Kermeyer v. Newby*, 14 Kan. 164 (check is no payment until paid); *Canonsburg Iron Co. v. Union Nat. Bank* (Pa. 1886), 6 Atl. Rep. 574; *Lee v. Hollister*, 5 Fed. Rep. 752; *Lawrence v. Morrisania Steamboat Co.*, 12 Fed. Rep. 850; *Brown v. Dunkel*, 46 Mich. 29; *First Nat. Bank v. Case*, 63 Wis. 504; *Paine v. Voorhees*, 26 Wis. 526.

**Non-negotiable Note.**—But a debtor's non-negotiable note does not seem to be regarded as payment. *Greenwood v. Curtis*, 4 Mass. 93; *Trustees etc. in Dut-ton v. Kendrick*, 12 Me. 381.

So held in *Indiana* of notes not pay-

able at a bank. "A promissory note not payable at a bank, and not governed by the law merchant, though given for a precedent debt, will not operate as a payment or in extinguishment of the precedent debt, in the absence of an express agreement by and between the parties that it should so operate." *Jeffries v. Lamb*, 73 Ind. 202. And cf. *Albright v. Griffin*, 78 Ind. 182; *Waring v. Hill*, 89 Ind. 497.

A note may be taken with other consideration in payment of an existing debt of smaller amount. *Keough v. McNitt*, 6 Minn. 513.

**Check.**—A check is not payment until paid. *Small v. Franklin Min. Co.*, 99 Mass. 277; *Ocean Tow Boat Co. v. Ship Ophelia*, 11 La. An. 28; *Canonsburg Iron Co. v. Union Nat. Bank* (Pa. 1886), 6 Atl. Rep. 574.

**Void Note.**—If the note given in payment is invalid, it is no payment. *Es parte Blackburne*, 10 Ves. 204; *Baker v. Bonesteel*, 2 Hilt. (N. Y.) 397; *Kottwitz v. Bagby*, 16 Tex. 656; *Markle v. Hatfield*, 2 Johns. (N. Y.) 455; s. c., 3 Am. Dec. 446; *Ritter v. Singmaster*, 73 Pa. St. 400; *Semmes v. Wilson*, 5 Cranch (C. C.) 285. So if the note is void for usury. *Central City Bank v. Dana*, 32 Barb. (N. Y.) 296; *Fleischmann v. Stern*, 24 Hun (N. Y.) 265; *Chastain v. Johnson*, 2 Bailey L. (S. Car.) 574. Even if the original note has been surrendered. *Winsted Bank v. Webb*, 39 N. Y. 325; s. c., 100 Am. Dec. 435. And *vide Gerwig v. Sitterly*, 56 N. Y. 214; *Hammond v. Hopping*, 13 Wend. (N. Y.) 505; *Austin v. Chittenden*, 33 Vt. 553. So where the note has been altered. *Stoman v. Cox*, 1 C. M. & R. 471; *Merrick v. Boury*, 4 Ohio St. 60; cf. *Morrison v. Welty*, 18 Md. 169; *Bank of Ohio Valley v. Lockwood*, 13 W. Va. 392; s. c., 31 Am. Rep. 768. But if the payee makes the alteration the debt is discharged. *Kennedy v. Crandell*, 3 Lans. (N. Y.) 1; *Plyler v. Elliott*, 19 S. Car. 257; *Smith v. Mace*, 44 N. H. 553 (altered fraudulently). So of a forged note. *Markle v. Hatfield*, 2 Johns. (N. Y.) 455; s. c., 3 Am. Dec. 446; *Aldrich v. Jackson*, 5 R. I. 218; *Emerine v. O'Brien*, 36 Ohio St. 491; *Goodrich v. Tracy*, 43 Vt. 314 (forged endorsement); *Eagle Bank v. Smith*, 5 Conn. 71, and cf. *Lovinger v. First Nat. Bank*, 81 Ind. 354.

1. *Lyman v. Bank of U. S.*, 12 How. (U. S.) 244; *Root v. Burt*, 118 Mass.

ing that the note was given in payment.<sup>1</sup>

(b) *Massachusetts Rule*.—The rule has been laid down in *Massachusetts* and followed in other States that a negotiable note of the debtor is *prima facie* a payment of an existing debt.<sup>2</sup> The rule goes to the presumption only, and the presumption may be rebutted by evidence that the note was not taken in payment.<sup>3</sup>

521; *Connecticut Trust etc. Co. v. Melendy*, 119 Mass. 449; *Darnall v. Morehouse*, 45 N. Y. 64; *Brown v. Scott*, 51 Pa. St. 357; *Sykes v. Gerber*, 98 Pa. St. 179; *Crabtree v. Rowand*, 33 Ill. 422; *Weston v. Wiley*, 78 Ind. 54; *First Nat. Bank v. Nugen*, 99 Ind. 160; *Bullew v. McGillicuddy*, 2 Dana (Ky.) 90; *Gardner v. Gorham*, 1 Doug. (Mich.) 507; *Dogan v. Aahbey*, 1 Rich. (S. Car.) 36; *Johnson v. Clarke*, 15 S. Car. 72; *Merrick v. Boury*, 4 Ohio St. 60; *Myatts v. Bell*, 41 Ala. 222; *Brugman v. McGuire*, 32 Ark. 733; *Salomon v. Pioneer etc. Co.*, 21 Fla. 374; s. c., 58 Am. Rep. 667; *McGuire v. Bidwell*, 64 Tex. 43. And see *Cole v. Sackett*, 1 Hill (N. Y.) 516; *Patapasco Ins. Co. v. Smith*, 6 Har. & J. (Md.) 166; s. c., 14 Am. Dec. 268.

The jury must be satisfied that it was the agreement of the parties that the note was to be taken in payment, and without such agreement, the debtor will be held on the original debt even though the note is credited as payment on the books of the creditor. *Follett v. Steele*, 16 Vt. 30. The evidence of intention must be strong. *Shepard v. Allen*, 16 Kan. 182.

1. *Wilbur v. Jernegan*, 11 R. I. 113; *Nightingale v. Chaffee*, 11 R. I. 609; s. c., 23 Am. Rep. 531; *Kelsey v. Rosborough*, 2 Rich. (S. Car.) 241; *Merrick v. Boury*, 4 Ohio St. 60; *Geib v. Reynolds*, 35 Minn. 331; *Foster v. Hill*, 36 N. H. 526; *Aultman etc. Co. v. Hetherington*, 42 Wis. 622; *Preston v. Jones*, 3 Ill. App. 632; *Haines v. Pearce*, 41 Md. 221. Such an agreement may be implied. *Haines v. Pearce*, 41 Md. 221. And *vide Swert v. Redman*, 1 Q. B. D. 536; *Miller v. Thorn*, 56 N. Y. 402.

"A promissory note given for an antecedent debt does not discharge the debt, unless expressly given and received as absolute payment; and the burden of proof is on the party asserting the fact to show that it was so given and received, the presumption being to the contrary." *Geib v. Reynolds*, 35 Minn. 331.

But it is clear that if the note is received in payment or as security, and

its value is diminished by the laches of the holder, the loss must fall on him. *Peacock v. Pursell*, 14 C. B., N. S. 728.

2. *Massachusetts*.—*Parham Sewing Machine Co. v. Brock*, 113 Mass. 194; *Green v. Russell*, 132 Mass. 538; *Thatcher v. Dinsmore*, 5 Mass. 299; *Dodge v. Emerson*, 131 Mass. 467; *Ely v. James*, 123 Mass. 36.

*Maine*.—*Bangor v. Warren*, 34 Me. 324; s. c., 56 Am. Dec. 657; *Bunker v. Barron*, 79 Me. 62; *Kidder v. Knox*, 48 Me. 551; *Ward v. Brown*, 56 Me. 61; *Mehan v. Thompson*, 71 Me. 492.

*Vermont*.—*Wernet v. Missisquoi Lime Co.*, 46 Vt. 458; *Ricker v. Adams*, 59 Vt. 154; *Wait v. Brewster*, 31 Vt. 516; *Dickinson v. King*, 28 Vt. 378; *Arnold v. Sprague*, 34 Vt. 402.

*Indiana*.—*Smith v. Bettger*, 68 Ind. 254; s. c., 34 Am. Rep. 256; *Weston v. Wiley*, 78 Ind. 54; *Nixon v. Beard*, 111 Ind. 137; *Grant v. Monticello*, 71 Ind. 58; *Teal v. Spangler*, 72 Ind. 380; *cf. Matasce v. Hughes*, 7 Oreg. 39; s. c., 33 Am. Rep. 696; *Hunt v. Boyd*, 2 La. 109. Proof of express agreement is not necessary. *White v. Jones*, 38 Ill. 159.

"It would seem very clear that the taking of new notes in a new form, payable at periods postponed beyond the time of the maturity of the previous notes, and especially taking them secured by the introduction of a new endorser, whose name was not on any of the original notes, accompanied with the further fact of the cancelling of the original notes, would fully authorize the presumption that the three new notes were received in payment and discharge of the balance due on the former notes, unless the presumption be rebutted by other evidence." *Huse v. Alexander*, 2 Met. (Mass.) 157.

3. *Amos v. Bennett*, 125 Mass. 123; *Re Clap*, 2 Low. (U. S.) 226; *Rindge v. Breck*, 10 Cush. (Mass.) 43; *Britts v. Dean*, 2 Met. (Mass.) 76; s. c., 35 Am. Dec. 389; *Appleton v. Parker*, 15 Gray (Mass.) 173; *vide Milliken v. Whitehouse*, 49 Me. 527; *Collamer v. Langdon*, 29 Vt. 32; *White v. Jones*, 38 Ill. 159; *Hudson v. Bradley*, 2 Cliff. (U. S.)

(c) *Renewal*.—A note taken in renewal of a former note is not regarded as payment of it.<sup>1</sup>

#### IV. NOVATION BY SUBSTITUTION OF A NEW DEBTOR—1. Delegation.

—This kind of novation is called in the civil law delegation. The original debtor, in order to be liberated from his creditor, gives him a third person, who becomes bound in his stead to the creditor or to the person appointed by him.<sup>2</sup> A delegation is

130; *Fowler v. Ludwig*, 34 Me. 455 (where a receipt was given for the original debt).

"The taking of the note of the debtor in payment and the giving of a receipt in full does not establish an agreement to take a note absolutely in payment, and is not an extinguishment of the original debt." *Feldman v. Beier*, 78 N. Y. 293; *Jagger Iron Co. v. Walker*, 76 N. Y. 521. Parol evidence is admissible to show the intent with which the note was given. *Graves v. Shulman*, 59 Ala. 406; *First Nat. Bank v. Nugen*, 99 Ind. 160. And *vide Varner v. Nobleborough*, 2 Me. 121; s. c., 11 Am. Dec. 48; *Hale v. Rice*, 124 Mass. 292. Where the taking of a note would deprive the taker of some substantial benefit, or where he has other security, that has a strong tendency to show that the note was not taken in payment. *Curtis v. Hubbard*, 9 Met. (Mass.) 328; *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158; s. c., 51 Am. Dec. 59; *Appleton v. Parker*, 15 Gray (Mass.) 173; *Palmer v. Elliot*, 1 Cliff. (U. S.) 63. And the presumption is controlled where the effect is to deprive the creditor of any security. *Parham Sewing Machine Co. v. Brock*, 113 Mass. 194. And *vide Ely v. James*, 123 Mass. 36; *Lovell v. Williams*, 125 Mass. 439; *Re Clap*, 2 Low. (U. S.) 226. The rule here, too, does not apply to non-negotiable notes. Trustees etc. of *Dutton v. Kendrick*, 12 Me. 381; *Edmond v. Caldwell*, 15 Me. 340; *Cadens v. Teasdale*, 53 Vt. 469; s. c., 38 Am. Rep. 697; *Walt v. Brewster*, 31 Vt. 516.

1 *Christian v. Newberry*, 61 Mo. 446; *Partridge v. Williams*, 72 Ga. 807; *Davis v. Dunn*, 74 Ga. 36; *Cheltenham Stone etc. Co. v. Gates Iron Works*, 124 Ill. 625; *Woods v. Woods*, 127 Mass. 141; *Whitton v. Mayo*, 114 Mass. 170; *Waydell v. Luer*, 5 Hill (N. Y.) 448; *Gregory v. Thomas*, 20 Wend. (N. Y.) 17; *Benton v. Martin*, 52 N. Y. 571; s. c., 40 N. Y. 345; *National Bank v. Bigler*, 83 N. Y. 51; *Hobson v. Davidson's Syndic*, 8 Mart. (La.) 431; s. c., 13 Am. Dec. 294; *Bank of America v. McNeil*, 10 Bush (Ky.) 54; *cf. Bank of Com. v.*

*Letcher*, 3 J. J. Marsh. (Ky.) 195; *Reeder v. Nay*, 95 Ind. 164; *Lee v. Hollister*, 5 Fed. Rep. 752. *Contra*, that the note is merged. *Slaymaker v. Gundacker*, 10 S. & R. (Pa.) 75; *Nichol v. Bate*, 10 Yerg. (Tenn.) 429; *Hill v. Bostick*, 10 Yerg. (Tenn.) 410. But the parties may always agree that the new note is to be taken in payment. *Crocket v. Trotter*, 1 Stew. & P. (Ala.) 446; *Weakly v. Bell*, 9 Watts (Pa.) 273; s. c., 36 Am. Dec. 116; *Morris v. Harveys*, 75 Va. 726. And it is "a question for the jury whether there was any such agreement. *Brown v. Scott*, 51 Pa. St. 351; *Hart v. Boller*, 15 S. & R. (Pa.) 162; s. c., 16 Am. Dec. 156.

**Return of Old Note.**—The return of the old note is evidence to prove an intention to take the new note in payment, but not conclusive evidence. *Jagger Iron Co. v. Walker*, 76 N. Y. 522; *Parrott v. Celby*, 71 N. Y. 597. Even where the new note has been put in judgment, if there has been no satisfaction. *Cole v. Sackett*, 1 Hill (N. Y.) 516; *First Nat. Bank v. Morgan*, 6 Hun (N. Y.) 346; *Winsted Bank v. Webb*, 39 N. Y. 325; s. c., 100 Am. Dec. 435; *Bates v. Rosekrans*, 37 N. Y. 409. See *contra*, *Smith v. Harper*, 5 Cal. 329; *Morgan v. Creditors*, 1 La. 527; *Morris v. Harveys*, 75 Va. 726 (even though the new note is not paid).

It has been held in *New York* that as a renewal in a bank is by common banking custom treated as an extinguishment of the old note, the same effect should be given to it by the courts. *Phoenix Ins. Co. v. Church*, 81 N. Y. 226; s. c., 37 Am. Rep. 494.

Where the renewal note was sent to the holder with the request to return the original note, it was held that the old note was discharged, although the payee retained both. *Sage v. Walker*, 12 Mich. 425. But *vide Auburn City Nat. Bank v. Hunsiker*, 72 N. Y. 252, *Fisher v. Marvin* 47 Barb. (N. Y.) 159.

2. "Suppose A owes B £100, and B owes C £100, and the three meet and it is agreed between them that A shall pay C the £100; B's debt is extinguished, and

C may recover the same against A." Per BULLER, J., in *Tatlock v. Harris*, 3 T. R. 174, 180.

If the promise of A to C is conditional, as to pay whatever may hereafter be found due from A to B, and after such amount is ascertained, but before it is paid, B becomes bankrupt, still C may sue A for the amount of A's debt to B. *Crowfoot v. Gurney*, 9 Bing. 372.

F sold property to A, receiving A's notes payable in one, two and three years, and executed his bond to convey the premises when the notes had been paid. A sold to B his interest in said property, and a deed was made to which the three were parties, reciting the original sale and the new one, whereby F agreed to surrender to A his three notes, and accept in their place three notes of B, to be drawn as of the same date, to run the same times, and bear the same rate of interest. The notes were not paid at maturity, and the estate was sold for the payment of the balance of the purchase money; but the net proceeds of the sale being insufficient, F filed a petition for a writ of *fi. fa.* against the said A and B, which was issued. On appeal, it was held, that F, by surrendering the notes given by A, surrendered the debt for which they stood, and that the acceptance of B's notes was a novation. *Mailhouse v. Frazier*, 25 Md. 96; *Thompson v. Percival*, 5 B. & Ad. 925; s. c., 3 Nev. & Man. 171; *Bird v. Gammon*, 3 Bing. N. C. 883; *Wilson v. Coupland*, 5 B. & Ald. 228; *Karr v. Porter*, 4 Houst. (Del.) 297; *Van Epps v. McGill*, Hill & Supp. (N. Y.) 109.

The purchaser of land gave his notes for the price which were endorsed to the plaintiff. The notes were then renewed and new security and endorsement were given. *Held*, that in a suit on them, the maker cannot set up a partial failure of consideration in the original trade (a shortage of 100 acres). *Windham v. Doles*, 59 Ga. 263.

An order drawn by A on B in favor of C in pursuance of a verbal agreement of all three, that B shall pay C what B owes A, who is owing C the same amount, is admissible to show the exact amount B has assumed to pay although he has not accepted it. *Wright v. McCully*, 67 Mo. 134.

"Kursteiner was a creditor of Hughes, and Warren was a creditor of Kursteiner against whom he had obtained a judgment for his debt. All three met, and it was then agreed that Hughes

should pay to Warren the amount that he owed to Kursteiner, and that Warren in consideration of Hughes' undertaking to do so should release his claim against Kursteiner. Kursteiner was released from the debt he owed Warren, and Hughes was in effect released from the claim that Kursteiner had on him. Hughes, however, afterwards refused to pay Warren. We do not think that his refusal was justified. Because Kursteiner was dishonest enough to sue Hughes, that is no reason why Warren should not be paid. It may prove Kursteiner's dishonesty, but it cannot release Hughes from the agreement he made with Warren." *Hughes v. Warren*, 3 Australian Jurist 65.

A sold machinery to B with a guaranty as to its working capacity. B refused to accept it as not in accordance with the guaranty. A, B and C then agreed that C should take the goods, A agreeing to release B from all claim, and C undertaking to repay B for his advances to A. *Held* that B was not a vendor to C and so not entitled to any vendor's lien. *Claycomb v. Bisbee*, 38 La. An. 575.

**Wages Cases.**—Plaintiff boarded employees of defendant under an agreement with them and defendant that payment should be made from their wages. *Held*, a novation and defendant was entitled to retain the amount from the wages. *Jacoby v. O'Hearn*, 32 Mo. App. 566; *Sterling v. Ryan*, 72 Wis. 36; s. c., 7 Am. St. Rep. 818; *Bull v. Brockway*, 48 Mich. 523; *Schuster v. Kansas City etc. R. Co.*, 60 Mo. 290.

B agreed to work for C, the amount of B's wages to be paid to A, who was to credit the amount against B's indebtedness to A. *Held* not a contract of novation, but that B was the agent of A, who virtually sold B's services to C. *Dwyer v. Gaylor*, 12 R. I. 263.

**New Municipalities.**—"When an old [municipal] corporation is dissolved and a new one created substantially embracing the same territory as the old, the new municipality becomes liable as successor for the debts of the old, although the respective charters differ in many respects, and consequently an action at law will lie." *Brewis v. Duluth*, 13 Fed. Rep. 334; *Broughton v. Pensacola*, 93 U. S. 266. So, too, if a municipality has been abolished and its territory divided among other municipalities, then a creditor may pursue his demand against the latter for their equitable proportions thereof. *Laramie*

made by the concurrence of three parties, and there may be a fourth.<sup>1</sup> It includes a novation by the extinction of the debt from the person delegating and the obligation contracted in its stead by the party delegated.<sup>2</sup> Commonly, indeed, there is a double novation, for the party delegated is commonly a debtor

*Co. v. Albany Co.*, 92 U. S. 307; *New Orleans v. Clark*, 95 U. S. 644; *Mt. Pleasant v. Beckwith*, 100 U. S. 514; *State v. Lake City*, 25 Minn. 404; *Dillon Mun. Corp.*, § 124, *et seq.* *O'Connor v. Memphis*, 13 Cent. Law J. 150.

**Other Examples.**—"Where, after breach of a contract, the performance of which is guaranteed, the creditor and principal debtor enter into a new contract, by which the amount of damages then due is made payable at a future day, and upon terms different from those imposed by the original contract, such new contract presumptively merges the old. In such a case, the new obligation, having been taken upon a sufficient consideration, becomes the exclusive medium by which the rights of the parties in respect to the payment of damages are to be ascertained. Such a contract is not collateral to the original, but in respect to the subject to which it appertains, it merges and supersedes the other. *Weed Sewing Machine Co. v. Winchell*, 107 Ind. 260.

"If A owes B, and A conveys land to C and has a lien for the purchase money on the land so conveyed, and they all meet together and agree that C shall execute his note to B for the unpaid purchase money, instead of giving the note to A, which is done, and B releases A from his debt, has B a lien on the land conveyed by A to C for the purchase money? We hold that he has. It is clear that if C had given his note to A for the unpaid purchase money, A might have assigned it to B, and thus transferred his vendor's lien to B. *Nichols v. Glover*, 41 Ind. 24.

Where A gave his notes on the purchase of a chattel and a mortgage back on them to secure the notes, and B, to prevent a foreclosure by the vendor, agreed with him and A to give the vendor his own note secured by mortgage and did so, *held*, in a suit on B's note, that the original contract with A was superseded and B could not take advantage of any breach of warranty on the sale to A. *Abbott v. Johnson*, 47 Wis. 239.

Where a note, given to an administrator for land, was by him turned over

as assets to the guardian of the heir at law, the maker thereof giving the guardian a new note, with the administrator as security, *held*, this was not such a novation of the original debt for the land as that the note was not still a debt contracted for the purchase of the land. *Lott v. Dysart*, 45 Ga. 355.

1. Where, by a novation, it was intended by all concerned that A should assume a debt of B, the fact that credit for the amount was given by mistake to a firm of which B is a member, does not invalidate the novation. *York v. Orton*, 65 Wis. 6.

A drew check on bank, which paid it with understanding it was to be charged to B's account. It was not so charged until four months later, when the bank informed B of the transaction, who consented to it. *Held* no novation and no liability on B's part. *Johnson v. Rumsey*, 28 Minn. 531.

Where individual corporators signed a note supposing they were binding the corporation, and afterwards tendered money to the payee who refused to accept it, but discharged the surety, and with the assent of the corporation agreed to look to it alone, the signers of the note were held not liable. *McClellan v. Robe*, 93 Ind. 298.

2. *Hodgson v. Anderson*, 3 B. & C. 842; *Browning v. Stallard*, 5 Taunt. 450; *Warren v. Butchelder*, 15 N. H. 129; *Butterfield v. Hartshorn*, 7 N. H. 345; s. c., 26 Am. Dec. 741; *Fiske v. Gregory*, 34 N. H. 414; *Stewart v. Campbell*, 58 Me. 439; s. c., 4 Am. Rep. 296; *Gresham v. Morrow*, 40 Ga. 487; *Caswell v. Fellows*, 110 Mass. 52.

"Heaton, Angler and Chase being together, it was agreed between them that the plaintiff should take Chase as his debtor for the sum due from the defendant. The debt due to the plaintiff from the defendant was thus extinguished. It was an accord executed, and Chase, by assuming the debt due to the plaintiff, must be considered as having paid that amount to the defendant, as part of the price he was to pay the defendant for the wagon. The agreement of the plaintiff to take Chase as his debtor was clearly a dis-

of the person delegating; and in order to be liberated from the obligation to him, contracts a new one with his creditor. In this case there is a novation both of the obligation of the person delegating, by his giving his creditor a new debtor, and of the person delegated, by the new obligation which he contracts.<sup>1</sup>

charge of the defendant." *Heaton v. Angier*, 7 N. H. 397; s. c., 28 Am. Dec. 353.

"The court finds that the three parties were together, that they agreed that Bowman was owing Jackson \$68, that Jackson was owing plaintiff more than that amount, that the debt due from Bowman to Jackson should be applied on the debt Jackson was owing plaintiff, that defendant agreed to make plaintiff a wagon, and that the amount defendant owed Jackson should be accredited to plaintiff in part payment of the wagon. There can be no doubt that this mutual agreement operated as a discharge of Bowman's, the defendant's, debt to Jackson to the extent of \$68, and that the defendant in that sum, became the debtor of the plaintiff." *Lester v. Bowman*, 39 Iowa 611.

Where in a novation by delegation the original debt was secured by mortgage, and in effecting the substitution of debtors through an agent of the creditor the mortgage was discharged on the record without his assent, it was held that as the original debt was transferred rather than extinguished, the mortgage would continue in force until it is actually paid. *Foster v. Paine*, 63 Iowa 85, see page 89, where the court says: "The rule is well settled that the mortgage continues in force until the debt is satisfied. No mere change in the form of the debt, nor (as we think) in the *personnel* of the debtor, has the effect to discharge it," citing *Sloan v. Rice*, 41 Iowa 465; *Packard v. Kingman*, 11 Iowa 219; *Watkins v. Hill*, 8 Pick. (Mass.) 522; *Pomeroy v. Rice*, 16 Pick. (Mass.) 22.

In *Derby v. Sanford*, 9 Cush. (Mass.) 263, the plaintiff and defendant entered into an entire contract by which the plaintiff was to do certain work for the defendant. Later the plaintiff addressed the following note to him: "I hereby authorize R R to finish the job already commenced . . . and to take the balance whatever may be due." The defendant assented in writing, with the assent of R R. On this state of facts the present action was held not maintainable. *SHAW, C. J.*, said: "The

doctrine of the assignment of *choses in action* does not arise here. There is no doubt that it is the law, that when an assignment of a debt is made, and the debtor agrees to pay the assignee, the assignment is a good consideration for the new promise, and an action may be maintained in the name of the assignee. It follows that if the debtor pays the assignee, such payment is a good defence to an action by the assignor. . . . The arrangement in this case was not an assignment of a *chose in action* for there was no debt due to Derby, and of course no *chose in action* to be assigned. It was the substitution of Reed for Derby as the contracting party with Sanford, to which Reed assented by taking the order and going on to complete the work. The defendant by his endorsement of the order undertook that the balance of the job, when completed as per agreement, should be paid to Reed. The completion of the job by Reed was a good consideration for such express promise, but in addition to that, the defendant, by the substitution, was wholly discharged from his contract to pay Derby anything. When the job was completed, we think Reed was the only creditor. And he alone could bring the action." And see *Wiggin v. Damrell*, 4 N. H. 96.

1. *Pothier Contr.*, pt. 3, ch. 2, art. 6, §§ 1, 2; *Contr. Sale*, pt. 6, ch. 4, § 553. "In that kind of novation, called in the civil law delegation, no new creditor could be substituted without the debtor's consent. This rule is observed in the common law. Hence, without this consent and promise to pay, a new creditor can have no action against the debtor, because there is no privity of contract between them. To establish such privity there must be a new promise founded on sufficient consideration. And the extinction of the prior debt is a sufficient consideration in such case."

"When assent or consideration is wanting, the novation operates only as a species of collateral security. This assent on the part of the debtor is said to be essential, for the reason that he may have an account with his assignor;

**2. Payment by Note of a Third Person.**—When a creditor accepts the note of a third person in payment of his debt, a novation takes place. The liability of the debtor is discharged, and that of the maker of the note substituted for it.<sup>1</sup> The mere acceptance of such a note, however, does not constitute a novation without some evidence that it is taken in satisfaction of the debt.<sup>2</sup> If the note is accepted without the endorsement of the debtor, the creditor is held to accept it in satisfaction of his debt,<sup>3</sup> although

and he shall not be barred of his right to a set-off, or any defence he may have. Still, if anything like an assent on his part can be inferred, he will be considered as the debtor." *Adams v. Power*, 48 Miss. 450.

**Discharge of Both Intermediary Obligations.**—In cases where A owes B and B owes C, and B, by order or otherwise, assigns his claim against A to C in payment and discharge of his debt to C, there is a novation. The debt which was due from B to C is extinguished, and the liability from A to B is also commonly said to be extinguished also, but the cases cited to this last point are not all clear to prove it. The case of *Hodgson v. Anderson*, 3 B. & C. 842, does not. All that was said by the court was by *BAYLEY, J.* "The debt existed, and it was the debt of the defendant, and the only question was to whom it was to be paid." In *Tatlock v. Harris*, 3 T. R. 174, *BULLER, J.*, merely says that the debt from B to C must be discharged. Such also is the decision in *Wharton v. Walker*, 4 B. & C. 163; *Butterfield v. Hartshorn*, 7 N. H. 345; s. c., 26 Am. Dec. 741; *Heaton v. Angier*, 7 N. H. 397; s. c., 28 Am. Dec. 353. On the other hand, *Story (Partn., § 25)*, implies the extinguishment of the liability of A to B but the continued existence of the debt itself in favor of C. See also *Burrows v. Robertson*, 7 Iowa 100; *Dever v. Akin*, 40 Ga. 423; *Adams v. Power*, 48 Miss. 450. *Pothier Cont. Sale*, pt. 6, ch. 4, § 553.

"The defendant owed the plaintiff a balance due on the exchange of property. In consideration of an agreement by the defendant to convey land to H, the latter gave his note to the plaintiff for the claim sued on. The defendant refused to make the conveyance, and without it H was insolvent." Held that the plaintiff's only claim was on the note. *Porter v. Dearinger*, 33 Ind. 155. See also the Georgia Statute. "One simple contract as to the same matter, and on no new consideration, does not

destroy another between the same parties; but if new parties are introduced by novation, so as to change the person to whom the obligation is due, the original contract is at an end." Code Ga., § 2724.

1. 2 Daniel Neg. Inst., § 1260, *et seq.*; 2 Whart. Contr., § 853; 2 Benj. on Sales (4th Am. ed.), p. 939; 3 Rand. Com. Paper, § 1534; *Lee v. Oppenheimer*, 32 Me. 253; *Noel v. Murray*, 13 N. Y. 167; *Whitbeck v. Van Ness*, 11 Johns. (N. Y.) 409; s. c., 6 Am. Dec. 383; *Youngs v. Stahelin*, 34 N. Y. 258; *Partee v. Bedford*, 51 Miss. 84; *Hoopes v. Strasburger*, 37 Md. 390; s. c., 11 Am. Rep. 538; *Gardner v. Lavasseur*, 28 La. An. 679; *Pugh v. Little Lock*, 33 Ark. 75; *Sauders v. Branch Bank*, 15 Ala. 353; *Smalley v. Edey*, 19 Ill. 207; *Wise v. Hilton*, 4 Me. 435; *Frisbie v. Larned*, 21 Wend. (N. Y.) 450. But the note must be a valid one. *Roberts v. Fisher*, 43 N. Y. 159; s. c., 3 Am. Rep. 680; *Wright v. Lawton*, 37 Conn. 167; *Vallier v. Ditson*, 74 Me. 553.

2. *Glenn v. Smith*, 2 Gill & J. (Md.) 493; s. c., 20 Am. Dec. 452; *Stevens v. Anderson*, 30 Ind. 391; *Kephart v. Butcher*, 17 Iowa 240; *Poole v. Rice*, 9 W. Va. 73; *Tobey v. Barber*, 5 Johns. (N. Y.) 68; s. c., 4 Am. Dec. 326; *Wise v. Chase*, 44 N. Y. 337; *Gresham v. Morrow*, 40 Ga. 487; *Allis v. Meadow etc. Distillery Co.*, 67 Wis. 16. An agreement to take the note in payment may be implied from subsequent conduct. *Hotchkiss v. Secor*, 8 Mich. 494; *Shipman v. Cook*, 16 N. J. Eq. 251 (presumed from lapse of time). There is no presumption that the note is taken in payment. *Smith v. Applegate*, 1 Daly (N. Y.) 91. But see *Shaw v. Republic L. Ins.*, 69 N. Y. 286; *Teamster v. Withrow*, 12 W. Va. 611; *Downey v. Hicks*, 14 How. (U. S.) 240; *Thorn v. Wilson*, 27 Ind. 370. And cf. *Brigham v. Lally*, 130 Mass. 485.

3. *Bank of England v. Newman*, 1 Ld. Raym. 442; *Ex parte Blackburne*, .

if it is accepted for an antecedent debt, the authorities are divided, some holding that in such case it is a conditional payment only.<sup>1</sup> So also if the debtor endorses the note, it will be presumed to be only a conditional payment.<sup>2</sup> Where a creditor takes the note of an agent, with knowledge of the liability of the principal, the debt is regarded as paid.<sup>3</sup>

**3. Certified Checks.**—A certified check is one which the bank upon which it is drawn certifies to be good.<sup>4</sup> Such certification,

10 Ves. 204; *Fyde v. Clark*, 1 Esp. 447; *Whitbeck v. Van Ness*, 11 Johns. (N. Y.) 409; s. c., 6 Am. Dec. 383; *Breed v. Cook*, 15 Johns. (N. Y.) 242; *Gibson v. Tobey*, 46 N. Y. 637; *Cambridge v. Allenby*, 6 B. & C. 373; *Soffe v. Gallagher*, 3 E. D. Smith (N. Y.) 507; *Smith v. Mercer*, L. R., 3 Exch. 51; *Susquehanna Fertilizer Co. v. White*, 66 Md. 444. But see, *contra*, *Porter v. Talcott*, 1 Cow. (N. Y.) 381; *Rew v. Barber*, 3 Cow. (N. Y.) 279; *Gordon v. Price*, 10 Ired. L. (N. Car.) 388.

It has been held that although the note of the third party is made payable directly to the creditor, it will not be a payment unless such was the agreement. *Whitney v. Goin*, 20 N. H. 354; *Hunter v. Moul*, 98 Pa. St. 13; s. c., 42 Am. Rep. 610. But *cf.* *Wiseman v. Lyman*, 7 Mass. 286 (*contra*); *Adams v. Power*, 48 Miss. 450. But if the agreement is proved, the original debt is gone. *Kellogg v. Richards*, 14 Wend. (N. Y.) 116; *Booth v. Smith*, 3 Wend. (N. Y.) 66. The creditor assumes the risk of the insolvency of the maker. *Long v. Spruill*, 7 Jones L. (N. Car.) 96; *Bicknell v. Waterman*, 5 R. I. 43; *Cadeus v. Teasdale*, 53 Vt. 469; s. c., 38 Am. Rep. 607; *Drake v. Hill*, 53 Iowa 37. But *cf.* *Roberts v. Fisher*, 43 N. Y. 159; *Wright v. Lawton*, 37 Conn. 167.

**1. Antecedent Debt.**—*Ward v. Evans*, 2 Ld. Raym. 928; *Swinyard v. Bowes*, 5 Mo. St. 62; *Van Wart v. Wooley*, 3 B. & C. 439. This rule is supported by the best American authority. *McLughn v. Bovard*, 4 Watts (Pa.) 308; *League v. Wasing*, 85 Pa. St. 244; *Gordon v. Price*, 10 Ired. L. (N. Car.) 388; *Downey v. Hicks*, 14 How. (U. S.) 240; *Gibson v. Toby*, 53 Barb. (N. Y.) 195; *Raynor v. Laux*, 28 Hun (N. Y.) 35; *Noel v. Murray*, 13 N. Y. 167; *Potts v. Mayer*, 74 N. Y. 594; *Gallagher v. Roberts*, 2 Wash. (U. S.) 193; *Freeman v. Benedict*, 37 Conn. 559; *Wilhelm v. Schmidt*, 84 Ill. 183; *Poole v. Rice*, 9 W. Va. 73; *Comiskey v. McPike*, 20 Mo. App. 82.

But see, *contra*, *Dennis v. Williams*, 40 Ala. 633. So note of a husband given for wife's debt. *Fickling v. Brewer*, 38 Ala. 685; *cf.* *Hetherington v. Hixon*, 46 Ala. 297. So if a note of a third party is taken under a contract calling for cash payments. *Whittaker v. Whittaker*, 4 Hun (N. Y.) 810. And so of a note of a ship's husband taken for supplies furnished the owner. *Johnson v. Cleaves*, 15 N. H. 332; *Robinson v. Read*, 9 B. & C. 449; *Schemerhorn v. Loines*, 7 Johns. (N. Y.) 311. And the endorsement of the debtor does not affect the matter. *Crocket v. Trotter*, 1 Stew. & P. (Ala.) 446; *Brown v. Jackson*, 2 Wash. (U. S.) 24. Unless the creditor takes such note rather than wait for his money. *St. John v. Purdy*, 1 Sandf. (N. Y.) 9; *Le Page v. McCrea*, 1 Wend. (N. Y.) 164; s. c., 19 Am. Dec. 469. But the question is one for the jury. *Talford v. Johnson*, 15 Ala. 385.

**2.** "The endorsement by the debtor, by which he incurs personal liability, rebuts the presumption of a mere exchange of the paper for the goods or other consideration which arises when there is mere transfer of a third party's bill or note by delivery or endorsement without recourse." 2 Dan. Neg. Inst., § 1265, *citing* *Monroe v. Huff*, 5 Den. (N. Y.) 369; *Boyd v. Hitchcock*, 20 Johns. (N. Y.) 76; s. c., 11 Am. Dec. 247; *Shriver v. Keller*, 25 Pa. St. 61; *Butler v. Haight*, 8 Wend. (N. Y.) 535; *Monroe v. Hoff*, 5 Den. (N. Y.) 360. And see *Day v. Thompson*, 65 Ala. 269; *cf. contra*, *Ely v. James*, 123 Mass. 36.

**3. Note of an Agent.**—*Perkins v. Cady*, 111 Mass. 318; *Ames Packing etc. Co. v. Tucker*, 8 Mo. App. 95. And see *Wyatt v. Marquis*, 3 East 147. Not so, however, where he is unaware of the agency. *Lovell v. Williams*, 125 Mass. 439.

**4.** See CHECKS, 3 Am. & Eng. Encyc. of Law 219; *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604.



if after the issue of the check,<sup>1</sup> is in effect a novation of the contract between the drawer and the bank. The drawer of the check is discharged from liability to the holder,<sup>2</sup> and the bank is substituted as a debtor in his place.<sup>3</sup> It is necessary that the certification should be made at the bank,<sup>4</sup> and by the proper officer.<sup>5</sup> The bank may be held if it retains the check for an unreasonable time without an express acceptance.<sup>6</sup> The statute of frauds can-

1. 2 Morse on Banking (2nd ed.), § 414; Keene v. Beard, 8 C. B., N. S. 372; Bullard v. Randall, 1 Gray (Mass.) 605; s. c., 61 Am. Dec. 433; Morse v. Massachusetts Nat. Bank, 1 Holmes (U. S.) 209; Cooke v. State Nat. Bank, 52 N. Y. 96.

Where the certification is obtained by the drawer before the delivery of the check, the drawer is not discharged until the check is paid. Bickford v. First Nat. Bank, 42 Ill. 238; s. c., 89 Am. Dec. 436; Rounds v. Smith, 42 Ill. 245; Brown v. Leckie, 43 Ill. 497; 2 Morse on Banking (2nd ed.), § 414 (c); Essex Co. Nat. Bank v. Bank of Montreal, 7 Biss. (U. S.) 193; Dan. on Neg. Inst., § 1601; Gibson v. National Park Bank, 98 N. Y. 87; Andrews v. German Nat. Bank, 9 Heisk. (Tenn.) 211; s. c., 24 Am. Rep. 300.

The drawer who has a check certified before delivery is, in effect, in the position of an endorser. Mutual Bank v. Rotge, 28 La. An. 933.

2. First Nat. Bank v. Whitman, 94 U. S. 343.

The bank is also discharged as to the drawer. Bullard v. Randall, 1 Gray (Mass.) 605; s. c., 61 Am. Dec. 433.

3. "Ordinarily, where the payee or holder of a check, which is payable immediately, instead of demanding payment, procures the check to be certified, the check is, as between the drawer and holder, regarded as paid, and the holder must look to the bank whose obligation it has accepted in lieu of the money; because by procuring the certification he has caused an amount of the drawer's fund, or credit, equal to that for which the check was drawn, to be set apart for the payment of that check and withdrawn from the control of the drawer, and his funds are as effectually diminished as if the money had been paid, while the bank has given a negotiable obligation to the holder of the check which is equivalent to a certificate of deposit." Thompson v. Bank of British North America, 82 N. Y. 6.

"When the business of the bank is

properly conducted, it is the duty of the officer certifying the check to cause it to be immediately charged as paid to the account of the drawer, and when this is done, the sum thus charged will remain as a deposit in the bank to the credit of the check, and be forever withdrawn from the control of the maker, except as a holder of the check. Such a deposit stands upon exactly the same grounds as any other." OAKLEY, C. J., in Willett v. Phoenix Bank, 2 Duer (N. Y.) 121.

4. 2 Morse on Banking (2nd ed.), § 414 (f), says: "A certified check has a distinctive character, as a species of commercial paper, the certification constituting a new contract between the holder and the certifying bank; the funds of the drawer are in legal contemplation, withdrawn from his credit and appropriated to the payment of the check, and the bank becomes the debtor of the holder, as for money had and received, as to the drawer and endorser, if there are any, the certification is payment of the check, and they are no longer liable upon it," citing National Commercial Bank v. Miller, 77 Ala. 168; s. c., 54 Am. Rep. 50. And see Girard Bank v. Bank of Penn Township, 39 Pa. St. 92; Seventh Nat. Bank v. Cook, 73 Pa. St. 483; s. c., 13 Am. Rep. 751; Commercial Bank v. Hughes, 17 Wend. (N. Y.) 94. And *vide* Dykers v. Leather Manufacturers' Bank, 11 Paige (N. Y.) 612.

5. Bullard v. Randall, 1 Gray (Mass.) 605; s. c., 61 Am. Dec. 433.

6. Who May Certify.—The cashier, president and teller may certify. Pope v. Bank of Albion, 57 N. Y. 126 (cashier); Irving Bank v. Wetherald, 36 N. Y. 335 (teller); Farmers' etc. Bank v. Butchers' Bank, 16 N. Y. 133; Claffin v. Farmers' etc. Bank, 25 N. Y. 296 (president). *Contra*, as to cashier, Mussey v. Eagle Bank, 9 Met. (Mass.) 313; Atlantic Bank v. Merchants' Bank, 10 Gray (Mass.) 532.

6. "If a bank does not pay or accept, it is bound to refuse. It has no right

not apply to the promise of the bank, even if verbal, as it is agreeing to pay its own debt.<sup>1</sup>

**V. NOVATION BY SUBSTITUTION OF A NEW CREDITOR.**—This kind of novation takes place by the intervention of a new creditor, where a debtor, for the purpose of being discharged from his original creditor, contracts some obligation in favor of a new creditor.<sup>2</sup> The new creditor can sue the debtor in his own name<sup>3</sup>.

**1. Assignment for Benefit of Creditors.**—Where a debtor assigns all his property to a trustee for the benefit of such creditors as assent to the assignment, a species of novation takes place by which the original debtor is discharged and the creditor takes in its

to receive and keep the check indefinitely, thereby leaving the holder to suppose that it has accepted the check and assumed the payment." *First Nat. Bank v. McMichael*, 106 Pa. St. 464.

It seems that the bank may be allowed twenty-four hours in which to examine its accounts. *Bellasis v. Hester*, 1 Ld. Raym. 280; *Kilsby v. Williams*, 5 B. & Ald. 815; *Boyd v. Emerson*, 2 Ad. & El. 184; *Overman v. Hoboken City Bank*, 31 N. J. L. 563; *Connelly v. McKean*, 64 Pa. St. 113; *Montgomery Co. Bank v. Albany City Bank*, 8 Barb. (N. Y.) 396; *Case v. Burt*, 15 Mich. 82.

Deducting the amount of a check from the drawer's account is an acceptance. *Seventh Nat. Bank v. Cook*, 73 Pa. St. 483; s. c., 13 Am. Rep. 751; *Pratt v. Foote*, 9 N. Y. 466. And *vide Saylor v. Bushong*, 100 Pa. St. 23.

Placing a check on a cancelling fork by mistake does not amount to an acceptance. *National Bank v. Second Nat. Bank*, 69 Ind. 479.

**1. Statute of Frauds.**—*Putney v. Farnham*, 27 Wis. 187; *Shields v. Middleton*, 2 Cranch (C. C.) 205; *Spadone v. Reed*, 7 Bush (Ky.) 455; *Besshears v. Rowe*, 46 Mo. 501; *Spalding v. Andrews*, 48 Pa. St. 411; *Pike v. Irwin*, 1 Sandf. (N. Y.) 14. Otherwise when the bank has no funds of the drawer when it accepts the check. 2 *Morse on Banking* (2nd ed.), § 406 (3).

**2. Barger v. Collins**, 7 Har. & J. (Md.) 213; *Clark v. Thompson*, 2 R. I. 146; *Tiernan v. Jackson*, 5 Pet. (U. S.) 597; *Mowry v. Todd*, 12 Mass. 281; *Pothier Contr.*, pt. 3, ch 2, art. 1.

In *Moor v. Hill*, Peake Add. Cas. 10, there was an action by two plaintiffs on an account stated. The defendant had been indebted to one plaintiff who later formed a partnership with the other partner. The account was then stated and it was agreed that the debt should

be paid to the firm. *Held*, that the action was properly brought by the firm. And see *Armsby v. Farnam*, 16 Pick. (Mass.) 318. But unless all the parties assent an agreement between the two plaintiffs is not enough. *Welsford v. Wood*, 1 Esp. 182; *Armsby v. Farnam*, 16 Pick. (Mass.) 318.

**3. Sue in Own Name.**—*Dennis v. Twitchell*, 10 Met. (Mass.) 184; *Derby v. Sanford*, 9 Cush. (Mass.) 264; *Wiggin v. Damrell*, 4 N. H. 69; *Hosack v. Rogers*, 8 Paige (N. Y.) 229; *Sharp v. Fly*, 9 Baxt. (Tenn.) 4; *Wiggins v. McDonald*, 18 Cal. 126; *Allen v. Gregg*, 130 Pa. St. 611; *Wilson v. Coupland*, 5 B. & Ald. 228; *McKinney v. Alvis*, 14 Ill. 33; *vide Warren v. Wheeler*, 21 Me. 484.

"Whatever may be the effect of handing over a written contract to a party, to whom it is intended to be transferred without a recognition of the transfer by the person bound by the contract, and a promise to pay the contents to a holder, we are satisfied that with such a recognition and promise the assignment is sufficient without the name of the assignor. It amounts to a substitution of one creditor for another by the consent of the two creditors and the debtor, and an action may be maintained by such assignee in his own name, founded on the assignment and the express promise of the debtor to pay him." *Mowry v. Todd*, 12 Mass. 281.

"If, upon a change in the members of a partnership firm, the existing debts due the partnership should be assigned over to the new firm, and after such assignment, with full knowledge thereof, the debtors should assent thereto, and promise payment to the new firm, that would amount, by operation of law, to an extinguishment of the liability to the old firm, and to a transfer of the debts to the new firm; so that the old firm would be no longer entitled to sue therefor, but the right would be exclu-

place the limited liability of the trustee.<sup>1</sup> (See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 1 Am. & Eng. Encyc. of Law 845; BANKRUPTCY, vol. 2, p. 67; COMPOSITION WITH CREDITORS, vol. 3, p. 385; INSOLVENCY, vol. 11, p. 167.)

**VI. CONTRACTS FOR THE BENEFIT OF THIRD PERSONS**—1. **The Strict Rule of the Common Law.**—The general rule of law is that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another for the benefit of a third person, who is a stranger to the consideration, will not support an action by the latter.<sup>2</sup> Of course where the

sively vested in the new firm." Story Part.. § 254.

1. A debtor in failing circumstances entered into an agreement with his creditors, by which they agreed to accept payment by his covenanting to pay two thirds of his annual income to a trustee of their nomination. No trustee was ever appointed and the agreement was never acted upon, although the debtor was always willing to perform his part of the agreement. *Held*, that a valid new obligation had been substituted for the old debts which were discharged. *Good v. Chessman*, 2 B. & Ad. 328.

A, being insolvent, a verbal agreement was entered into between several of his creditors and B, whereby B agreed to pay the creditors 50 per cent. of their claims in satisfaction of their debts which they agreed to accept and to assign their claims to B. *Held*, that one of their creditors, who had so agreed but had not taken the 50 per cent. could not sue A, as his claim against him was gone. *Austey v. Marden*, 1 B. & P., N. S. 124.

2. *Exchange Bank v. Rice*, 107 Mass. 37, per GRAY, J. This is the law in England and a few of the United States. *Tweddle v. Atkinson*, 1 B. & S. 393 (overruling *Dulton v. Poole*, 1 Ventr. 318); *Re Rotherham Alum & Chemical Company Co.*, L. R., 25 Ch. D. 111; *In re Empress Engineering Co.*, L. R., 16 Ch. D. 125; *Eley v. Assur. Co.*, L. R., 1 Ex. D. 88.

**Massachusetts.**—*Stoddard v. Ham*, 129 Mass. 383; s. c., 37 Am. Rep. 369; *Reed v. Home Sav. Bank*, 127 Mass. 295; *Moore v. Moore*, 127 Mass. 22; *Mellen v. Whipple*, 1 Gray (Mass.) 317; *Dow v. Clark*, 7 Gray (Mass.) 198; cf. *Arnold v. Lyman*, 17 Mass. 400; s. c., 9 Am. Dec. 154.

**New Hampshire.**—*Lang v. Henry*, 54 N. H. 57; cf. *Jackson v. Smith*, 52 N. H. 11.

**Vermont.**—*Tuttle v. Catlin*, 1 D. Chip. (Vt.) 366; s. c., 12 Am. Dec. 691; *Hall v. Huntoon*, 17 Vt. 244; s. c., 44 Am. Dec. 332; *Fugure v. Mutual Soc. of St. Joseph*, 46 Vt. 362; cf. *Fullam v. Adams*, 37 Vt. 391; *Rutland etc. R. Co. Cole*, 24 Vt. 33.

**Connecticut.**—*Treat v. Stanton*, 14 Conn. 445; *Colt v. Ives*, 31 Conn. 25; s. c., 81 Am. Dec. 161; cf. *Clapp v. Lawton*, 31 Conn. 95; *Steene v. Aylesworth*, 18 Conn. 244.

**Maryland.**—*Owings v. Owings*, 1 Har. & G. (Md.) 484.

**Michigan.**—*Litchfield v. Garratt*, 10 Mich. 426; *Edwards v. Clement* (Mich. 1890), 45 N. W. Rep. 1107; cf. *Donkersley v. Levy*, 38 Mich. 54.

In *Warren v. Batchelder*, 15 N. H. 129, the defendant owed one D, who owed the plaintiff. D and the defendant had a settlement and D paid to him money enough to cover the plaintiff's claim against him. The plaintiff was not a party to this arrangement, but demanded the money, and brought an action for money had and received. It was held, that as the debt of D to the plaintiff still existed, and as no consideration passed from the plaintiff, that the action would not lie. GILCHRIST, J., said: "That the legal interest in a simple contract, and the right to enforce it, resides in the person from whom the consideration moves, we understand to be a cardinal point of law. A contrary decision involves the result, that he from whom the consideration moves is not the party to sue, if any other person is intended to be benefited by the contract . . . In the case before us, the consideration did not move from the plaintiff. His debt was not extinguished, and he can maintain no action. We do not mean to say that there must have been an express agreement by the plaintiff to ac-

promisee is in fact acting as the agent of a third person, although that is unknown to the promisor, the principal is the real party to the contract, and may therefore sue in his own name on the promise made to his agent.<sup>1</sup>

**2. American Rule.**—But for reasons of convenience and otherwise, this strict rule of the common law has been much modified in America, and it is now settled in most of the States that a third person may maintain an action in his own name upon a contract

cept the defendant as his debtor, and extinguish the original debt; but such an agreement must be proved either by direct evidence or by proof of facts which show that it must have been made."

In *Butterfield v. Hartshorn*, 7 N. H. 345; s. c., 26 Am. Dec. 741, the plaintiff held a claim against the estate of a deceased person. The executor of the deceased sold land of the estate to the defendant, and left a portion of the purchase price in his hands to pay the claims of the plaintiff and others, and the defendant gave the executor a promise to pay them. The defendant had made no promise to the plaintiff who was not allowed to recover. The court said: "The principal question in this case is, whether the plaintiff can avail himself of the promise made by the defendant to the executor—he never having agreed to accept the defendant as his debtor, nor having made any demand of him for the money prior to the commencement of this suit . . .

In cases of this kind, a contract, in order to be binding, must be mutual to all concerned; and, until it is completed by the assent of all interested, it is liable to be defeated and the money deposited countermanded. It seems also to be clear that no contract of the kind here attempted to be entered into can be made without an entire change of the original rights and liabilities of the parties to it. There is to be a deposit of money for the payment of a prior debt, an agreement to hold the money for this purpose, and an agreement on the part of a third person to accept it in compliance with this arrangement. It is made through the agency of three individuals, for the purpose of payment; and it can have no other effect than to extinguish the original debt, and create a new liability of debtor and creditor between the person holding the money and the person who is to receive it. On any other supposition there would be a duplicate liability for the same

debt; and the deposit, instead of being a payment would be a mere collateral security, which is totally different from the avowed object of the parties. To entitle the plaintiff to recover, there must be an extinguishment of the original debt; and it is questionable whether in cases of this kind anything can operate as an extinguishment of the original debt but payment, or an express agreement of the creditor to take another person as his debtor in discharge of the original claim."

Where A received from B certain claims to be collected, with an agreement to apply the net avails to the payment of certain debts of B, and the claims had been collected to the amount of \$1,000, but the debts to be paid were \$1,300, it was held that the remedy of a creditor entitled to a proportionate share was in equity, and not at law. *Clapp v. Lawton*, 31 Conn. 95. But see *Belknap v. Bender*, 75 N. Y. 446; s. c., 31 Am. Rep. 476.

**1. Undisclosed Agency.**—Exchange Bank v. Rice, 107 Mass. 37; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Barry v. Page*, 10 Gray (Mass.) 398; *Hunter v. Giddings*, 97 Mass. 41; s. c., 93 Am. Dec. 54; *Byington v. Simpson*, 134 Mass. 169; s. c., 45 Am. Rep. 314; *Isley v. Merriam*, 7 Cush. (Mass.) 242; s. c., 54 Am. Dec. 721; *Sims v. Bond*, 5 B. & Ad. 389; s. c., 2 Nev. & Man. 608; *Ford v. Williams*, 21 How. (U. S.) 287; *Ruiz v. Norton*, 4 Cal. 355; s. c., 60 Am. Dec. 618; *Violet v. Powell*, 10 B. Mon. (Ky.) 347; s. c., 52 Am. Dec. 548. And *vide* *Anderton v. Shoup*, 17 Ohio St. 128; *Pitts v. Mower*, 18 Me. 361; s. c., 36 Am. Dec. 727; *Gilpin v. Howell*, 5 Pa. St. 41; s. c., 45 Am. Dec. 720; *Bayley v. Onondaga Co. Mut. Ins. Co.*, 6 Hill (N. Y.) 476; s. c., 41 Am. Dec. 759; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72; s. c., 38 Am. Dec. 618; *Chandler v. Coe*, 54 N. H. 561; *St. Louis etc. R. Co. v. Thacher*, 13 Kan. 567; *Crosby v. Watkins*, 12 Cal. 88.

made for his benefit, though not made with him;<sup>1</sup> and in some

1. *Hendrick v. Lindsay*, 93 U. S. 143. See also *Nat. Bank v. Grand Lodge*, 98 U. S. 123, where a corporation adopted a resolution assuming the payment of certain bonds of an association, provided that the association should issue stock to the corporation to the amount of the bonds, as the bonds were paid. It was held that the holders of the bonds could not compel, by a suit in their own name, the corporation to pay the bonds. *Austin v. Seligman*, 18 Fed. Rep. 519; *Sonstihy v. Keeley*, 7 Fed. Rep. 447.

**Alabama.**—*Mason v. Hall*, 30 Ala. 599; *Carver v. Eads*, 65 Ala. 190.

**California.**—*Wiggins v. Mc. Donald*, 18 Cal. 126; *Morgan v. Overman Mining Co.*, 37 Cal. 534.

Where the proof was that defendant, having agreed with B whom he owed, to pay in lieu thereof to the plaintiff, a creditor of B, the amount of his (plaintiff's) demand, afterwards met the plaintiff and stated to him that he (defendant) had agreed with B to pay his (plaintiff's) demand, and was to pay it, and that plaintiff then stated his "willingness to look to defendant;" *held*, that this proof authorized a finding that defendant agreed with plaintiff to pay him his demand. *McLaren v. Hutchinson*, 22 Cal. 187; s. c., 83 Am. Dec. 59.

**Colorado.**—*Lehow v. Simonton*, 3 Colo. 346; *Green v. Richardson*, 4 Colo. 584; *Green v. Morison*, 5 Colo. 18.

**Florida.**—*Wright v. Terry*, 23 Fla. 160.

**Illinois.**—*Bristow v. Lane*, 21 Ill. 194; *Dean v. Walker*, 107 Ill. 540; s. c., 47 Am. Rep. 467; *Snell v. Ives*, 85 Ill. 279; *Daub v. Englebach*, 109 Ill. 267; *Bay v. Williams*, 112 Ill. 91; s. c., 54 Am. Rep. 209.

In *Indiana* "it has been many times decided that a promise made by one to another from whom the consideration moves for the benefit of a third, may be sued on by the party for whose benefit the promise was made." *Clodfelter v. Hulctt*, 72 Ind. 141, *citing* *Raymond v. Pritchard*, 24 Ind. 318; *Josselyn v. Edwards*, 57 Ind. 212; *Campbell v. Patterson*, 58 Ind. 66; *Carter v. Temblin*, 68 Ind. 436; *Fisher v. Wilmoth*, 68 Ind. 449. And see *Redelsheimer v. Miller*, 107 Ind. 485; *South Side Planing Mill Assoc. v. Cutler etc. Lumber Co.*, 64

Ind. 566; *Davis v. Calloway*, 30 Ind. 112.

**Iowa.**—Where A has paid money of B to C, and C has promised to pay it to B, the law creates a privity between B and C, and B may sue C. *Johnson v. Collins*, 14 Iowa 63; *Johnson v. Knapp*, 36 Iowa 616; *Rice v. Savery*, 22 Iowa 470; *Lamb v. Tucker*, 42 Iowa 118.

**Kansas.**—*West v. Western Union Tel. Co.*, 39 Kan. 93; *Rickman v. Miller*, 39 Kan. 362; *Plano Mfg. Co. v. Burrows*, 40 Kan. 361; *Mumper v. Kelley*, 43 Kan. 256; *Anthony v. Herman*, 14 Kan. 497.

**Kentucky.**—"There is a conflict of the authorities in this country on the subject, and the right was not recognized in the earlier decisions of this court; but it is now settled in this State that a third person may maintain an action in his own name upon a contract, supported by a consideration made in his favor, though not made with him. *Smith v. Lewis*, 3 B. Mon. (Ky.) 229; *Allen v. Thomas*, 3 Metc. (Ky.) 198; s. c., 77 Am. Dec. 169; *Lucas v. Chamberlain*, 8 B. Mon. (Ky.) 276; *Dodge v. Moss*, 82 Ky. 441; *Mize v. Barnes*, 78 Ky. 506.

**Louisiana.**—*New Orleans St. Joseph's Assoc. v. Magnier*, 16 La. An. 338.

**Maine.**—*Bohanan v. Pope*, 42 Me. 93; *Machias Hotel Co. v. Coyle*, 35 Me. 405; s. c., 58 Am. Dec. 712; *cf.* *Segars v. Segars*, 71 Me. 530; *Maxwell v. Haynes*, 41 Me. 559; *Dearborn v. Parks*, 5 Me. 81; s. c., 17 Am. Dec. 206.

**Missouri.**—"It is well established in this State that a party, for whose benefit a stipulation in a simple contract is made, may maintain a suit on such stipulation in his own name." *Fitzgerald v. Barker*, 70 Mo. 687. And see also *Beardslee v. Morgner*, 4 Mo. App. 139; *Raum v. Kaltwasser*, 4 Mo. App. 573; *Rogers v. Gosnell*, 58 Mo. 589, where the court says: "It is a presumption of law that, when a promise is made for the benefit of a third person, he accepts it, and to overthrow the presumption a dissent must be shown." *Meyer v. Lowell*, 44 Mo. 328; *cf.* *Ridge v. Olmstead*, 73 Mo. 578.

**Minnesota.**—*Sanders v. Classon*, 13 Minn. 379; *Welsh v. First Division etc. R. Co.*, 25 Minn. 314; *Jordan v. White*, 20 Minn. 91; *Maxfield v. Schwartz*, 42 Minn. 221.

**Nebraska.**—*Shamp v. Meyer*, 20 Neb. 223.

**Nevada.**—*Milliani v. Tognini*, 19 Nev. 133; *Ruhling v. Hackett*, 1 Nev. 360.

**New Jersey.**—*Joslin v. New Jersey Car Co.*, 36 N. J. L. 141; *Bennett v. Merchantsville Bldg. & L. Assoc.*, 44 N. J. Eq. 116; *cf. Burnett v. Jersey City*, 31 N. J. Eq. 341; *Young v. Trustees*, 31 N. J. Eq. 290; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *O'Neill v. Clark*, 33 N. J. Eq. 444; *Laing v. Byrne*, 34 N. J. Eq. 52; *Norwood v. De Hart*, 30 N. J. Eq. 412.

**New York.**—*Delaware etc. Canal Co. v. Westchester Co. Bank*, 4 Den. (N. Y.) 97; *Barker v. Bucklin*, 2 Den. (N. Y.) 45; s. c., 43 Am. Dec. 726; *Schemerhorn v. Vanderheyden*, 1 Johns. (N. Y.) 139; s. c., 3 Am. Dec. 304 (this is the first case on this point decided in America, and follows *Dutton v. Poole*, 1 Ventr. 318); *Ellwood v. Monk*, 5 Wend. (N. Y.) 235; *Lawrence v. Fox*, 20 N. Y. 268. But this doctrine has been yielded to with reluctance. *Pardee v. Treat*, 82 N. Y. 385; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; s. c., 7 Am. Rep. 314.

A person for whose benefit a promise is made cannot maintain an action to enforce it when the promise is void between the original parties for want or failure of consideration, or fraud. *Dunning v. Leavitt*, 85 N. Y. 30.

**North Carolina.**—*Draugham v. Bunting*, 9 Ired. L. (N. Car.) 10.

Where a debtor promised his creditor to leave a sum of money in the hands of a third person, in part payment of what was due, and did so, the third person agreeing to hold it for the creditor, *held*, that upon a refusal by such third person to pay the money, the creditor could maintain an action against him. The creditor's loss was a sufficient consideration to imply a promise to himself. *White v. Hunt*, 64 N. Car. 496.

**Ohio.**—*Miller v. Flover*, 15 Ohio St. 148; *Thompson v. Thompson*, 4 Ohio St. 333.

**Oregon.**—*Baker v. Eglin*, 11 Ore. 333.

**Pennsylvania.**—*Fleming v. Alter*, 7 S. & R. (Pa.) 295; *Beers v. Robinson*, 9 Pa. St. 229.

"It is a rudimental principle that a party may sue on a promise made for a sufficient consideration for his use and benefit, though it be made to another and not to himself." *Merriman v. Moore*, 90 Pa. St. 78.

The Pennsylvania courts attempt to draw a distinction between the liability of a person who holds money or other property which in equity and good conscience belongs to a third person, and the case where a person promises to pay the debt of the person with whom he contracts to a third person. "Hence, if one pay money to another for the use of a third person, or having money belonging to another, agree with that other to pay it to a third, an action lies by the person beneficially interested. This right of action is not restricted to cases of money only; but extends to an agreement to pay over any valuable thing, so that such third person is the only party in interest. But when a debt already exists, a promise by a third person to pay such debt, being for the benefit of the original debtor, and to protect him against it, he must necessarily have a right of action against his promisor to secure that protection. If the third person also became liable to the original creditor, he would be subject to two separate actions at the same time and for the same debt. This would be manifestly unjust." *Kountz v. Holthouse*, 85 Pa. St. 235. And see *Torrens v. Campbell*, 74 Pa. St. 470; *Hostetter v. Hollinger*, 117 Pa. St. 606; *Justice v. Tallman*, 86 Pa. St. 147; *Delp v. Bartholomay Brewing Co.*, 123 Pa. St. 42. And *cf. National Bank v. Grand Lodge*, 98 U. S. 123.

Where one creditor, in consideration of a confession of judgment, promises his debtor to pay other creditors' debts, but no fund is created out of which such other debts are to be paid, and the other creditors are not parties to the agreement, they cannot sue upon it. *Adams v. Kuehn*, 119 Pa. St. 76.

**South Carolina.**—*Thompson v. Gordon*, 3 Strobb. (S. Car.) 196; *Brown v. O'Brien*, 1 Rich. L. (S. Car.) 268; s. c., 44 Am. Dec. 254.

**Virginia.**—*Jones v. Thomas*, 21 Gratt. (Va.) 101; *Willard v. Worsham*, 76 Va. 392; *cf. Ross v. Milne*, 12 Leigh (Va.) 204; s. c., 37 Am. Dec. 646.

**Wisconsin.**—"By repeated decisions of this court the persons for whose benefit the promise is made may maintain actions in their own names to enforce such promise." *Kollock v. Parcher*, 52 Wis. 393, *citing Putney v. Farnham*, 27 Wis. 187; *Bassett v. Hughes*, 43 Wis. 319. And see *Town of Platteville v. Hooper*, 63 Wis. 381; *Winningshoff v. Wittig*, 64 Wis. 180;

States the third person may sue on a contract made for his benefit even if it is under seal.<sup>1</sup> But in order to enable a person to sue on a contract made for his benefit, the principal object of the contract as between the parties to it must be the benefit to the third person; it is not enough that the object of the contract may incidentally result to the benefit of some third party.<sup>2</sup> The parties to the contract may rescind or modify it at any time before the third person has assented to it or acted under it,<sup>3</sup> but after his

*Johannes v. Phenix Ins. Co.*, 66 Wis. 50; s. c., 57 Am. Rep. 248.

1. **Contract Under Seal.**—*Coster v. Mayor of Albany*, 43 N. Y. 399; *Van Schaick v. Third Ave. R. Co.*, 38 N. Y. 346; *McDowell v. Laev*, 35 Wis. 171; *Houghton v. Milburn*, 54 Wis. 554; *Bassett v. Hughes*, 43 Wis. 319; *Devol v. McIntosh*, 23 Ind. 529; *Rogers v. Gosnell*, 51 Mo. 466; *Emmit v. Brophy*, 42 Ohio St. 82; *Garvin v. Mobley*, 1 Bush (Ky.) 48; *Huckabee v. May*, 14 Ala. 263. *Contra*, *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Willard v. Wood*, 135 U. S. 309; *Northampton v. Elwell*, 4 Gray (Mass.) 81; *Robb v. Mudge*, 14 Gray (Mass.) 534; *Flynn v. North American L. Ins. Co.*, 115 Mass. 449; *Smith v. Mayberry*, 13 Nev. 427; *Thompson v. Thompson*, 4 Ohio St. 333; *Moore v. House*, 64 Ill. 162; *Howe v. How*, 1 N. H. 49; *Hinkley v. Fowler*, 15 Me. 285; *Fairchild v. North Eastern Mut. etc. Ins. Assoc.*, 51 Vt. 613; *vide* *Mason v. Hall*, 30 Ala. 599.

2. **Essential of the Right of the Third Person.**—"When two parties for a consideration sufficient as between themselves covenant to do some act, which, if done, would incidentally result to the benefit of a mere stranger, that stranger has not the right to enforce the covenant, though one of the contracting parties might enforce it against the other." *Lake Ontario Shore R. Co. v. Curtiss*, 80 N. Y. 223.

"Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent for the third party, who, by bringing his action, adopts his acts, or upon the doctrine of a trust, the promisor being regarded as having received money or other thing for the third party, is not material. In either case, there must be a legal right, founded upon some obligation of the promisee, in the third party to adopt and claim the promise as made for his benefit."

A grantee of mortgaged premises

whose conveyance recites that the land is conveyed subject to the mortgage, and that the grantee assumes and agrees to pay the same as part of the consideration, is not liable personally to the mortgagor in case his grantor was not personally liable. *Vrooman v. Turner*, 69 N. Y. 280; s. c., 25 Am. Rep. 195.

But a stipulation in a mortgage, whereby the mortgagee assumes and agrees to pay a prior mortgage on the premises does not impose upon the mortgagee a personal liability for the prior mortgage debt, which can be enforced against him by the prior mortgagee. *Garnsey v. Rogers*, 47 N. Y. 233; s. c., 7 Am. Rep. 440.

A creditor of a firm cannot maintain an action upon an agreement made with the firm by one not a member, to pay a portion—for instance, one quarter—of its indebtedness, as no one creditor can show from the contract that it was intended for his benefit, or covers any part of his debt. *Wheat v. Rice*, 97 N. Y. 296.

A creditor who has in no way accepted and adopted a promise by a third party, in a contract between him and the debtor, to pay the debt, has no legal interest in the promise which will entitle him to contest an action by the promisor for a reformation of the contract by striking out the promise on the ground of mistake. *Ibid.*

An agreement by a third person, or continuing partner, with an outgoing member of a firm to relieve him from and indemnify him against the firm debts, where no consideration passed to the promisor, cannot be enforced against him by a creditor of the firm. *Berry v. Brown*, 107 N. Y. 659.

3. **Right of Rescission.**—*Trimble v. Strother*, 25 Ohio St. 378; *Brewer v. Maurer*, 38 Ohio St. 543; s. c., 43 Am. Rep. 436; *Davis v. Calloway*, 30 Ind. 112; *Kelly v. Roberts*, 40 N. Y. 432; *Durham v. Bischof*, 47 Ind. 211; *Talburt v. Ins. Co.*, 80 Ind. 434; *Gilbert v.*

assent his rights are fixed and cannot be affected by any acts of the original parties to the contract.<sup>1</sup> This rule may be called the American rule and seems to be justified by reasons of expediency, although the courts are by no means agreed on the legal reasons supporting it.<sup>2</sup> It is evident that three essential

Sanderson, 56 Iowa 349; s. c., 41 Am. Rep. 103; Jones v. Higgins, 80 Ky. 409; Bay v. Williams, 112 Ill. 91; s. c., 54 Am. Rep. 209; cf. Pruitt v. Pruitt, 91 Ind. 595.

1. Where one person for a valuable consideration agrees with another to do some act for the benefit of a third person, the latter may maintain an action on such agreement, and if the third person assents to such arrangement, he cannot be affected by a rescission of the contract by the original parties. Bassett v. Hughes, 43 Wis. 319; Hartley v. Harrison, 24 N. Y. 170; Rogers v. Gosnell, 58 Mo. 589; cf. Young v. Trustees of Public schools, 31 N. J. Eq. 209; Willard v. Worsham, 76 Va. 392; O'Neill v. Clark, 33 N. J. Eq. 444; Laing v. Byrne, 34 N. J. Eq. 52.

2. **Reasons for the Rule.**—"The new rule, however, is as convenient as it is just. The objections to it are in every way technical and arbitrary—a repetition of verbal formulas without any convincing reasons. It certainly avoids a circuitry of actions, and it enables the only person beneficially interested in the promise—the real party in interest—to come into court in the first instance and establish his rights, without being driven to enforce them in a roundabout manner through the intervention of a third person, who, if successful, must account to him for the proceeds of the litigation." Pomeroy on Remedies (2nd ed.), § 139. But see Gilbert v. Sanderson, 56 Iowa 349; s. c., 41 Am. Rep. 103; Cohrt v. Cock, 56 Iowa 658.

The editor of these volumes says in an article in 23 Am. Law Reg. N. S. 1: "No doubt this question of the rights of third persons in such contracts is a difficult and doubtful one. Perhaps that fact explains the conflict of authority; it certainly demands for each of these cases careful and thorough consideration. Whatever the apparent presumption of such a remark, it is believed that many of them have been too hastily decided, and many of the opinions too carelessly worded. It is hardly too much to say that authority may be found for almost any view of a

given state of facts which counsel or the court may prefer to adopt."

The court, in Wood v. Moriarty, 15 R. I. 518, discusses the matter fully. It says: "The diversity of decision shows that the action cannot be maintained without resorting to implications or assumptions which the courts do not always find it easy to allow, and which they sometimes refuse to allow. It seems to us that we shall best find the grounds, if there are any, on which the action can be maintained, by an analysis or explication of the contract with the debtor. The contract is this: A agrees with B, for a consideration moving from B, to pay to C, the debt which Bowes C. The contract is absolute. If A does not pay the debt, and B has to pay, it is broken. It is therefore a contract by A to pay the debt in lieu of B, or in relief of B, to take it upon himself, and to become so far as he can independently of C, the debtor of C in place of B. The contract as between A and B is not collateral, but substitutional. But, this being so, how does C, who is not a party to it, get the right to sue A upon or by reason of it? It has been held that he gets this right directly from the contract itself, because B in making it with A, makes it for C, if C desires to accede to it, as well as for himself, so that C has only to ratify or assent to it, which he does unequivocally by suing on it. But in this view, if C accepts the contract, he must accept it as made; that is as a contract by which A agrees that he instead of B will pay the debt which B owes to C. C cannot, at the same time, assent to the contract and dissent from the terms of it. Accordingly, if he sues A on the contract, he must sue him instead of B, and cannot also sue B, and B is therefore released. But as we have seen, another view has been taken. It has been held that the contract between A and B imposes a duty upon A to pay C the debt which B owes to him, and that from this duty the law implies a promise by A in favor of C to pay B's debt to C. But if a promise is implied from the duty, the promise must correspond to the duty.



requisites of a novation are wanting to any legal right that the third person may have: 1. A contract drawn up in accordance with the intention of the parties; 2. The consent of the third person to the arrangement; and, 3. The discharge of the original debt. But inasmuch as many courts in America have, through an inaccurate use of language classed these cases under novation, it seems proper to treat them here. So far as these cases are exceptions to the ordinary rule of contracts, they seem to divide themselves into several distinct classes.

**3. Where the Promisee Holds Money or Other Property.**—The first class includes those cases in which the promisee has money or other property in his hands which in equity and good conscience belongs to the third person, and promises the person from whom the money or property is received, either expressly or by implication, to pay it to such person. The promisee seems to be regarded as holding the property in trust for the party interested.<sup>1</sup>

The duty which the contract imposes upon A is that he, instead of B, shall pay the debt which B owes to C; and accordingly, such is the promise to be implied from it. If, therefore, C sues A upon the implied promise, he must sue him as liable instead of B, for the debt of B to him, C, he cannot consistently sue both A and B, and consequently B is released.

We do not claim that either of these views is free from difficulty. Either of them, however, is free from one difficulty which other views encounter, and which is the principal reason why the courts which refuse to allow the action refuse to do so. Other views give the creditor the benefit of the new contract for nothing, since they allow him still to retain his hold upon the original debtor; whereas, according to either of the views above set forth, the creditor cannot have the benefit of the new contract without assenting to the terms of it, thereby releasing the original debtor, so that the assent is in itself a consideration."

Another explanation is given by a learned writer in 15 Am. Law Rev. 231, who says: "A, in contracting with B for a valid consideration, binds himself either to perform or be sued. This is the ordinary nature of the obligation on A's part. Now, it is undeniably competent for A to bind himself to B, to perform some act for the benefit of a third person C, and A binds himself here in the same alternative to perform or be sued; and it being competent for A to contract with B in such manner as to make the perform-

ance of the contract relate to C, that is, in such manner as to make the one alternative of the obligation to which A binds himself to relate to C, the law to be consistent must allow A to contract with B in such manner that the other alternative of the obligation shall relate to C as well." This argument is ingenious, but does not seem entirely sound.

1. *Justice v. Tallman*, 86 Pa. St. 147; *Carnegie v. Morrison*, 2 Met. (Mass.) 381; *Fitch v. Chandler*, 4 Cush. (Mass.) 254; *Putnam v. Field*, 103 Mass. 556; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; s. c., 7 Am. Rep. 314; *Wyman v. Smith*, 2 Sandf. (N. Y.) 331; *Rodney v. Shankland*, 1 Del. Ch. 35; s. c., 12 Am. Dec. 70; *Todd v. Tobey*, 29 Me. 219; *Crocker v. Higgins*, 7 Conn. 342; *Kreutz v. Livingstone*, 15 Cal. 345; *Draughan v. Bunting*, 9 Ired. (N. Car.) 10; *Brown v. O'Brien*, 1 Rich. (S. Car.) 268; s. c., 44 Am. Dec. 254; *Johnson v. Collins*, 14 Iowa 63; *Cross v. Truesdale*, 28 Ind. 44; *Miller v. Billingsley*, 41 Ind. 489; *Donkersley v. Levy*, 38 Mich. 55; *Burton v. Larkin*, 36 Kan. 246; s. c., 59 Am. Rep. 541; cf. *Warren v. Batchelder*, 15 N. H. 129; *Bigelow v. Davis*, 16 Barb. (N. Y.) 561.

**Statute of Limitations.**—But the statute of limitations applies to this sort of a trust and begins to run from the time the money or property is received by the promisor. *Hostetter v. Hollinger*, 117 Pa. St. 606; cf. *Churchman v. Indianapolis*, 110 Ind. 259.

The remedy of the third person is assumpsit and not debt. *Ross v. Milne*,

**4. Conveyance to Promisee.**—A second class of cases is where a conveyance of property is made to one who promises to pay a debt of the vendor as part of the consideration. The promisee is treated as a sort of trustee for the benefit of the creditor of the vendor.<sup>1</sup>

(a) *Assumption of Mortgage Debt.*—The most common instance of this class is where property is conveyed subject to a mortgage which the grantee agrees to assume and pay. The grantee in this case is held personally liable to the mortgagee for the amount of the debt assumed.<sup>2</sup> The promise of the grantee must be clear,

12 Leigh (Va.) 204; s. c., 37 Am. Dec. 646; *Reeside v. Reeside*, 49 Pa. St. 322; s. c., 88 Am. Dec. 503.

A portion of the court, in the case of *Lawrence v. Fox*, 20 N. Y. 268, considered that the promise was to be regarded as made to the third person through the medium of the promisor as his agent, whose conduct he could ratify when it came to his knowledge, though taken without his being privy thereto, and this view has met with some favor in other cases. *Treat v. Stanton*, 14 Conn. 445; *Johnson v. Collins*, 14 Iowa 63; *Meech v. Ensign*, 21 Am. L. Reg. 608.

This ground seems hardly tenable as the promisor is the agent of the promisee, if of anybody; the assets in his hands are the property of the promisee, and any loss would fall on him and not on the third person. The latter cannot complain if the contract has been rescinded (*Davis v. Calloway*, 30 Ind. 112), although not after the third person has acted on the contract. *Bassett v. Hughes*, 43 Wis. 319.

1. *Pinckhard v. Banks*, 13 East 20; *Huckabee v. May*, 14 Ala. 263; *Ainslie v. Wilson*, 7 Cow. (N. Y.) 662; s. c., 17 Am. Dec. 532; *Ellwood v. Monk*, 5 Wend. (N. Y.) 235; *Snell v. Ives*, 85 Ill. 279; *Shober et al. Lithographing Co. v. Kerting*, 107 Ill. 344; *Beasley v. Webster*, 64 Ill. 458; *Jordan v. White*, 20 Minn. 91; *Welsh v. First Division et al. R. Co.*, 25 Minn. 314; *Bassett v. Hughes*, 43 Wis. 319; *Morgan v. Overman Min. Co.*, 37 Cal. 536; *Johnson v. Collins*, 14 Iowa 63; *Joslin v. New Jersey Car Spring Co.*, 36 N. J. L. 141; *Allen v. Gregg*, 130 Pa. St. 611.

2. "These cases rest upon the following argument: B is indebted to A; B sells land to C, who agrees, instead of paying the price in full, to assume the debt, or to become A's debtor in lieu of B. If A were present assenting, the novation would be consummated on the

instant; but A, being absent, learns of the agreement afterwards, and assents to it by bringing his action. Why may not the novation be completed by the assent so given as effectually as if given on the instant? If it be said that in order to create a privity between A and C, the assent must be mutual, the answer is that C had already assented, and there was nothing wanting but A's assent to perfect the novation. To reach such a conclusion, it is only necessary to make certain presumptions which are so appropriate to the nature of the transaction that the law can readily allow them . . . But it is the very making of these presumptions which constitutes a strong objection to this class of cases. Three essential elements of a novation are wanting: 1st, A contract drawn up in accordance with the intention of the parties. Certainly to give the mortgagee additional security was not their object; to thus interpret it is to make a contract for them. 2nd, The consent of the mortgagee to accept the promisor as his debtor. 3rd, The discharge of the original debtor." 23 Am. L. Reg., N. S. 1.

"The cases proceed upon the principle that the undertaking of the grantee to pay off the encumbrance is a collateral security acquired by the mortgagor, which enures by an equitable subrogation to the benefit of the mortgagee." *Burr v. Beers*, 24 N. Y. 178; s. c., 80 Am. Dec. 327.

Where a purchaser of real estate has assumed and agreed to pay a mortgage upon it as part of the consideration, the holder of the mortgage note is allowed to avail himself of this contract of assumption and hold the purchaser personally, and at the same time enforce the original contract and mortgage; but this is not a novation. *Davis v. Hardy*, 76 Ind. 272; *Logan v. Smith*, 70 Ind. 597; *Risk v. Hoffman*, 69 Ind.

and he cannot be held merely on his acceptance of a deed subject to a mortgage,<sup>1</sup> but, given the promise, it would seem that the

137; *Josselyn v. Edwards*, 57 Ind. 212; *Ayres v. Randall*, 108 Ind. 595; *cf.* *Kelso v. Fleming*, 104 Ind. 180; *Thayer v. Marsh*, 75 N. Y. 342; s. c., 11 Hun (N. Y.) 504; *Ayers v. Dixon*, 78 N. Y. 323; *Thorpe v. Keokuk Coal Co.*, 48 N. Y. 253; *Palmeter v. Carey*, 63 Wis. 426; *Lewis v. Covilland*, 21 Cal. 178; *Pellier v. Gillespie*, 67 Cal. 582; *Dean v. Walker*, 107 Ill. 540; s. c., 47 Am. Rep. 467; *Urquhart v. Brayton*, 12 R. I. 169; *Mechanics' Sav. Bank v. Goff*, 13 R. I. 516; *Merriman v. Social Mfg. Co.*, 12 R. I. 175; *Norwood v. De Hart*, 30 N. J. Eq. 412; *Crowell v. Currier*, 27 N. J. Eq. 152; *Gage v. Jenkinson*, 58 Mich. 169; *Crawford v. Edwards*, 33 Mich. 354; *Unger v. Smith*, 44 Mich. 22; *cf.* *Booth v. Connecticut L. Ins. Co.*, 43 Mich. 209; *Luney v. Mead*, 60 Iowa 469; *Ross v. Kennison*, 38 Iowa 396; *Bowen v. Kurtz*, 37 Iowa 239; *Bowen v. Beek*, 94 N. Y. 86; s. c., 46 Am. Rep. 124; *Schley v. Tryer*, 100 N. Y. 71; *Garnsey v. Rogers*, 47 N. Y. 233; s. c., 7 Am. Rep. 440; *Page v. Becker*, 31 Mo. 466; *Helm v. Vogel*, 69 Mo. 529; *Fitzgerald v. Barker*, 70 Mo. 685; *Conner v. Howe*, 35 Minn. 518; *Cooper v. Foss*, 15 Neb. 515; *Davis v. Hulett*, 58 Vt. 90; *Alcelda v. Morales*, 3 Nev. 132; *Twitchell v. Mears*, 8 Biss. (U. S.) 211; *Hayden v. Snow*, 9 Biss. (U. S.) 511; *Willard v. Wood*, 135 U. S. 309; *Fiske v. McGregory*, 34 N. H. 414; *Thompson v. Thompson*, 4 Ohio St. 333.

If mortgaged land is sold to a third party, who assumes the mortgage debt, and gives the mortgagee a new mortgage to secure it, the original notes being left outstanding, there is no novation, unless the mortgagee accepts the new mortgage as a substitute for the original one. *Waters v. Hubbard*, 44 Conn. 340.

If the grantee is evicted by a title paramount, he is no longer liable. *Crowe v. Lewin*, 95 N. Y. 423; *Osborne v. Cabell*, 77 Va. 462.

Where the vendor is not liable to the mortgagee, the grantee assumes no personal liability. *Carter v. Hallahan*, 92 N. Y. 498; *Vrooman v. Turner*, 69 N. Y. 280; s. c., 25 Am. Rep. 195; *Norwood v. De Hart*, 30 N. J. Eq. 412. But see *Merriman v. Moore*, 90 Pa. St. 78; *Brewer v. Maurer*, 38 Ohio St. 543; s. c., 43 Am. Rep. 436; *Dean v. Walker*, 107 Ill. 540; s. c., 47 Am. Rep. 469.

Though if the vendor is a *feme covert* whose separate estate is liable, the grantee can be held in his covenant. *Huyler v. Atwood*, 26 N. J. Eq. 504; *Cashman v. Henry*, 75 N. Y. 103; s. c., 31 Am. Rep. 437; *Brewer v. Maurer*, 38 Ohio St. 543; s. c., 43 Am. Rep. 436.

**Mortgage in Form a Deed.**—Where the instrument is in form a deed, though in fact a mortgage, the grantee is not liable. *Arnaud v. Grigg*, 29 N. J. Eq. 482; *Root v. Wright*, 84 N. Y. 72; *Pardee v. Treat*, 82 N. Y. 385.

**1. Grantee Must Promise in Clear Terms.**—*Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554; *Drury v. Tremont Imp. Co.*, 13 Allen (Mass.) 168; *Fiske v. Tolman*, 124 Mass. 254; s. c., 26 Am. Rep. 259; *Middaugh v. Batchelder*, 33 Fed. Rep. 706; *Bumgardner v. Allen*, 6 Munf. (Va.) 439; *Foster v. Water*, 42 Conn. 244; *Woodbury v. Saxon*, 58 N. H. 380; *Walker v. Goldsmith*, 7 Oreg. 161; *Fowler v. Fay*, 62 Ill. 375; *Dean v. Walker*, 107 Ill. 540; s. c., 47 Am. Rep. 467; *Rapp v. Stoner*, 104 Ill. 618; *Schley v. Fryer*, 100 N. Y. 71; *Belmont v. Coman*, 22 N. Y. 438; s. c., 78 Am. Dec. 213; *Collins v. Rowe*, 1 Abb. N. C. (N. Y.) 97; *Hull v. Alexander*, 26 Iowa 569; *Lewis v. Day*, 53 Iowa 575; *Ritchie v. McDuffie*, 62 Iowa 46; *Winans v. Wilkie*, 41 Mich. 264; *Patton v. Adkins*, 42 Ark. 197; *Hall v. Morgan*, 79 Mo. 47; *Tanguay v. Felthousen*, 45 Wis. 30; *Campbell v. Patterson*, 58 Ind. 66; *Moore's Appeal*, 88 Pa. St. 450.

No particular form of words is necessary, but the intention must be clear. *Stephens v. Cornell*, 32 Hun (N. Y.) 414; *Mallory v. West Shore etc. R. Co.*, 35 N. Y. Super. Ct. 178; *Adams v. Wadhams*, 40 Barb. (N. Y.) 227; *Equitable L. Assur. Soc. v. Bostwick*, 100 N. Y. 628; *Wright v. Briggs*, 99 Ind. 563; *Vreeland v. Van Blarcom*, 35 N. J. Eq. 530.

"There can be no doubt at this day that where the purchaser of land encumbered by a mortgage agrees to pay a particular sum as purchase money, and on the execution of the contract of purchase the amount of the mortgage is deducted from the consideration, and the land conveyed subject to the mortgage, that the purchaser is bound to pay the mortgage debt whether he agreed to do so by express words or

grantee can be held even if it be only verbal.<sup>1</sup> If, however, the grantee has agreed to assume the mortgage debt, his liability to the mortgagee is fixed on his acceptance of the deed.<sup>2</sup> It would seem that this doctrine which allows a third person to sue on a contract to which he is not a party is an equitable rather than a legal one, and in some States the mortgagee must resort to a court of equity to enforce his right against the grantee.<sup>3</sup> The same

not. This obligation necessarily results from the very nature of the transaction. Having accepted the land subject to the mortgage and kept back enough of the vendor's money to pay it, it is only common honesty that he should be required either to pay the mortgage or stand primarily liable for it. His retention of the vendor's money for the payment of the mortgage imposes on him the duty of protecting the vendor against the mortgage debt." *Heid v. Vreeland*, 30 N. J. Eq. 591. And *vide* *Thayer v. Torrey*, 37 N. J. L. 339; *Kennedy v. Brown*, 61 Ala. 296; *cf.* *Belmont v. Coman*, 22 N. Y. 438; s. c., 78 Am. Dec. 213; *Smith v. Truslow*, 84 N. Y. 660.

On the other hand, it is said that the language is chosen by the grantor, who should express the intent in clear language, if any such obligation has been agreed upon. *Hubbard v. Ensign*, 46 Conn. 576.

"In this case there was no agreement or consent of the defendant to pay the mortgage debt, or to make it his own, and no consideration moving to him for its payment. He was merely a dry trustee, to whom the property came by the acts of others, and not his own. He is clearly not liable for the mortgage debt under the circumstances. The property was bound for it, but not himself personally. The criterion of personal liability, for an encumbrance to which property is subjected, appears to be the contract or consent of the purchaser to become bound for it where the debt forms a part of the price or consideration he is to pay for the encumbered property. His undertaking to pay the encumbrances is a contract with his vendor. But where property is cast upon him by act of the law, or by the agency of others who are the beneficiaries, there is no reason for assuming that he intended to bind himself. *Girard L. Ins. etc. Co. v. Stewart*, 86 Pa. St. 89.

1. **Verbal Assumption.**—The remedy is in equity. *Bolles v. Beach*, 22 N. J. L. 680; s. c., 53 Am. Dec. 263; *Wilson*

*v. King*, 23 N. J. Eq. 150; *Putney v. Farnham*, 27 Wis. 187; *Merriman v. Moore*, 90 Pa. St. 78; *Wright v. Briggs*, 99 Ind. 563; *cf.* *Boozar v. Teague*, 27 S. Car. 348; *Conover v. Brown*, 29 N. J. Eq. 510; *Taintor v. Hemmingway*, 18 Hun (N. Y.) 458; *Remington v. Palmer*, 62 N. Y. 31.

Question raised in *Canfield v. Shear*, 49 Mich. 313; *Gage v. Jenkinson*, 58 Mich. 169.

The agreement may be wholly outside of the conveyance. *Schmucker v. Sibert*, 18 Kan. 104; s. c., 26 Am. Rep. 765; *Ludington v. Low*, 53 N. Y. Super. Ct. 374; *Wright v. Briggs*, 99 Ind. 563; *Colgin v. Henley*, 6 Leigh (Va.) 85.

2. *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; s. c., 13 Am. Rep. 556; *Bowen v. Beck*, 94 N. Y. 86; s. c., 46 Am. Rep. 124; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Locke v. Horner*, 131 Mass. 93; s. c., 41 Am. Rep. 199; *Bishop v. Douglass*, 25 Wis. 696; *Taylor v. Whitmore*, 35 Mich. 97; *Klein v. Isaacs*, 8 Mo. App. 568; *State v. Davis*, 96 Ind. 539; *Thompson v. Dearborn*, 107 Ill. 87; *Sparkman v. Gove*, 44 N. J. L. 252; *Schmucker v. Sibert*, 18 Kan. 104; s. c., 26 Am. Rep. 765.

Acceptance may be by an agent. *Fairchild v. Lynch*, 42 N. Y. Sup. Ct. 265; s. c., 46 Ib. 1. Or implied from circumstances. *Bundy v. Iron Co.*, 38 Ohio St. 300.

But where the acceptance is distinctly refused there is no liability. *Culver v. Badger*, 29 N. J. Eq. 74; *Cordts v. Hargrave*, 29 N. J. Eq. 446.

3. **Remedy in Equity.**—"It would seem to be clear, then, that in ordinary cases the mortgagee does not, by force of the contract, acquire a right of action against the purchaser, but the benefit flowing to him from the contract is limited to a right to be subrogated to the rights of his debtor. He stands in his debtor's rights, and may appropriate to the satisfaction of his mortgage any security held by his debtor, for its payment. He can, therefore, only have a personal judgment against the pur-

rules apply on the assignment of chattels subject to a mortgage which the grantee agrees to assume and pay.<sup>1</sup>

**5. Assignment of Lease.**—Another class of cases is where a lessee of premises assigns his lease. The assignee is held bound directly to the lessor to pay the rent and to abide by the covenants in the lease.<sup>2</sup>

**6. Suretyship.**—Where the facts warrant an inference that the promisee by his contract with the promisor became a surety for

chaser for his debt, when the mortgagor holds an obligation which will support such judgment. His right is simply the right of substitution, permitting a new creditor to take the place of an old one, and allowing the new one to succeed to the rights of the old one." *Klapworth v. Dressler*, 13 N. J. Eq. 62; s. c., 78 Am. Dec. 69; *Crowell v. Currier*, 27 N. J. Eq. 152; *Mount v. Van Ness*, 33 N. J. Eq. 262; *Biddel v. Brizzolara*, 64 Cal. 354; *Booth v. Connecticut Mut. L. Ins. Co.*, 43 Mich. 299; *Unger v. Smith*, 44 Mich. 22; *Stuart v. Worden*, 42 Mich. 154.

But in some States the mortgagee sues at law. *Urquhart v. Brayton*, 12 R. I. 169, where the court says: "This is equivalent to regarding the transaction as a novation, or if not, we think it may be so regarded. The case stands thus: B is indebted to A; B sells land to C, who agrees, instead of paying the price in full, to assume the debt or to become A's debtor, in lieu of B. If A were present assenting, the novation would be concluded on the instant, but A, being absent, learns of the agreement afterward, and assents to it by bringing his action. Why may we not hold the novation consummated by the assent so given as effectually as if given on the instant? If it be said that in order to create a privity between A and C, the assent must be mutual, the answer is that C had already assented, and there was nothing wanting but A's assent to perfect the novation." See *Mechanics' Sav. Bank v. Goff*, 13 R. I. 516; *Merriman v. Moore*, 90 Pa. St. 78; *Hoff's Appeal*, 24 Pa. St. 200.

**1. Chattel Mortgage.**—Where a mortgagee in a chattel mortgage promised, in consideration of a surrender and delivery to him, of the mortgaged property by the mortgagor, to pay the amount due on a second mortgage to the holder thereof, held, a valid agreement which might be enforced by such mortgagee. *Pulliam v. Adamson*, 43 Minn. 511; *Kollock v. Parcher*, 52 Wis.

393; *Pape v. Porter*, 33 Fed. Rep. 7. But there must be a distinct agreement. *Hamill v. Gillespie*, 48 N. Y. 556.

**2.** This rule rests "upon the broader and more satisfactory basis, that the law, operating upon the acts of the parties, creates the duty, establishes the privity, and implies the promise and obligation upon which the action is founded. In the case at bar, the agreement, though made between Parmelee and Dyer, is in express terms to pay the rent to Brewer, the plaintiff, and he is the party to be benefited thereby. It is made upon a valid consideration; being the surrender of the shop by the former, and its occupation by the latter. To make the defendant liable, no consideration need move as between him and the present plaintiff. Nor is it any objection to the plaintiff's right to recover, that Parmelee might also have a remedy on the contract in case the plaintiff should not elect to adopt it. It does not operate to extinguish Parmelee's liability. The plaintiff, if he so elects, can seek his remedy on the agreement, or may rely on the original undertaking of his lessee, in which latter case, Parmelee could enforce the contract against the defendant. These principles are all well settled in the adjudged cases, and it is unnecessary to enlarge upon them." *Brewer v. Dyer*, 7 Cush. (Mass.) 337; cf. *Mellen v. Whipple*, 1 Gray (Mass.) 317; *Bedford v. Terhune*, 30 N. Y. 453; 86 Am. Dec. 394; *Graves v. Porter*, 11 Barb. (N. Y.) 592; *Davis v. Morris*, 36 N. Y. 569; *Cox v. Fenwick*, 4 Bibb (Ky.) 538; *Overman v. Sanborn*, 27 Vt. 54; *Hawkins v. Sherman*, 3 C. & P. 459; *Sutliff v. Atwood*, 15 Ohio St. 186; *Dorrance v. Jones*, 27 Ala. 630; *Rawlings v. Duval*, 4 Har. & M. (Md.) 1.

Where A leased premises to B, who assigned his lease to C, and C agreed with A to pay him the rent, it was held that this was not a novation, as C was under no liability to B to pay him rent. *Meister v. Birney*, 24 Mich. 435.

the latter, the cases allow the party benefited to sue the promisee.<sup>1</sup>

**7. The Statute of Frauds.**—The statute of frauds is no defence to a suit by a third person on a contract made for his benefit, as it is held that the promisee does not agree to pay the debt of another, but is making a direct promise to pay his own debt.<sup>2</sup>

1. *Blyer v. Monholland*, 2 Sandf. Ch. (N. Y.) 478; *Curtis v. Tyler*, 9 Paige (N. Y.) 432; *King v. Whiteley*, 10 Paige (N. Y.) 465; *Crawford v. Edwards*, 33 Mich. 354; *Bishop v. Douglass*, 25 Wis. 696; *Klapworth v. Dressler*, 13 N. J. Eq. 62; s. c., 78 Am. Dec. 69; *cf. Willson v. Burton*, 52 Vt. 394; *Crenshaw v. Thackston*, 14 S. Car. 437; *Dean v. Walker*, 107 Ill. 540, 545; s. c., 47 Am. Rep. 467; *Willard v. Worsham*, 76 Va. 392; *George v. Andrews*, 60 Md. 28; s. c., 45 Am. Rep. 706; *Boardman v. Larrabee*, 51 Conn. 39; *Ellis v. Johnson*, 96 Ind. 377.

"Even here, however, the effect is to make a contract for the parties different from that which they intended. Certainly there is no express contract of suretyship; contrary to the fact, the court must assume a contract created not by the acts of the parties, but by the operation of a rule of law on those acts. The promisor agrees with the promisee to pay the debt, and thereby, as between themselves, becomes the principal debtor. But the promisee, not being discharged, is also liable to the third person. If compelled to pay, he is a surety only in this, that he has a right to call upon the promisor to indemnify him. But all this does not affect the third person and he is not a party to it. What interest has he in the transaction, and in what consists his equity? To make that relationship available to him, it is necessary not only to bring him into contract relations with other parties, but also to reverse the positions of principal and surety, and make the promisor the surety instead of the principal. According to what rule of law can this be done? By what process of reasoning can it be vindicated? This doctrine and the exception to the rule cannot both stand." 23 Am. L. Reg., N. S. 1.

2. *Johnson v. Knapp*, 36 Iowa 616; *Barker v. Bradley*, 42 N. Y. 316; s. c., 1 Am. Rep. 521; *Beasley v. Webster*, 64 Ill. 458; *Jordan v. White*, 20 Minn. 91; *Stariha v. Greenwood*, 28 Minn. 521; *Joslin v. New Jersey Car Spring Co.*, 36 N. J. L. 141; *Townsend v.*

*Long*, 77 Pa. St. 143; s. c., 18 Am. Rep. 438; *Dock v. Boyd*, 93 Pa. St. 92; *Ludwick v. Watson*, 3 Oreg. 256; *Lee v. Newman*, 55 Miss. 365; *Seaman v. Hasbrouck*, 35 Barb. (N. Y.) 151; *Stilwell v. Otis*, 2 Hilt. (N. Y.) 148; *cf. Center v. McQuesten*, 18 Kan. 476; *Clapp v. Lawton*, 31 Conn. 95 (*contra*).

Where the promise is to pay money in consideration of some benefit received by the promisor, it makes no difference that the promise is parol, or that incidentally the payment will extinguish an obligation of the promisee to the third person. *Burkham v. Mastin*, 54 Ala. 122; *Mathers v. Carter*, 7 Ill. App. 225; *Haggerty v. Johnston*, 48 Ind. 41; *Borchsenius v. Canutson*, 100 Ill. 82; *Schindler v. Euell*, 45 How. Pr. (N. Y.) 33; *Ford v. Finney*, 35 Ga. 258; *Follansbee v. Johnson*, 28 Minn. 311.

"Where the defendant, in order to get rid of an encumbrance on his own property, or to obtain some direct personal advantage to himself, or because of his indebtedness to such person to an amount equal thereto, promises to pay the debt of another, the promise is not within the statute." *Wood St. of Frauds*, § 158.

In *Fullam v. Adams*, 37 Vt. 391, *POLAND, C. J.*, referring to this class of cases, says: "And we believe it will be found in all the cases now regarded as sound, where it has been held that a parol promise to pay the debt of another is binding, the promisor held in his hand funds, securities and property of the debtor, devoted to the payment of the debt, and his promise to pay attaches upon his obligation or duty growing out of the receipt of the fund . . . The party making the promise holds the funds of the debtor for the purpose of paying his debt, and, as between him and the debtor, it is his *duty* to pay the debt, so that when he promises the creditor to pay it, in substance he promises to pay his own debt, and not that of another." A being indebted to B, C verbally promised B to pay him the amount and charged it to A, without his consent. *Held*, that as B had not released or assigned his debt,

8. **Insurance.**—A person for whose benefit a policy of insurance is taken out is allowed to sue on it, although not named in the policy. Such policies are often written "for whom it may concern."<sup>1</sup>

**VII. NOVATION AS AFFECTED BY THE STATUTE OF FRAUDS.**—In a novation between three or more parties where a debtor agrees to pay the debt to a creditor of his own creditor and so discharge his debt to him, the substituted contract is not within the statute of frauds, if not in writing, as an agreement to answer for the debt of another. The debtor in such case makes a new contract on a valid consideration, and the debt, which it is claimed he has agreed to answer for, has been discharged by the novation.<sup>2</sup>

the promise was without consideration, and within the statute of frauds. *Richardson v. Williams*, 49 Me. 558.

1. *Farrow v. Com. Ins. Co.*, 18 Pick. (Mass.) 53; s. c., 29 Am. Dec. 564; *Ballard v. Merchants' Ins. Co.*, 9 La. 258; s. c., 29 Am. Dec. 444; *Martin v. Fishing Ins. Co.*, 20 Pick. (Mass.) 389; s. c., 32 Am. Dec. 220; *De Bolle v. Pennsylvania Ins. Co.*, 4 Whart. (Pa.) 68; s. c., 33 Am. Dec. 38; *Flemming v. Marine Ins. Co.*, 4 Whart. (Pa.) 59; *Crosby v. New York Mut. Ins. Co.*, 5 Bows. (N. Y.) 377; s. c., 19 How. Pr. (N. Y.) 313; *Lee v. Adsit*, 37 N. Y. 97; *Clinton v. Hope Ins. Co.*, 45 N. Y. 461; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 14; *Newson v. Douglass*, 7 Harr. & J. (Md.) 417; s. c., 16 Am. Dec. 317. And *vide Barnes v. Union Mut. F. Ins. Co.*, 45 N. H. 21; *Ardesco Oil Co. v. North America Min. & Oil Co.*, 66 Pa. St. 380.

2. *Bird v. Gammon*, 3 Bing. N. C. 883; *Goodman v. Chase*, 1 B. & Ald. 297; *Butcher v. Stewart*, 11 M. & W. 857; *Austey v. Marden*, 4 B. & P. 124; *Lane v. Burghart*, 1 Q. B. 993; *Hodgson v. Anderson*, 3 B. & C. 842; *Browning v. Stallard*, 5 Taunt. 450; *Lacy v. McNelle*, 4 D. & R. 7; *Chick v. McAfee*, 7 Port. (Ala.) 62; *Mason v. Hall*, 30 Ala. 599; *Carpenter v. Murphree*, 49 Ala. 84; *Barringer v. Warden*, 12 Cal. 311; *cf. Ellison v. Jackson etc. Co.*, 12 Cal. 542; *Welch v. Kenny*, 49 Cal. 49; *Packer v. Benton*, 35 Conn. 343; s. c., 95 Am. Dec. 246; *Karr v. Porter*, 4 Houst. (Del.) 297; *Harris v. Young*, 40 Ga. 65; *Anderson v. Whitehead*, 55 Ga. 277; *Sapp v. Faircloth*, 70 Ga. 690; *Eddy v. Roberts*, 17 Ill. 505; *Runde v. Runde*, 59 Ill. 98; *Schoenfeld v. Brown*, 78 Ill. 487; *Decker v. Shaffer*, 3 Ind. 187; *Hopkins v. Carr*, 31 Ind. 260; *Chamberlin v. Ingalls*, 38 Iowa 300;

*Bowen v. Kurtz*, 37 Iowa 239; *Lester v. Bowman*, 39 Iowa 611; *Mosely v. Taylor*, 4 Dana (Ky.) 542; *Lord v. Davison*, 3 Allen (Mass.) 131; *Pike v. Brown*, 7 Cush. (Mass.) 133; *Curtis v. Brown*, 5 Cush. (Mass.) 488; *Dearborn v. Parks*, 5 Me. 81; s. c., 17 Am. Dec. 206; *Rowe v. Whittier*, 21 Me. 545; *Hilton v. Dinsmore*, 21 Me. 410; *Maxwell v. Haynes*, 41 Me. 559; *Andre v. Bodman*, 13 Md. 241; s. c., 71 Am. Dec. 628; *Mulcrone v. American Lumber Co.*, 55 Mich. 622; *Robinson v. Lane*, 14 Smed. & M. (Miss.) 161; *Robbins v. Ayres*, 10 Mo. 538; s. c., 47 Am. Dec. 134; *Lee v. Porter*, 18 Mo. App. 377; *Wright v. McCully*, 67 Mo. 134; *Clark v. Hall*, 11 N. J. L. 78; *Barker v. Bucklin*, 2 Den. (N. Y.) 45; s. c., 43 Am. Dec. 726; *Farley v. Cleveland*, 4 Cow. (N. Y.) 432; s. c., 15 Am. Dec. 387; *Van Eppes v. McGill, Hill & D. Supp.* (N. Y.) 109; *Ellwood v. Monk*, 5 Wend. (N. Y.) 235; *Cox v. Weller*, 6 Thomp. & C. (N. Y.) 309; *Watson v. Randall*, 20 Wend. (N. Y.) 201; *Rice v. Carter*, 11 Ired. L. (N. Car.) 298; *Styron v. Bell*, 8 Jones L. (N. Car.) 222; *Draughan v. Bunting*, 9 Ired. L. (N. Car.) 10; *Cooper v. Chambers*, 4 Dev. (N. Car.) 261; s. c., 25 Am. Dec. 710; *Bacon v. Daniels*, 37 Ohio St. 279; *Allhouse v. Ramsay*, 6 Whart. (Pa.) 331; *Scott v. Atchison*, 36 Tex. 76 (semble); *McCreary v. Van Hook*, 35 Tex. 631; *Williams v. Little*, 35 Vt. 323; *Gleason v. Briggs*, 28 Vt. 135; *Waggoner v. Gray*, 2 Hen. & M. (Va.) 603; *Cook v. Barrett*, 15 Wis. 506; *Kissocks v. Woodward*, 1 U. C., K. B. 345.

A son worked for his father and did work for which the father was indebted, and the defendant, in consideration of the son releasing the father from the debt, verbally promised to pay the son.

**VIII. NOVATION IN INSURANCE.**—An insurance company may, by the terms of its charter, reserve the right to assign its business and so relieve itself from liability on its policies.<sup>1</sup> If there is no such provision in the charter, whether such an assignment binds the insured is determinable only on the facts as to his acceptance of it.<sup>2</sup> Whether or not there is a novation in such case is a question of fact,<sup>3</sup> but it is evident that all three parties, the old company, the new company, and the assured must assent to the arrangement.<sup>4</sup> The assent of the assured may be inferred from his

*Held* that the promise was not within the statute and the defendant was bound. The court, per HOAR, J., said: "The plaintiff discharged the debt due to him from his father in consideration of the defendant's promise to pay him the amount due him. This promise was not a promise to pay the debt of another within the statute of frauds, but an original undertaking. The defendant promised to pay not as surety, or guarantor, but as the sole debtor; not as a collateral promise, but as a substituted promise. There was no debt of another as soon as the defendant's promise was made." *Wood v. Corcoran*, 1 Allen (Mass.) 405.

So when one thus undertaking agreed to "pay and guarantee" the debt, it was held that the word "guarantee" was not to be understood in a technical sense, but that the agreement was an absolute agreement to pay, and *indebitatus assumpsit* would lie. *Packer v. Benton*, 35 Conn. 343; s. c., 95 Am. Dec. 246. In this case BUTLER, J., said: "Here the contract was tripartite, between the debtor, a creditor, and a third person; and it contemplated the discharge of the original debtor, and a new obligation by the third party to the particular creditor. Such new obligation and indebtedness is not within the statute of frauds."

A, employed by T & Co. to haul timber to their mill, was promised by the defendants for whom T & Co. were manufacturing, that if he brought orders from T & Co. they would pay. *Held* a novation and not within the statute of frauds. *Preston v. Young*, 46 Mich. 103; s. c., 41 Am. Rep. 148. A wife bought a stove and then deserted her husband. She asked the dealer to take the stove back, but the husband needed it and promised to pay for it. *Held*, that his promise was not one to answer for his wife's debt. *Palmer v. Witcherly*, 15 Neb. 98.

If the original debt is not discharged,

then the statute applies. *Gunnels v. Stewart*, 3 Brev. (S. Car.) 52; *Jones v. Ballard*, 2 Mills (Const. S. Car.) 113; *Plummer v. Lyman*, 49 Me. 229; *Richardson v. Williams*, 49 Me. 558; *Stewart v. Campbell*, 58 Me. 439; s. c., 4 Am. Rep. 296; *Furbish v. Goodnow*, 98 Mass. 297; *Packer v. Benton*, 35 Conn. 343; s. c., 95 Am. Dec. 246; *Emmett v. Dewhurst*, 3 Macn. & Gord. 587. And *vide Birchell v. Neaster*, 36 Ohio St. 331.

Where a surety who has paid a debt he has guaranteed, sues the principal, the original debt being discharged, the statute does not apply. *Madden v. Floyd*, 69 Ala. 221; *Beal v. Brown*, 13 Allen (Mass.) 114.

1. *Hort's Case*, L. R., 1 Ch. Div. 307, *Grain's Case*, L. R., 1 Ch. Div. 315; *Cocker's Case*, L. R., 3 Ch. Div. 1; *Domain's Case*, L. R., 3 Ch. Div. 21. Even though the policy says nothing about this charter right. *Dowse's Case*, L. R., 3 Ch. Div. 384.

2. *Conquest's Case*, L. R., 1 Ch. Div. 334.

The burden of proof to show that a new policy taken on the surrender of a former one is a novation is on the party alleging it. *McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401. Although slight evidence is sufficient in the case of ordinary firms to show that a creditor who continues his dealings with incoming partners accepts the new firm as his debtors, instead of the old, yet strict proof will be required before it is held that a creditor of the company, under a special contract, has accepted the liability of another company with which the first is amalgamated. *In re Family Endowment Soc.*, L. R., 5 Ch. App. 118. Per LORD HATHERLY.

3. *In re Family Endowment Soc.*, L. R., 5 Ch. App. 118; *Conquest's Case*, L. R., 1 Ch. Div. 334.

4. *Manchester v. London Life etc. Assoc.*, L. R., 9 Eq. 643.



subsequent acts, or acquiescence with knowledge of the facts, but his conduct must be unequivocal.<sup>1</sup> The subject of novation has

1. "Where on the amalgamation of two companies, notice is given to the policy holder of the fact, and in substance notice is given to him that he has his election whether he will choose to take a policy or liability of the new company in lieu of, and instead of, the policy of the original company, who were liable to him, even though he does not in terms assent to the novation by taking out a new policy, by having endorsed it, or by entering into an express agreement; yet, if he acts upon it and takes the benefits which he could only be entitled to receive upon the assumption that he had assented to it, that will be evidence on which the court may find, and, unless there is something to contradict it, ought to find, that he has agreed to take the liability of the new company in substitution for that of the old one." MELLSH, L. J., in *Spencer's Case*, L. R., 6 Ch. App. at p. 370.

Whether or not payment of premiums to the new company completes the novation does not seem to be clear. "In whatever way the circular may be worded, if it is such as to convey the information to the mind of the policy holder that he is to choose, and then, knowing that he has a choice, and that his choice is to be expressed by payment of his premiums in a particular way, he goes and pays them in that way, there would be enough to fix him." *Conquest's Case*, L. R., 1 Ch. Div. 334.

"It appears to me monstrous that a person having a contract of this kind is to be told that he has lost his right under his contract and must take such remedy as he can get from some other office, because he pays his premiums and takes receipts at the place where he is told to do so." JAMES, L. J., in *Manchester etc. Life Assur. Co.*, L. R., 5 Ch. App. 640 at 649; *Griffith's Case*, L. R., 6 Ch. 347.

M effected a policy upon his life with the British Nation Life Assurance Association. The association subsequently was amalgamated with the European Society, and ceased to carry on business. Some time afterwards a memorandum, under the seal of the European Society, and signed by two of its directors, was endorsed on the policy declaring that the funds of the

European Society, should be liable for the payment of the policy money, provided the future premiums were paid to the European Society. The subsequent premiums were accordingly paid to that society. *Held*, that there was a complete novation, and that on the winding-up of the two companies, M had no proof against the British Nation Association. *Miller's Case*, 3 L. R., Ch. Div. 391. *In re Anchor Assur. Co.*, L. R., 5 Ch. App. 632; *In re Medical, Invalid & Life Ins. Soc.*, L. R., 6 Ch. App. 362.

The payment of premiums for a long period of time will constitute a novation. *Cocker's Case*, L. R., 3 Ch. Div. 1 (15 years); *National Provincial Life Assur. Soc.*, L. R., 9 Eq. 306; Here a claim for death was sent in.

If the new company endorses the policy, the payment of premiums constitutes a novation. *Ex parte Blood*, L. R., 9 Eq. 316; *Hort's Case*, L. R., 1 Ch. Div. 307; *Miller's Case*, L. R., 3 Ch. Div. 391.

**Annuity.**—An insurance company having transferred its business to another company, a person who had purchased an annuity from the former company declined to accept the liability of the latter company in lieu of his contract with the former; *held* that the receipt by him of payments in respect of his annuity from the latter company was not evidence of adoption by him of the transfer, or that he regarded that company in any other light than as the agent of the former company. *India etc. Life Assur. Co.*, *In re Dyke's Case*, 29 W. R. 586; affirmed on appeal, 7 L. R., Ch. 651; 41 L. J., Ch. 601; 20 W. R. 790; 27 L. T., N. S. 191. *In re Family Endowment Soc.*, L. R., 5 Ch. App. 118.

The receipt of a circular by a policy holder inviting him to elect to hold the assignee, and the payment of premiums to and acceptance of a bonus from the assignee, constitutes a novation. *Spencer's Case*, L. R., 6 Ch. App. 362; *In re Times Life Assur. Co.*, L. R., 5 Ch. App. 381; *In re Anchor Assur. Co.*, L. R., 5 Ch. App. 632.

But application to the assignee for endorsement of the policy, which was refused because the applicant declined to sign an assent to the transfer, coupled with taking receipts in the name of the

come up in England, outside of the regular courts, in the proceedings in the winding up of the European and Albert Companies under special acts of parliament. In the one case LORD CAIRNS, and in the other LORD WESTBURY, and later LORD ROMILLY acted as arbitrator, holding different views.<sup>1</sup> The question of novation in insurance does not seem to have, as yet, arisen in America.

assignee does not constitute a novation. *India etc., L. Assur. Co., L. R., 7 Ch. App. 651; In re Manchester etc. L. Ins. Co., L. R., 5 Ch. App. 640.*

But a policy holder is held when he makes application to the assignee in case of loss as the sole debtor. *In re National Provincial L. Assur. Soc., L. R., 9 Eq. 306.*

The position of the policy holder, whether a lawyer or business man, or woman, officer, or clergyman, is material in determining whether he has assented to the transfer. *Conquest's Case, L. R., 1 Ch. Div. 334.*

When by the terms of the policy the debt is to be paid out of the assets of the company, more evidence is necessary to show a novation than where a simple relation of debtor and creditor exists. *In re Anchor Assur. Co., L. R., 5 Ch. App. 632.*

A mutual society handed over its funds to another society which agreed to assume its liabilities. The assent of the insured was held to constitute a novation. *In re Merchants' etc. Assur. Soc., L. R., 9 Eq. 694; In re United Ports etc. Ins. Co., L. R., 16 Eq. 354; cf. Harman's Case, L. R., 1 Ch. Div. 326.*

1. LORD CAIRNS held that if a policy holder, after receiving notice of an amalgamation, paid his premium to the new company, he accepted the latter as his contractor and made what is called a novation of the contract, unless he showed expressly that the payments were made to them as agents of the original company.

LORD WESTBURY, however, held that it must affirmatively appear that the new company had the corporate power to assume the contracts of the old company; that the fact of transfer was communicated to the assured, with an offer to him to accept either a new policy or an assumption of the old one, and that his acceptance of the offer must be proved by "acts which unequivocally denote his understanding and acceptance of that proposal;" that there must be evidence of an intention

to make a new contract as plainly as if it were expressed in writing; that the mere act of payment of the premium to the new company is equivocal, and that taking a receipt from the new company proves nothing, and that in the absence of evidence of other acts, those alone do not show a novation. LORD WESTBURY expressed the difference between his view and that of LORD CAIRN's, as follows: "There is no difference between us in the principle of law that governs these cases: LORD CAIRNS held it to be a question of novation, and that novation was a question of fact. I hold also that novation is a question of intention, and that intention is a fact which must be proved. I will not admit of presumptions and inferences as the *media* from which I will infer that intention, any more than Justinian did when he referred to the uncertainty and difficulty that clouded the subject as long as it was possible to introduce those presumptions, and he superseded the presumptions by a plain and direct rule." *Blundell's Case (L. T., E. A.), p. 45.*

The whole matter is now regulated in England by statute. Life Insurance act, 1872, § 7, which is as follows: "Where a company, either before or after the passing of this act, has transferred its business or has amalgamated with another company, no policy holder in the first named company, who shall pay to the other company the premiums accruing due in respect of his policy, shall by reason of any such payment made after the passing of this act, or by reason of any other act done after the passing of this act, be deemed to have abandoned any claim which he would have had against the first mentioned company, on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorized." This adopts the rule of

**IX. NOVATION AS APPLIED TO PARTNERSHIP.**—The doctrine of novation is applied to the law of partnership when a partner retires from the firm, or a new partner is taken in, or both such events take place, and the question arises whether the new firm, or continuing partner as the case may be, is solely responsible to a creditor for the debt of the old firm incurred prior to the change in the partnership.<sup>1</sup>

**1. Liability of Retiring Partner.**—In the case of a retiring partner, it is well settled that he is not discharged from liability for the debts of the old firm even though the continuing partner, or the new firm, agrees with him to pay them, and, in general, the creditor is not to be affected or given any new rights, by an arrangement by, or between, his debtors to which he is not a party.<sup>2</sup> But,

the civil law, Justinian III, tit. XXIX, par. 3.

These cases of *LORDS CAIRNS* and *WESTBURY* are all reported in full in Reilly's Report of the arbitration, and are stated very fully in *Crawley's Life Insurance* (London 1882), pp. 227-234. See also *Bliss on Life Insurance* (2nd ed.), § 424, note.

1. Let it be supposed that a firm of three members, A, B and C, is indebted to D; that A retires, and B and C either alone, or together with a new partner, E, take upon themselves the liabilities of the old firm. D's right to obtain payment from A, B and C is not affected by the above arrangement, and A does not cease to be liable to him for the debt in question. But if after A's retirement, D accepts as his sole debtors B and C, or B, C and E (if E enters the firm), then A's liability will have ceased and D must look for payment to B and C, or to B, C and E, as the case may be. When, therefore, a partner has retired, and a creditor of the firm continues to deal with the continuing partners, and such other persons, if any, as may have become associated with them in partnership, it is of great importance to ascertain whether the creditor has or has not accepted the new firm as his debtors in lieu of the old firm. If he has, the retired partner's liability will have ceased, whilst if he has not, it will still continue. 2 *Lindley on Partnership* 239 (2nd Am. ed.).

2. "It frequently happens that, upon the retirement of one partner, the remaining partners undertake to pay the debts, and to secure the credits of the firm. This is a mere matter of private arrangement and agreement between the partners, and can in no respect be

admitted to vary the rights of the existing creditors of the firm. But in all cases of this sort, it may be stated, as a general doctrine, that if the arrangement is made known to a creditor and he assents to it, and by his subsequent act or conduct, or binding contract, he agrees to consider the remaining partners as his exclusive debtors, he may lose all right and claim against the retiring partner, especially if the retiring partner will sustain a prejudice, and the creditor will receive a benefit from such act, conduct, or contract."

*Story, Partnership*, § 158. *Smith v. Jameson*, 5 T. R. 601; *Rogers v. Maw*, 4 D. & L. 66; *Dickenson v. Lockyer*, 4 Ves. 36; *Cummins v. Cummins*, 8 Ir. Eq. 723. *Harris v. Lindsay*, 4 Wash. (U. S.) 271.

In the following cases a new partner had come in and agreed to assume the debts with the others. *Vere v. Ashley*, 10 B. & C. 288; *Lee v. Fontaine*, 10 Ala. 755; s. c., 44 Am. Dec. 505; *Hicks v. Wyatt*, 23 Ark. 55 (put on ground of "want of privity of contract"); *Goode-now v. Jones*, 75 Ill. 48; *Locke v. Hall*, 9 Me. 133; *Manny v. Frazier*, 27 Mo. 419; *Parmelee v. Wiggenghorn*, 6 Neb. 322; *Morehead v. Wriston*, 73 N. Car. 398; *Torrens v. Campbell*, 74 Pa. St. 470; *Kountz v. Holthouse*, 85 Pa. St. 235; *Shoemaker Piano Mfg. Co. v. Bernard*, 2 Lea (Tenn.) 358, *McKeand v. Mortimore*, 11 U. C., Q. B. 428. In *Shoemaker v. King*, 40 Pa. St. 107, a firm sold all its assets to A who agreed to pay the firm debts, but it was held that the creditors of the firm had thereby no right of action against him. So in bankruptcy, where a new partner joins the firm on an agreement that the new firm shall assume the debts of the old, a creditor who has not assented to

the arrangement cannot prove against the new firm for a debt due from the old. *Ex parte* Williams, Buck 13; *Ex parte* Freeman, Buck 471; *Ex parte* Fry, 1 G. & J. 96; *Ex parte* Parker, 2 M. D. & D. 511; *Ex parte* Peele, 6 Ves. 602. In *In re* Isaacs, 3 Sawy. (U. S.) 35, two traders agreed to unite their stocks in trade and to convert the separate business debts into firm debts. It was held that this would not entitle a separate creditor who had not acceded to the arrangement to prove in bankruptcy against the firm assets. The court says (*dissenting views*): "I am unable to see why a promise made by one partner to another, that he will hold himself jointly liable for the separate debt of the latter, may not, on the same principle, be availed of by the creditor. Why should evidence of the assent of the latter be exacted (and it is admitted that slight evidence will be sufficient, as was the case in *Ex parte* Kedie, 2 Deac. & Ch. 32), when that assent would in no case be withheld as the only effect of the arrangement would be to give to the creditor the security of the firm liability and that of the other partner, in addition to the liability of the partner with whom he had already contracted . . . But whatever may be said of the justice of the rule, I consider it too firmly established for me, at least, to depart from . . . If I have ventured to doubt the soundness of the rule thus laid down, it is because it has appeared to me that sufficient attention has not been given to the distinction between the cases where the creditor is supposed to have relinquished the old liability and accepted a new and substituted liability in its stead, and those where a new and additional liability has been created without impairing the old. In the former his assent is evidently necessary; in the latter, it seems to me it should be presumed, and he should be allowed the advantage of the promise made between third persons for his benefit. And in this view I have at least the countenance of Mr. J. DILLON." *In re* Downing, 3 N. B. R. 182. But see *Jones v. Bartlett*, 50 Wis. 589.

The same rule holds where there is no new partner, but on the retirement of one partner, the others agree to assume and pay the debts of the old firm. *Ex parte* Bradbury, 4 Deac. 202. *Robb v. Mudge*, 14 Gray (Mass.) 534; *Fowle v. Torrey*, 31 Mass. 289; *Ayres*

*v. Gallup*, 44 Mich. 13; *Spaunhorst v. Link*, 46 Mo. 197; *Merrill v. Green*, 55 N. Y. 270.

A partnership debt is not provable against the private estate of one of the partners, who has received an assignment of all the partnership property and executed a bond to his retiring partner to assume and pay the partnership debts, without evidence of an express or implied consent by him to pay the same to the creditor as his private debt; and notice by the creditor of his election to treat it as a private debt is not sufficient. *Wild v. Dean*, 3 Allen (Mass.) 579.

A, one of the two partners, sold out to the other B, who agreed to assume all the firm debts and C joined as surety in a written guaranty for this purpose. D, a creditor of the firm, being unable to collect his debt from either A or B, brought suit against C on his guaranty; *held*, that the action could not be maintained as there was no privity of contract between C and D. *Campbell v. Lacock*, 40 Pa. St. 448.

**Creditor Who Has Not Assented May Sue.**—Some jurisdictions repudiate this rule and hold that an agreement between partners to assume debts of a prior firm enures to the benefit of a creditor of the prior firm who can sue the assuming partner or partners without any evidence of his assent to such an arrangement. Where there is no new partner. *Warren v. Farmer*, 100 Ind. 593; *Bays v. Conner*, 105 Ind. 415; *Hardy v. Blazer*, 29 Ind. 226; 8 C. 92 Am. Dec. 347; *Powers v. Fletcher*, 84 Ind. 154; *Hood v. Spencer*, 4 McLean (U. S.) 168. Such an agreement is not within the statute of frauds. *Haggerty v. Johnston*, 48 Ind. 41. And see *Hoyt v. Murphy*, 18 Ala. 316, where a set-off was allowed. So in bankruptcy where one partner takes the assets and assumes the firm debts, the firm creditors are allowed to prove *pari passu* with the separate creditors of such partner. *In re* Lloyd, 22 Fed. Rep. 88; *In re* Collier, 12 Nat. Bank Reg. 266; *In re* Long, 7 Ben. (U. S.) 141; 8 C., 9 Nat. Bank Reg. 227; *In re* Rice, 9 Nat. Bank Reg. 373.

The same is held where a new partner is taken in and the new firm assumes the old debts. *Poole v. Hintrager*, 60 Iowa 180.

Where A borrowed money and bought goods which were put in as assets in a firm of A and B then formed, the court held the firm for the

if the creditor assents to such an arrangement, or agrees to accept the continuing partner or new firm as his debtors, and releases the retiring partner or the old firm,<sup>1</sup> then a novation of the debt is effected.<sup>2</sup>

debt, it considering that there was proof that B understood that the debts that A owed for goods brought into the firm were to be paid out of the partnership funds. *Colt v. Wilder*, 1 Edw. Ch. (N. Y.) 484.

W purchased a half interest in the business of F, with whom he formed a copartnership, and thus acquired an interest in the assets to which the plaintiff had a right to look for the satisfaction of a debt due to him from F. As a part of the consideration for his purchase, W promised F to pay one-half of the latter's indebtedness to the plaintiff. *Held*, that this promise being for the benefit of the plaintiff, it enures to him by equitable subrogation, and he can maintain an action upon it against W. *Ringo v. Wing*, 49 Ark. 457. And *vide* *Smead v. Lacey*, 1 Disney (Ohio) 239.

**Limitation of This Doctrine.**—Elsewhere this doctrine is limited to cases where the partner or firm that assumes the debts also takes the assets, which should be held for the debts. *Arnold v. Nichols*, 64 N. Y. 117; *Turner v. Joycox*, 40 N. Y. 470; and *cf.* *Merrill v. Green*, 55 N. Y. 270; *Wheat v. Rice*, 97 N. Y. 296. And see also *Torrens v. Campbell*, 74 Pa. St. 470; *Kountz v. Holthouse*, 85 Pa. St. 235; *Hopkins v. Johnson*, 2 La. An. 842; *Marsh v. Bennett*, 5 McLean (U. S.) 117. In *McKillip v. Cattle*, 12 Neb. 477, it was held that where one partner took the assets and assumed the debts under a decree of court, he was bound to the creditor on the ground that the partner could not take the property without complying with the conditions. In *Sedam v. Williams*, 4 McLean (U. S.) 51, it was held that the partner taking the assets and assuming the liabilities was a trustee for the creditors and the retired partner, and the creditors might avail themselves of a mortgage given to the retired partner to secure him.

An agreement between a retiring partner and his co-partners that the latter will take the assets and assume the debts with them constitutes the new firm a trustee of the assets for the benefit of the creditors of the old

firm, and new creditors must be postponed to them; and the statute of limitations does not apply. *Bowman v. Spalding* (Ky. 1887), 2 S. W. Rep. 911.

1. It would seem that the right to sue the new firm is not necessarily inconsistent with the right to hold the retired partner or the old firm. *Harrie v. Farwell*, 15 Beav. 31; *Story Part.*, § 369; *Collyer Part.*, § 767. And see *Isre Isaacs*, 3 Sawy. (U. S.) 35; *Kirwan v. Kirwan*, 2 C. & M. 617; *Daniel v. Cross*, 3 Ves. 277; *Fergusson v. Fyffe*, 8 C. & Fin. 121; *Fogarty v. Cullen*, 49 N. Y. Sup. Ct. 397.

Where A of B & Co. retired and C took his place, but the firm name was unchanged and no notice of dissolution was given, and an old customer, ignorant of the change, sold goods to the new firm; *held* that the old firm was liable by estoppel, and the new firm on the facts, but there could not be a joint liability and the creditor must elect. *Scarf v. Jardine*, L. R., 7 App. Cas. 350.

2. **Assent of Creditor.**—"1. There is no *a priori* presumption to the effect that the creditors of the firm do, on the retirement of a partner, enter into any agreement to discharge him from liability.

"2. An agreement by a creditor of several persons, liable to him jointly, to discharge one or more of them and look only to the others, is not necessarily invalid for want of consideration.

"3. Except under special circumstances, a creditor who releases one partner discharges all. Consequently, if a creditor discharges a retired partner and acquires no fresh right to obtain payment from the others, either alone or with a new partner, the creditor will be altogether remediless. One test, therefore, to determine whether a retired partner has been discharged is to see whether the creditor has obtained a new right to demand payment; for if he has not, no discharge can possibly be made out by any evidence which fails to establish an extinguishment of the creditor's demand altogether." 2 *Lindley Partnership*, p. 241 (5th ed.).

**Consideration.**—It was formerly held in *England* that although the creditor

assented to hold the continuing partners who take the assets and agree to pay the debts, yet there was no consideration for such agreement, and retired partner is not discharged. *Lodge v. Dicus*, 3 B. & Ald. 611; *David v. Ellice*, 5 B. & C. 196; s. c., 7 D. & R. 690. And *vide* *Thomas v. Shilliben*, 1 M. & W. 124. And these cases have been followed in a few cases in *America*. *Early v. Burt*, 68 Iowa 716; *Chase v. Vaughan*, 30 Me. 412. And see *Wildes v. Fessenden*, 4 Met. (Mass.) 12, where one joint debtor with the consent of the other remitted to the creditor joint funds with the request that they be placed to his individual credit, and he be debited with the bills drawn on the joint account, and the creditor replied that he had received the letter and "noted the contents," it was held that he had not thereby released the other debtor, and that there would have been no consideration for such an agreement had it been made.

These early English cases were criticised severely in *Thompson v. Percival*, 5 B. & Ad. 925, where DENMAN, C. J., said there was abundant evidence in *David v. Ellice* to go to the jury, and in *Hart v. Alexander*, 2 M. & W. 483, PARKE, B., said: "I apprehend the law to be now settled, that if one partner goes out of a firm and another comes in, the debts of the old firm may, by consent of all the three parties, the creditor, the old firm, and the new firm, be transferred to the new firm. In *David v. Ellice*, the retired partner was held liable, but the court was substituted for a jury in that case, and I much doubt whether twelve merchants would have determined it as the court did." See also *Kirwan v. Kirwan*, 2 C. & M. 617; *Re Clap*, 2 Low. (U. S.) 226; *Backus v. Fobes*, 20 N. Y. 204. Where the court says: "It is quite true that the obligation of one of two joint debtors, substituted for that of both, affords no new security to the creditor. But if one of the debtors agree to surrender and does surrender to the other his interest in the property and funds which they own together, an agreement of the creditor to discharge him and look to the other is well founded on that consideration." *Lytle v. Ault*, 7 Ex. 669, explains clearly the nature of the consideration for such an agreement. ALDERSON, B., said: "It is demonstrable that the sole security of A may be a better thing than the joint security of A and B; for, by accepting the sole

security of A, instead of the joint security of both debtors, the creditor possesses a legal remedy against A during his lifetime, and against his assets after his death, and no security whatever against B. Now as to the case where the security is joint—after the death of A, there exists a legal liability of B, and no legal liability of A's assets; but an equitable remedy against the assets of A, subject to the necessity of making B a party to a suit in equity. Now these two securities are different things, and therefore a bargain to take the one for the other is good." PARKE, B., said in course of the argument: "The plaintiff agrees to take the security of one partner instead of that of both. She is at liberty to enter into that arrangement, for the court cannot enquire into the value of the consideration. If there be any consideration whatever, it will support an agreement. Now although £10 would be no satisfaction for a debt of £100, yet an article of much less value than £10 may be given and received in satisfaction of such a debt. It may at first appear paradoxical, but the sole responsibility of one of many partners may be of greater value than that of all, for you may thereby obtain the security of his real and personal estate." The American cases in general agree with the modern English view. *Collyer v. Moulton*, 9 R. I. 90.

It was agreed between two partners and creditor of the firm, that it should be submitted to arbitrators to divide and appropriate the assets of the firm as they deemed fit, for the payment of debts, and to determine which of the partners should pay the creditor, and that the other should be discharged. *Held*, that such submission constitutes a sufficient consideration for the creditor's agreement, and that an award discharging one of the partners is a bar to an action against him. *Backus v. Fobes*, 20 N. Y. 204.

It is essential, however, that the creditor be a party to the agreement, or at least show by his conduct that he assents to it; otherwise, the agreement between the debtors is *res inter alios*. *Hayes v. Knox*, 41 Mich. 529; *Rawson v. Taylor*, 30 Ohio St. 389; s. c., 27 Am. Rep. 464. In these two cases, the creditor was not a party to the agreement and so was not allowed to recover. *Rice v. Wolff*, 65 Wis. 1.

A and B gave notes for their firm debt. C joined the firm, which then

Such assent or agreement may be either express,<sup>1</sup> or implied from the subsequent acts or conduct of the creditor, although neither the failure of the creditor to demand payment of the retired partner for a period of time less than that prescribed as a bar by the statute of limitations, nor a demand for payment from the new firm or continuing partner, nor the receipt of interest, nor even a partial payment of the debt by the new firm, nor all these facts combined necessarily establish such assent.<sup>2</sup> It is

was styled A, B & Co. A then retired, and B and C gave him a bond to pay the debts of the firm of A, B & Co. A was obliged to pay one of the notes, and sued on this bond. It was held that he could not recover, as the debts of A and B were not covered by the bond until the creditors had agreed to the substitution. *Childs v. Walker*, 2 Allen (Mass.) 259. *In re Stewart*, 62 Iowa 614; *Lisso v. Navra*, 34 La. An. 1111; *Laucks v. Martin*, 20 W. N. C. (Pa.) 93; *Luddington v. Bell*, 77 N. Y. 138; s. c., 33 Am. Rep. 601. It is not enough that one member has retired with assent of creditor and transferred all his interest in the firm to the other partners. *Clark v. Billings*, 59 Ind. 508.

A promise of the vendor of goods to a firm to release the retiring partner from further liability and to look to the other partner alone for payment, must, in order to be binding, be founded on some new consideration; and where it is made after the dissolution, and not as an inducement to or consideration of it, and no new partner is introduced into the firm or assumes liability for the debt, and no different or additional security therefor is given, and a note already given and not surrendered or any new note given, and no change is made in the form, terms or time of the debt, and no other fact appears than the dissolution and the agreement of the partners, the promise is a mere *nudum pactum*. *Eagle Mfg. Co. v. Jennings*, 29 Kan. 657; s. c., 44 Am. Rep. 668. And see *Walstrom v. Hopkins*, 103 Pa. St. 118.

"But if the other partner promise the creditor to assume and pay the entire debt, and the creditor promises to look to him alone, a substitution of debtors is affected, and the other partner is released. This is founded on the doctrine that the sole liability of one of two debtors may, under many circumstances, be more beneficial and convenient than the joint liability of two, and

therefore the change is founded upon a valuable consideration; and whether it was actually a benefit in each particular case will not be looked into, but the agreement will be sustained. 1 Bates on Partnership, § 505.

1. A verbal agreement is sufficient. *Glover v. First Universalist Parish of the Dowagiac*, 48 Mich. 595; *Ex parte Lane, De Gex* 300; *Files v. McLeod*, 14 Ala. 611; *Durham v. Manrow*, 2 N. Y. 541; *Aikin v. Duren*, 2 Nott & M. (S. Car.) 370; *Rice v. Barry*, 2 Cranch (C. C.) 447; *Howes v. Martin*, 1 Esp. 162; *Stephens v. Squire*, 5 Mod. 205; *Hopkins v. Carr*, 31 Ind. 260. And see *Schindler v. Euell*, 45 How. Pr. (N. Y.) 33.

2. Assent.—*Hall v. Jones*, 56 Ala. 493. "So, if the creditor should give up the securities of the old firm, and take those of the new firm in lieu thereof, or should give a prolonged credit to the new firm for the old debt, receiving from the latter in consideration thereof an additional interest or a new security; in all such cases, the retiring partner would be discharged. But the mere fact of the creditor's taking an additional security from the new firm, without surrendering the old, or of his receiving interest from the new firm without varying from that due on the old debt, or of his acquiescing in delay without contracting upon any new consideration to prolong the credit, will not absolve the retiring partner from his original responsibility." Story, Partnership, § 158.

*Hayes v. Knox*, 41 Mich. 529. "The plaintiff had money deposited with a firm composed of A, B and C, and annual accounts were rendered him. B and C successively retired and A took in K as a new partner, who put in much new capital. The plaintiff's account was transferred to the new firm and he disclaimed any right against the retiring partners. Annual accounts were continued and the plaintiff was paid interest and part of his principal.

*Held*, no evidence of assent of plaintiff to look to the new firm alone. And in the absence of such assent, it could not be inferred that K intended to assume the debt. *Kirwan v. Kirwan*, 2 C. & M. 617.

In *Hart v. Alexander*, 2 M. & W. 484, the court held the retired partner discharged when the creditor dealt with the new firm for a long time after his retirement. *PARKE, B.*, p. 492, doubts *David v. Ellice*, 5 B. & C. 196, and *Kirwan v. Kirwan*, 2 C. & M. 617, and says that the former and *Lodge v. Dicus* are much shaken by *Thompson v. Percival*, 3 Nev. & M. 167.

Where the creditor transferred on his books the account against the firm that had been dissolved to the account of the continuing partner who had assumed the debts and with whom he had separate dealings, this did not prevent him from recharging the firm and holding them. *Barker v. Blake*, 11 Mass. 16. And this is so even though the creditor states his account against the continuing partner. *Averill v. Lyman*, 18 Pick. (Mass.) 346. Or drew on him *Skannel v. Taylor*, 12 La. An. 773. Or dealt with him in finishing a contract of employment made with the firm as attorneys to conduct a suit. *Waldeck v. Brande*, 61 Wis. 579.

Where the partners set up in defence that the creditor agreed to hold the continuing partner only as on a debt due him from the others, their book was held admissible to show performance of the agreement on their part. *Moore v. Knott*, 14 Oreg. 35.

A firm of A and B gave a note and then dissolved. A took the assets and assumed the debts, and formed a partnership with the holder of the note. *Held* that B was still held on the note. *Gulick v. Gulick*, 16 N. J. L. 186. And see *Mitchel v. Dobson*, 7 Ired. Eq. (N. Car.) 34.

Where the continuing partner agreed to assume the debts of the firm and published a notice that he will pay them, a creditor who did not so present his claim can still hold the other partner. *Umbarger v. Plume*, 26 Barb. (N. Y.) 461. And where the creditor verbally assented to the arrangement and promised to give up the partnership note and take that of the continuing partner, but did not do it, the retiring partner was held. *Frentress v. Markle*, 2 Greene (Iowa) 553. And it is no evidence to go to the jury that the creditor said he was satisfied with such an ar-

range ment. *Chase v. Vaughan*, 30 Me. 412; *Smith v. Rogers*, 17 Johns. (N. Y.) 340; *Clark v. Billings*, 59 Ind. 508; *Walstrom v. Hopkins*, 103 Pa. St. 118.

Where, after the dissolution of a firm in which the continuing partner, A, had assumed the firm debts, a creditor stated his account of firm debts and at the same time stated his account against A for his separate dealings with him, but included a firm debt in it, it was held that the retired partner was not thereby discharged, especially where he had given a note by way of security or satisfaction of such debt. *Averill v. Lyman*, 18 Pick. (Mass.) 346.

**Interest.**—The retired partner is not discharged where the new firm pays interest on the debt to the creditor, either at the new or the old rate. *Hall v. Jones*, 56 Ala. 493; *Hawk v. Johnson*, 34 Pitts. L. J. 213; *Heath v. Percival*, 1 P. Wms. 682; s. c., 1 Str. 403; *Harris v. Farwell*, 15 Beav. 31; *E\* parte Parker*, 2 Mont. D. & D. 511; *Beale v. Moulds*, 10 Q. B. 976; *Morehead v. Wriston*, 73 N. Car. 398; *Shamburg v. Ruggles*, 83 Pa. St. 148. *Contra*, *Osborn v. Osborn*, 36 Mich. 48; *Cross v. Burlington Nat. Bank*, 17 Kan. 336; *Goodrich v. Chute*, 3 N. Y. Supp. 102.

There must be a promise to the creditor on a new consideration or a release of the prior partner or firm. *Morris v. Marqueeze*, 74 Ga. 86; *Goodenow v. Jones*, 75 Ill. 48; *Shoemaker v. King*, 40 Pa. St. 107, where it was said: "While the old debt remains, the new contract cannot be substituted, but only a collateral one, a promise to pay another's debt, and it is forbidden by the statute as a cause of action." And see *Wallace v. Freeman*, 25 Tex. Supp. 91; *White v. Thieleus*, 106 Pa. St. 173. Mere knowledge and approval is not enough. *Birkitt v. McGuire*, 7 U. C. App. 53; s. c., 31 U. C., C. P. 430.

**Estoppel.**—The new firm or continuing partner may so conduct themselves that they will be estopped to deny a liability to the creditor. *McCracken v. Milhous*, 7 Ill. App. 169; *Lucas v. Coulter*, 104 Ind. 81; *Beall v. Poole*, 27 Md. 645; *Updike v. Doyle*, 7 R. I. 446; *Shoemaker Piano Mfg. Co. v. Bernard*, 2 Lea (Tenn.) 358, where the new firm allowed the old debts to be entered on the books of the new firm. And see *Davison v. Donaldson*, 9 Q. B. D. 623; *Featherstone v. Hunt*, 1 B. & C. 113 (a



a question of fact for the jury, under appropriate instructions from the court, whether such an assent or agreement, on the part of the creditor, existed in fact.<sup>1</sup>

case of fraud). Rendering an account by the new firm with the old balance included in it does not make the new firm liable. *Ex parte* Parker, 2 M. D. & D. (Bank'cy) 381. Unless it was done at the creditor's suggestion. Then this is evidence of the adoption of the new firm by the creditor as his debtors, if they have assumed the debts of the old firm. *Hine v. Beddome*, 8 U. C., C. P. 381. But writing to a creditor, recognizing the debt and scheduling it as a firm debt shows an assumption. *White v. Thielus*, 106 Pa. St. 173. And see *Ex parte* Parker, 2 Mont. D. & D. 146.

Merely crediting the new firm which has assumed the debts of the old with payments by them is not evidence of assent of the creditor. *Hall v. Jones*, 56 Ala. 493; *Scull v. Alter*, 16 N. J. L. 147. And see *Botsford v. Kleinhaus*, 29 Mich. 332. On this point, STORY says (Partn., § 157): "Where there is a cash account current between a firm and a customer, and the account is in favor of the latter, a retiring partner will be liable for the balance of this account, at the time of his retirement. But if the account be continued, the balance, the balance for which the retiring partner is liable, will be diminished by every payment which is made by the new firm, supposing such payment not to be appropriated to the discharge of any specific item, because, in such case, it is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side."

Taking security from the new firm is not conclusive to release the retired partner. *Thompson v. Percival*, 5 B. & Ad. 925. The course of dealing may be looked at to show the intent of the parties, and if it is thus shown, it is not necessary to prove any agreement. *Bill v. Barker*, 16 Gray (Mass.) 62. Thus, acceptance of a dividend in insolvency on proof of a firm debt against the insolvent estate of a continuing partner who had assumed the firm debts is a bar to any action against the other partners, although in another State. *Bucklin v. Bucklin*, 97 Mass. 256. But see *Bank of Wilmington v. Almond*, 1 Whart. (Pa.) 169; *Buxton v. Edwards*, 134 Mass. 567. And see *Regester v. Dodge*, 19 Blatchf. (U. S.) 79; s. c., 6 Fed. Rep. 6. *Contra*, where

it was held that proof of debt in bankruptcy against the new firm, and a delay of five years after the death of the retired partner to call upon his estate for payment, were held to constitute a discharge of the retired partner.

The pleadings and papers in a suit against a new firm are admissible in evidence to show an intention to release a retired partner. *Baum v. Fryrear*, 85 Mo. 151.

Where the sureties on a partnership note sign a renewal note signed by one partner on the assurance that it would be signed by the other partner, they can recover whatever they have paid on its account from all the partners, although it may have been signed by only one. *McKee v. Hamilton*, 33 Ohio St. 7.

A drew a bill on B, C & Co., which was accepted and by him negotiated. At maturity the bill was paid by a bill drawn on B alone, the firm having been dissolved. This bill, A, as endorser, had to take up, and it was held he had no action against the firm. *Springer v. Shirley*, 11 Me. 204.

A and B, partners, agreed to give C a commission if he would sell their goods to D. Pending negotiations, the firm was dissolved and B retired, A agreeing to assume all firm obligations. A then formed a partnership with E, and the new firm sold the goods directly to D. *Held*, that C could recover commission from A. *Sinclair v. Galland*, 8 Daly (N. Y.) 508.

1. *Question for Jury*.—"The law is this: When a creditor of a firm contracts or agrees with a new firm to take their security in discharge of that of the old, the retiring partner is discharged from any liability to pay the debt; but whether such a contract or agreement has or has not taken place is a fact to be submitted to a jury." *Harris v. Farwell*, 15 Beav. 31; *Thompson v. Percival*, 5 B. & Ad. 925; *Hart v. Alexander*, 2 M. & W. 484; *Nightingale v. Chaffee*, 11 R. I. 609; s. c., 23 Am. Rep. 531; *Re Clap*, 2 Low. (U. S.) 226; *Backus v. Fobes*, 20 N. Y. 204; *Hayes v. Knox*, 41 Mich. 529; *Evans v. Drummond*, 4 Esp. 89; *Reed v. White*, 5 Esp. 122. Where the creditor expressly refused to assent to the discharge of the retired partner, cir-

cumstances are not to be taken against him. *Adler v. Foster*, 39 Mich. 87.

Where one partner assigns part of his interest to A by an agreement constituting him (A) "a partner in the firm to an amount of one eighth of all its profits and losses from the time the firm began business," and such person is received by the firm as a member, he is a partner from the beginning and liable for all debts. *Earon v. Mackey*, 106 Pa. St. 452.

Some cases hold that slight circumstances will be sufficient to justify the finding that the creditor has released the retired partner and accepted the new firm as his sole debtors. *Shaw v. McGregory*, 105 Mass. 96. Where the court says: "There was evidence that the defendants were the successors of the firm from which only one partner had retired, and this implies that they were severally liable for its debts, had taken possession of its assets, and were continuing the same business in the same place. Under such circumstances comparatively slight evidence would tend to the inference that they had assumed the debts of the old firm, and such evidence is found in the fact that the plaintiff's account, which was presented and received by them without comment or objection, was wholly made out to the last firm, though containing items due from both concerns."

In this case, goods were sold to the firm of A, B, C & Co. A retired and the plaintiff sold more goods to the continuing partners, who did business as B, C & Co. carrying on the same business. There was evidence that in an interview lasting an hour when the plaintiff's account was presented and the note signed therefor, B, a member of both firms was present, though he took no part in the conversation, and had never kept the books and did not order the goods. *Held*, that the jury was warranted in finding that he had assented to the making of the note.

**Slight Circumstances Enough.**—"In disposing of questions of this character, courts have frequently held, that when the dissolution of an old firm has occurred, and a new firm has agreed to assume the liabilities of the old firm, but slight circumstances are required to justify finding an intention on the part of a creditor of the old firm, who has notice of the dissolution and the agreement by the new firm, to accept the liability of the new firm in place of

the old. In *Ex parte Williams* (Buck 13), the court speaking of such a case, say: "A very little will do." In *In re Smith, Knight & Co.* (L. R., 4 Ch. App. 671, LORD JUSTICE GIFFORD says: "There is no doubt whatever, that, if you have an old firm, and either a new partner is taken into it, or a new firm constituted, and the assets are taken over by that new firm, and the customer knowing all these circumstances, afterwards goes on and deals with the new firm, you infer, from slight circumstances, an assent on his part to accept the new firm as his debtors." In *In re Family Endowment Soc.* (L. R., 5 Ch. App. 518), speaking of a case very like the present, it was said that very slight evidence would be required to establish that the creditor had taken the liability of the new firm instead of the old. *Register v. Dodge*, 19 Blatchf. (U. S.) 79; s. c., 6 Fed. Rep. 6.

In this case the plaintiff for several years, and until after the death of the retired partner, before bringing suit, and in the mean time, had accepted a dividend in bankruptcy from the estate of the new firm which had become insolvent. And see *Citizen's National Bank v. Hine*, 49 Conn. 236; *Ex parte Kedie*, 2 Deac. & Ch. 32; *Ex parte Williams*, Buck 13, per LORD ELTON. But where the creditor drew on the new firm and his drafts were refused, he was allowed to hold the retired partner. *Skannel v. Taylor*, 12 La. An. 773.

**The burden of proof** is on those who set up the extinguishment or release. *Davis's Estate*, 5 Whart. (Pa.) 530; s. c., 34 Am. Dec. 574; *Kimberly's Appeal* (Pa. 1886), 7 Atl. Rep. 75; *Hall v. Jones*, 56 Ala. 493.

Where the retired partner alleged that he had agreed with the agent of the creditor that a judgment against the firm should be in his control so that he could collect it from the continuing partner, who had assumed the firm debts, it was held that the burden was on him to show such an agreement, and under the facts of the case his property was liable for satisfaction of the judgment. *Aiken v. Thompson*, 43 Iowa 506.

The assent of the creditor is not had merely by a notification by him that he elects to hold the continuing partner, unless the former partners directly assent to this. The creditor must show what amounts to a contract. *Wild v. Dean*, 3 Allen (Mass.) 579.

**2. Deceased Partner.**—In the case of a deceased partner the creditor does not necessarily lose his right against the estate of such partner by continued dealings with the continuing partner, unless there is evidence of an intent to abandon his recourse on such estate.<sup>1</sup>

1. *Winter v. Innes*, 4 Myl. & Cr. 101. And *vide Devaynes v. Noble*; 1 Mer. 616; *Sleech's Case*, 1 Mer. 539; *Clayton's Case*, 1 Mer. 572; *Palmer's Case*, 1 Mer. 623.

The New York law on this point is as follows: After the death of one partner, the surviving members of the firm alone are liable at law for the debts of the firm. *Waydell v. Luer*, 3 Den. (N. Y.) 410, per Lott, S. The creditor has merely an equitable recourse to the estate of the deceased partner upon showing that the surviving partners are insolvent or that he has exhausted his legal remedy against them. *Lawrence v. Trustees of Lake etc. Orphan House*, 2 Den. (N. Y.) 577; *Van Riper v. Poppenhausen*, 43 N. Y. 68; *Pope v. Cole*, 55 N. Y. 124; s. c., 14 Am. Rep. 108. The estate of the deceased partner is then a surety to the creditor for the payment of his debt by the survivors, and may avail itself when sued of any conduct of the creditor which violates its rights or suspends its remedies as a surety. *Millard v. Thorn*, 56 N. Y. 402; *Colgrove v. Tallman*, 67 N. Y. 95; s. c., 23 Am. Rep. 90.

Where one of two partners dies and judgment is recovered against the surviving partner for a partnership debt, and he becomes a bankrupt before the judgment is satisfied, the executors of the other may be compelled in equity to make satisfaction. *Storer v. Hinkley*, Kirby (Conn.) 147. But the estate of the deceased partner cannot be reached while the surviving partner is solvent. *Alsop v. Mather*, 8 Conn. 584.

An attempt to obtain payment from the survivors is not sufficient evidence of an intent to abandon recourse to the estate of the retired partner, even though a judgment be obtained against the survivors. *Jacomb v. Harwood*, 2 Ves. 265; *Buckingham v. Ludlum*, 37 N. J. Eq. 137. So of partial payments from the survivor. *Hammersley v. Lambert*, 2 Johns. Ch. (N. Y.) 508; *Fogarty v. Cullen*, 49 N. Y. Sup. Ct. 397.

So proof in insolvency, or bankruptcy against the continuing partner is not sufficient. *Sleech's Case*, 1 Mer.

570; *Harris v. Farwell*, 15 Beav. 31; and *cf. Brown v. Gordon*, 16 Beav. 302; *Bilborough v. Holmes*, 5 L. R., Ch. Div. 255.

If the creditor knows of the decease of the partner and allows his estate to be administered, he is precluded from claiming against it. *Oakley v. Pasheller*, 4 C. & Fin. 212; s. c., 10 Bli., N. S. 548. And see *Swire v. Redman*, 1 Q. B. Div. 536; *Wilson v. Lloyd*, L. R., 10 Q. B. 406 (discredited in *Simpson v. Henning*, L. R., 10 Q. B. 406). *Brown v. Gordon*, 16 Beav. 302, where the creditor was held to have lost his rights by sixteen years' delay.

An agreement to accept the new firm as sole debtors must be clearly proved. *Bank v. Green*, 40 Ohio St. 431; *Leach v. Church*, 15 Ohio St. 169; *Fogarty v. Cullen*, 49 N. Y. Sup. Ct. 397. But accepting a note of the new firm discharges the estate of the deceased. *Citizen's Mut. Ins. Co. v. Ligon*, 59 Miss. 305; *Lewis v. Davidson*, 39 Tex. 660.

Of course no dealing with the continuing partner induced by fraud can affect the creditor's rights. *Plumer v. Gregory*, 18 Eq. 621; *Daniel v. Cross*, 3 Ves. 277.

**Note of Surviving Partner.**—A note of the surviving partner given for the firm debt is not deemed payment unless such was the agreement. *Thompson v. Briggs*, 28 N. H. 40; *McLane v. Spencer*, 6 Ired. L. (N. Car.) 423; *Leach v. Church*, 15 Ohio St. 169; *Titus v. Todd*, 25 N. J. Eq. 458; *Collier v. Leach*, 29 Pa. St. 404; *Boatmen's Sav. Ins. v. Mead*, 52 Mo. 543 (in this case there was a special stipulation that the estate of the deceased should not be discharged).

But if the creditor is unaware of the death of the partner, or the dissolution of the firm, and the firm name is unchanged, a note given by the continuing partner is of course not an extinguishment of the debt. *Mason v. Tiff any*, 45 Ill. 392; *Bernard v. Torrance*, 5 Gill & J. (Md.) 383; *Buxton v. Edwards*, 134 Mass. 567; *Hill v. Marcy*, 49 N. H. 265; *First Nat. Bank v. Morgan*, 73 N. Y. 593.

**3. Liability of Incoming Partner.**—It is equally well settled that a new partner coming into an existing firm is not liable for debts contracted by the firm before he entered it, without an agreement, express or implied with the creditor,<sup>1</sup> but he may become liable by an express promise or an assumption of the debt on proper consideration.<sup>2</sup> The presumption is against any such assumption,

**Liability of Widow.**—If a widow goes on in her husband's place as a partner, and a contract is carried out from which she receives a benefit, the presumption is that she intended to assume his burdens. *Frazer v. Howe*, 106 Ill. 563. But see *Serviss v. McDonnell*, 107 N. Y. 260. If she gives a mortgage to secure certain firm debts, it is presumed that she intended to become liable for the debts, and the mortgage is good as against other creditors. *Preusser v. Henshaw*, 49 Iowa 41.

Under the Civil Code of Louisiana, a widow, even where she has accepted the succession of her husband without benefit of inventory, is not liable *in solido* with the surviving partners for the payment of a note made by a firm of which her husband was a member. *Henderson v. Wadsworth*, 115 U. S. 264.

1. "The doctrine is well established that an incoming partner is not liable for the debts incurred, nor upon contracts made before he entered the partnership, unless such liability is created by express contract, based upon a good consideration; and before the new firm can be made liable in any such case, there must be a novation, and the new contract must receive the consent of all the parties, and must have the effect to rescind and extinguish the original debt or contract, and create a new liability of debtor and creditor, or of contractors between the creditor or contractor and the new firm, and such new contract must be founded on some good consideration moving to the new firm." *Parmalee v. Wiggenghorn*, 6 Neb. 322; *Atwood v. Lockhart*, 4 McLean (C. C.) 350; *Butler v. Henry*, 48 Ark. 551; *Ringo v. Wing*, 49 Ark. 457; *Citizens' Nat. Bank v. Hine*, 49 Conn. 236; *Bryan v. Tooke*, 60 Ga. 437; *Bracken v. Dillon*, 64 Ga. 243; s. c., 37 Am. Rep. 70; *Morris v. Marqueze*, 74 Ga. 86; *Wright v. Brosseau*, 73 Ill. 381; *Goodenow v. Jones*, 75 Ill. 48; *Wheat v. Hamilton*, 53 Ind. 256 (*semble*); *Waller v. Davis*, 59 Iowa 103; *Duncan v. Lewis*, 1 Duv. (Ky.) 183; *Meador v. Hughes*, 14 Bush (Ky.) 652; *Mous-*

*seau v. Thebeus*, 19 La. An. 516; *Beall v. Poole*, 27 Md. 645; *Guild v. Belcher*, 119 Mass. 257; *Lake v. Munford*, 4 Smed. & M. (Miss.) 312; *Fagan v. Long*, 30 Mo. 222; *Durand v. Curtis*, 57 N. Y. 7; *Sizer v. Ray*, 87 N. Y. 220; *Serviss v. McDonnell*, 107 N. Y. 260; *Pierce v. Alspaugh*, 83 N. Car. 258; *Shafer's Appeal*, 99 Pa. St. 246; *Morrison's Appeal*, 93 Pa. St. 326; *Holmes v. Caldwell*, 8 Rich. L. (S. Car.) 247; *Shoemaker Piano Mfg. Co. v. Bernard*, 2 Lea (Tenn.) 358; *Adkins v. Arthur*, 33 Tex. 431; *Hart v. Tomlinson*, 2 Vt. 101; *Poindexter v. Waddy*, 6 Munf. (Va.) 418; s. c., 8 Am. Dec. 749; *Peters v. McWilliams*, 78 Va. 567; *McLinden v. Wentworth*, 51 Wis. 170; *Hine v. Beddome*, 8 U. C., C. P. 381; *McKeand v. Mortimore*, 11 U. C., Q. B. 428.

A as A & Co., borrowed money from the plaintiff under an agreement to purchase and ship grain and turn the bills of lading to cover the advances made. He used the money in the purchase of grain, sold it, and used the proceeds as his contribution to the capital stock of a firm he formed with B and others. It was held that the plaintiff had no lien or equity on the grain so purchased which it could enforce, and could not follow the *fund* as a trust fund in the new firm, and that its only remedy was to proceed against A as an ordinary debtor, and attach or levy on his interest in the new firm. *Bank v. Gray*, 12 Lea (Tenn.) 459.

"It is not necessary that an incoming partner should *do something* in order to *escape* liability for the previous debts and obligations of his copartners, but on the contrary, it is necessary that he should *do something* in order to *make himself liable* for such debts and obligations. It is in fact necessary that the incoming partner should do something from which it may be inferred that he intends to assume, or that the new partnership shall assume the previous debts and obligations of his copartners." *Gauss v. Hobbs*, 18 Kan. 500.

2. *Burritt v. Dickson*, 8 Cal. 113;

but it may be rebutted by satisfactory proofs of the contrary intention and agreement.<sup>1</sup> It is essential that all the partners are

Markham v. Hazen, 48 Ga. 570; Wilson v. Dozier, 58 Ga. 602; Lucas v. Coulter, 104 Ind. 81; Preusser v. Henshaw, 49 Iowa 41; Cross v. Burlington Nat. Bank, 17 Kan. 336; Beall v. Poole, 27 Md. 645; Shaw v. McGregory, 105 Mass. 96; Botsford v. Kleinhans, 29 Mich. 332; Coleman v. Pearce, 26 Minn. 123; Mueller v. Wiebracht, 47 Mo. 468; Baum v. Fryrear, 85 Mo. 151; Howell v. Sewing Machine Co., 12 Neb. 177; Morrison v. Bludgett, 8 N. H. 238; s. c., 29 Am. Dec. 653; Colt v. Wilder, 1 Edw. Ch. (N. Y.) 484; Arnold v. Nichols, 64 N. Y. 117; Bate v. McDowell, 49 N. Y. Super. Ct. 106; Abpt v. Miller, 5 Jones L. (N. Car.) 32; Morehead v. Wriston, 73 N. Car. 398; Smead v. Lacey, 1 Disney (Ohio) 239; Earon v. Mackey, 106 Pa. St. 452; White v. Thieleus, 106 Pa. St. 173; Hart v. Kelley, 83 Pa. St. 286; Updike v. Doyle, 7 R. I. 446; Shoemaker Piano Mfg. Co. v. Bernard, 2 Lea (Tenn.) 358; Wallace v. Freeman, 25 Tex. Supp. 81; Allen v. Atchison, 26 Tex. 616; Hobbs v. Wilson, 1 W. Va. 50; Hine v. Beddome, U. C., C. P. 381.

Where the new member of the firm covenants with the retiring partner whose share he has purchased, to pay the latter's share of the firm debts, and the new firm has made payments on the plaintiff's claim, and the retiring partner had assigned to the plaintiff all claim he might have against the new member, it was held that the jury would be warranted in holding the new firm liable to the plaintiff. Osborn v. Osborn, 36 Mich. 48. And *cf.* also McCracken v. Milhous, 7 Ill. App. 169; Frazer v. Howe, 106 Ill. 563; Poole v. Hintrager, 60 Iowa 180.

1. **Presumption.**—An incoming partner (that is, a new partner coming into an existing firm) will not be liable in respect to debts contracted by the firm previously to his entering it. But although this is the clearly established doctrine, yet it does not follow that an incoming partner may not become liable for such debts by expressly assuming them upon a proper consideration, or otherwise dealing with the creditor in such manner as to create an implied obligation and duty to pay the same in common with the old firm. The presumption of law, indeed, is against any such liability; but the presumption, like

many others, may be removed by due and satisfactory proofs of the contrary intention and agreement. Thus, for example, if the balance due from the old firm be, with the consent of the creditor and all of the new firm, carried to the debit of the new firm, the latter deriving a benefit therefrom as a credit or deposit, it is very clear that the new firm will be bound thereby and therefor, as their own debt. "*A fortiori*, the same rule will apply where it is an express stipulation of the partnership between the old firm and the incoming partner, that the new firm shall assume all the outstanding debts of the firm, and shall pay the same, and the creditor shall assent thereto and take the new firm as his debtors." Story Partn., § 152.

"The inference that a retired partner has been discharged is greatly facilitated by the circumstance that a new partner has joined the firm and become liable to the creditor in respect to the debt in question. But this is not necessarily conclusive, for there may be circumstances showing that such was not the intention of the parties. At the same time, in the absence of any such evidence, the acceptance by the creditor of the liability of a new partner will practically preclude him from afterwards having recourse to the retired partner." 2 Lindley on Partnership (5th ed.) 248.

The receipt of money by the new firm is sufficient to raise a presumption that the incoming partner made a parol contract binding himself to fulfil the covenants and conditions of the original contract, because the liability must rest on a novation, and a new contract receiving the express consent of all the parties, and which effects a rescission and extinguishment of the original contract. Parmalee v. Wiggenghorn, 6 Neb. 322. The mere act of joining the firm is not enough. Beall v. Poole, 27 Md. 645.

In Bracken v. Dillon, 64 Ga. 243; s. c., 37 Am. Rep. 70, the court say: "The jury must be satisfied from the evidence," but other cases hold slight evidence is sufficient to warrant the court in inferring that the new partner has assumed the debts, especially if he has received a benefit from them. *Ex parte* Peele, 6 Ves. 602; *Ex parte* Jackson, 1 Ves. 131; Cross v. Burlington Nat. Bank, 17 Kan. 336; Wheat v.

parties to the agreement;<sup>1</sup> a mere promise by the incoming part-

Hamilton, 53 Ind. 256 (*semble*). So where the new partner does not deny the debt and allows the creditor to sue the new firm. *Burritt v. Dickson*, 8 Cal. 113. But agreeing with the other partners that the cost of fitting up the premises shall be paid before there is any division of the profits is not an assumption. *Hart v. Kelley*, 83 Pa. St. 286.

**Entry on Books.**—An entry on the books of the new firm as a debt of the new firm of a debt incurred by the old firm, fixes on a new partner the knowledge that it is claimed that the debt belongs to the new firm to pay, and is evidence that it does so. *Cross v. Burlington Nat. Bank*, 17 Kan. 336; *Abpt v. Miller*, 5 Jones L. (N. Car.) 32; *Udike v. Doyle*, 7 R. I. 446; *Shoemaker Piano Mfg. Co. v. Bernard*, 2 Lea (Tenn.) 358; *Hine v. Beddome*, 8 U. C., C. P. 381; *Ex parte Griffin*, 3 Ont. App. 1; *Ex parte Kedie*, 2 Deac. & C. 321; *Ex parte Whitmore*, 3 M. & A. 672; s. c., 3 Deac. 365, and on appeal as *Ex parte Jackson*, 2 Mont. D. & D. 146; *Rolfe v. Flower, L. R.*, 1 P. C. 27. But *contra* when the new partner had no access to the books and did not know of the entries. *Ex parte Peele*, 6 Ves. 602; *Shoemaker Piano Mfg. Co. v. Bernard*, 2 Lea (Tenn.) 358. So carrying an account of the new firm on the old books as a continuing account with no line of demarkation between the new and the old, may be evidence of the assumption of the earlier part of the unbroken account. *Bate v. McDowell*, 49 N. Y. Super. Ct. 106; *Udike v. Doyle*, 7 R. I. 446; *Rolfe v. Flower, L. R.*, 1 P. C. 27. But will not control other improbabilities. *Ex parte Sandham*, 4 Deac. & Ch. 818.

"There was no change in the style of the firm or in its books; no balancing of accounts nor anything indicative of a purpose to distinguish the business of the one firm from that of the other; debts contracted by the firm, originally composed of three persons, were either partially or fully paid out of the proceeds of property belonging to the firm composed of four members, and the accounts were so kept as to indicate a mutual understanding of the parties that the business was to be continued just as if no change had taken place in the membership of the firm." *Earon v. Mackey*, 106 Pa. St. 452.

The assumption of old debts by the new firm is inferable from the fact that the course of business of the new firm was to pay all debts indiscriminately without charging anything to the old firm, and no account of stock was taken when the new partner came in, and no change was made in the book-keeping. *Smead v. Lacey*, 1 Disney (Ohio) 239.

**Fraud.**—Where a new partner is induced to come in and assume the old debts by fraud, he can make any defence he could in a suit by a partner on the agreement to assume, for the creditor's rights are based on that agreement. *Morris v. Marqueeze*, 74 Ga. 86; *Torrens v. Campbell*, 74 Pa. St. 470 (*semble*). But the new partner must repudiate at once on discovering the fraud, or he cannot take advantage of it. *Arnold v. Nichols*, 64 N. Y. 117. So an agreement to release a retired partner is not valid when induced by fraud. *Clark v. Taylor*, 68 Iowa 519.

**Assent of Creditor.**—It is too late for the creditor to assent after the new partner has retired from the firm. *McKeand v. Mortimore*, 11 U. C., Q. B. 428. Or after the bankruptcy of the new firm. *Ex parte Freeman*, Buck 471. Where the creditor was a lunatic, see *Ex parte Parker*, 2 Mont. D. & D. 511. But evidence of the willingness of the creditor to look to the new firm is not sufficient evidence of the intent to discharge the old firm. *Gough v. Davies*, 4 Price 200.

**1. Assent of All Parties.**—"Where it is established by satisfactory evidence that upon the accession of a new partner, a new promise has been made by the entire new firm, in respect of the old debt, with the consent of the old partners as well as of the creditor, it will amount to a novation of the debt, as it is called in the Roman law, and the new partner will be chargeable with the debt. But such an adoption or ratification of the new promise by the new partner must be clearly shown, otherwise it will not be obligatory upon him, and it cannot be inferred from the mere act of joining the partnership without other circumstances in aid of the inference." *Story Partn.*, § 153; *Giddings v. Seevers*, 24 Md. 363; *Ex parte Gibson, L. R.*, 4 Ch. 662; *Rolfe v. Flower, L. R.*, 1 P. C. 27; s. c., 3 Moore P. C., N. S. 365.

A declaration against four persons as

ner alone to the creditor, where the original liability is not discharged, is within the statute of frauds.<sup>1</sup>

**4. Note of Continuing Partner.**—Where, after the retirement or death of one partner, the continuing partner or partners give a note in payment of a debt of the prior firm, even though the note is made in the name of the old firm, the retired partner is not thereby discharged; in such case the note binds only the actual maker, and the liability of the prior firm is undisturbed,<sup>2</sup> unless

partners on common counts will sustain proof that the debt was incurred by two of them, and that the other two subsequently joined the firm and the new firm agreed to pay. *Beall v. Poole*, 27 Md. 645.

**1. Statute of Frauds.**—*Bracken v. Dillon*, 64 Ga. 243; s. c., 37 Am. Rep. 70; *Sternberg v. Callanan*, 14 Iowa 251; *cf. Poole v. Hintrager*, 60 Iowa 180.

It is too late to raise the question after payments by the new firm on the old account. *Mueller v. Wiebracht*, 47 Mo. 468.

**2. Spenceley v. Greenwood**, 1 F. & F. 207; *Myatts v. Bell*, 41 Ala. 222; *Turnbow v. Broach*, 12 Bush (Ky.) 455; *Perrin v. Keene*, 19 Me. 355; s. c., 36 Am. Dec. 759; *Parham Sewing Machine Co. v. Brock*, 113 Mass. 194; *Goodspeed v. South Bend Plow Co.*, 45 Mich. 237; *Yarnell v. Anderson*, 14 Mo. 619; *Moore v. Lackman*, 52 Mo. 323 (even in renewal); *Vernon v. Manhattan Co.*, 22 Wend. (N. Y.) 183; *Gardner v. Conn*, 34 Ohio St. 187; *Burris v. Whitner*, 3 S. Car. 510 (renewal); *Seward v. L'Estrange*, 36 Tex. 295; *Titus v. Todd*, 25 N. J. Eq. 458; *Woodworth v. Downer*, 13 Vt. 522; s. c., 37 Am. Dec. 611; *Parker v. Cousins*, 2 Gratt. (Va.) 372; s. c., 44 Am. Dec. 388 (renewal). And see *Bank v. Green*, 40 Ohio St. 431; *Citizens' Mut. Ins. Co. v. Ligon*, 59 Miss. 305; *Torrey v. Baxter*, 13 Vt. 452 (where a note of a third person was given by the firm to its creditor who was unable to enforce it through an agreement made between the maker and the firm). *Miller v. Miller*, 8 W. Va. 542 (renewal of a note is not payment). So where a retired partner confessed judgment on a note, the judgment binds him alone. *McCleery v. Thompson*, 25 W. N. C. (Pa.) 130. But a note by one partner, after dissolution given to parties who have had no notice of the dissolution, is good. *Graves v. Merry*, 6 Cow. (N. Y.) 701; s. c., 16 Am. Dec. 471. In *Fowler v. Richardson*, 3 Sneed (Tenn.) 508, it

was held that the retiring partner was discharged as the old debt was extinguished, but the note binds only the party that gave it.

In a suit on such a note, the recovery is had on the original consideration. *Perrin v. Keene*, 19 Me. 355; s. c., 36 Am. Dec. 759; *Burris v. Whitner*, 3 S. Car. 510; *Seward v. L'Estrange*, 36 Tex. 295. Neither is the individual note of one partner after dissolution a payment of the firm debt without proof of an agreement. *Swire v. Redman*, 1 Q. B. Div. 536; *Medberry v. Soper*, 17 Kan. 369; *Yarnell v. Anderson*, 14 Mo. 619; *Leabo v. Goode*, 67 Mo. 126; *Ellswagner v. Coleman*, 7 Mo. App. 582; *Leach v. Church*, 15 Ohio St. 169 (a surviving partner); *Little v. Quinn*, 1 Civ. Sup. Ct. 379; *Davis's Estate*, 5 Whart. (Pa.) 530; s. c., 34 Am. Dec. 574; *Mason v. Wickersham*, 4 W. & S. Pa. 100; *Nightingale v. Chaffee*, 11 R. I. 609; s. c., 23 Am. Rep. 531. And see *Featherstone v. Hunt*, 1 B. & C. 113. Where the note is considered as a higher security, there may be a merger. *Isler v. Baker*, 6 Humph. (Tenn.) 85. Especially if the firm note is not surrendered. *Davis's Estate*, 5 Whart. (Pa.) 530; s. c., 34 Am. Dec. 574; *Little v. Quinn*, 1 Cin. Sup. Ct. 379. And see *Kimberly's Appeal* (Pa. 1886), 7 Atl. Rep. 75. But mere neglect to surrender the firm note does not invalidate an agreement to accept an individual note in payment. *Dages v. Lee*, 20 W. Va. 584. Acts and declarations inconsistent with an intent to take the note merely as collateral may be shown. *Bank v. Green*, 40 Ohio St. 431. And see *Hoopes v. McCann*, 19 La. An. 201.

"The difference between the law of Massachusetts and that of England and most of the States of the Union, I understand to be merely this: That in the courts of this State (Massachusetts), a negotiable bill or note is taken to be a mere beneficial security than a book account, or any debt of that kind,

the note is received by the creditor under an express or implied understanding that it is taken in payment;<sup>1</sup> so taking the note of

and, though it does not operate as a merger in law, is presumed *prima facie* to be taken as payment. But it is a mere question of fact, and any evidence which rebuts the presumption is competent, and it is easily overcome. In other courts, the ordinary presumption of fact is the other way. On the other hand, I suppose that it is not difficult to find cases out of Massachusetts in which the deliberate exchange of one note for another is presumed to be intended as payment of the note given up; but this is rather because the old one is given up than because the new one is taken. But the question always comes back to the intent of the parties." *Re Clapp*, 2 Low. (U. S.) 226.

Where a note of a third person was taken in exchange for the firm paper, the retired partner was held discharged. *Pope v. Nance*, 1 Stew. (Ala.) 354, and 220; s. c., 18 Am. Dec. 60. And see *Torrey v. Baxter*, 13 Vt. 452.

1. *Bottomley v. Nuttall*, 5 C. B., N. S. 122; *Waydell v. Luer*, 3 Den. (N. Y.) 410; *Gandolfo v. Appleton*, 40 N. Y.) 533; *Clafin v. Ostrom*, 54 N. Y. 581; *Leabo v. Goode*, 67 Mo. 126; *Hill v. Voorhies*, 22 Pa. St. 68; *Potter v. McCoy*, 26 Pa. St. 458; *Folk v. Wilson*, 21 Md. 538; s. c., 83 Am. Dec. 559. And see *Tyner v. Stoops*, 11 Ind. 22; s. c., 71 Am. Dec. 341; *In re Parker*, 19 Nat. Bank Reg. 340; *Hill v. Marcy*, 49 N. H. 265; *Bank v. Green*, 40 Ohio St. 431. And see cases cited in the preceding note. But see *contra*, that an understanding need not be shown, but may be inferred from an exchange of notes. *Watts v. Robinson*, 32 U. C., Q. B. 362; *Arnold v. Camp*, 12 Johns. (N. Y.) 409; s. c., 7 Am. Dec. 628; *Townsend v. Stevenson*, 4 Rich. L. (S. Car.) 59. And see *Yarnell v. Anderson*, 14 Mo. 619, where the note was signed by a surety.

"We unhesitatingly admit that partners, in respect to debts contracted by them during their association, cannot, by any agreement between themselves, at the period of their separation, change their condition of principal debtors, or in any way affect the rights of their creditors. If the agreement be that one of them shall retain the partnership effects, and pay the debts, they continue, nevertheless, bound as principals, so that no indulgence granted by

the creditor to the paying partner, short of an agreement, express or implied, to take him as his debtor and to discharge the other partner, can place them in the situation of principal and surety, so as to discharge the retiring partner. To support a defence of this kind, such an agreement must be satisfactorily made out . . . But we do not mean to concede that where two persons are indebted by simple contract, and the note of one for the amount of the debt is taken by the creditor, it is in all cases necessary to the discharge of the other to provide an *express* agreement to accept the note in satisfaction of the original debt. The agreement may be inferred from the nature and operation of the new contract, or from circumstances clearly indicating that such was the intention of the parties." *Harris v. Lindsay*, 4 Wash. (U. S.) 271.

No agreement to discharge can be inferred when the creditor is ignorant of the retirement of the partner and the new notes are signed like the old. *Bernard v. Torrance*, 5 Gill & J. (Md.) 383; *Heroy v. Van Pelt*, 4 Bosw. (N. Y.) 60. And see *Smith v. Turner*, 9 Bush (Ky.) 417.

The question whether the note was taken in settlement or not is for the jury. *Bowyer v. Knapp*, 15 W. Va. 277.

If the evidence is conflicting as to whether the note of a former partner was taken as payment, the amount and value of the property taken by him when he agreed to assume the debts and his liability to pay the creditor are material evidence as to whether the creditor discharged the other partner. *Gates v. Hughes*, 44 Wis. 332. But the intent of the parties must be clear. *Loveridge v. Larned*, 7 Fed. Rep. 294.

Where a note of the new firm is accepted in payment of the prior debt, the promise to discharge the retired partner is based on a sufficient consideration, and is valid. *Thompson v. Percival*, 5 B. & Ad. 925; *Evans v. Drummond*, 4 Esp. 98; *Reed v. White*, 5 Esp. 122; *Kirwan v. Kirwan*, 2 C. & M. 617; *Hart v. Alexander*, 2 M. & W. 483; *Bank of Mobile v. Dunn*, 67 Ala. 381; *Espy v. Comer*, 80 Ala. 333; *Bonnell v. Chamberlaine*, 26 Conn. 481; *Tillotson v. Tillotson*, 34 Conn. 335; *Macklin v. Crutcher*, 6 Bush (Ky.) 401;



one partner, while the firm is still in existence, is not deemed a novation of the firm debt, unless such an intent is proved;<sup>1</sup> but

s. c., 99 Am. Dec. 680; *Smith v. Turner*, 9 Bush (Ky.) 417; *Rayburn v. Day*, 27 Ill. 46; *Rusk v. Gray*, 83 Ind. 589; *Hoopes v. McCann*, 19 La. An. 201; *Meyer v. Atkins*, 29 La. An. 586; *Folk v. Wilson*, 21 Md. 538; s. c., 83 Am. Dec. 599; *Hotchkiss v. Secor*, 8 Mich. 494; *Field v. Fisher*, 65 Mich. 606; *Keerl v. Bridgers*, 10 Smed. & M. (Miss.) 612; *Moore v. Lackman*, 52 Mo. 323; *Titus v. Todd*, 25 N. J. Eq. 458; *Ludington v. Bell*, 77 N. Y. 138; s. c., 33 Am. Rep. 601; *Hoskisson v. Eliot*, 62 Pa. St. 393; *Nichols v. Cheairs*, 4 Sneed (Tenn.) 229; *Stephens v. Thompson*, 28 Vt. 77; *Ricker v. Adams*, 59 Vt. 154; *Bowyer v. Knapp*, 15 W. Va. 277; *Hoesfingel v. Wells*, 47 Wis. 628; *Port Darlington Harbor Co. v. Squair*, 18 U. C. Q. B. 533. As to the renewal of partnership paper with corporate paper, see *McLellan v. Detroit File Works*, 56 Mich. 579.

Where a firm becomes a corporation, the promise of the president of the corporation to pay the debt is without consideration. *Georgia Co. v. Castleberry*, 43 Ga. 187.

1. "If the jury or the court should find as a fact that the money was borrowed by and loaned to the firm, and upon its credit, then the taking of the individual note of one member of the firm would not be a payment of such firm debt, unless it was affirmatively shown that such note was taken in payment of the same." *Hoesfingel v. Wells*, 47 Wis. 628; *Sheehy v. Mandeville*, 6 Cranch (C. C.) 256; *Glenn v. Smith*, 2 Gill & J. (Md.) 508; s. c., 20 Am. Dec. 452; *Whitney v. Goin*, 20 N. H. 354; *Soffe v. Gallagher*, 3 E. D. Smith (N. Y.) 507.

The note will be considered as collateral only, as changing the form of the partnership debt is of very little weight in evidence. *Loveridge v. Larned*, 7 Fed. Rep. 294; *Tyner v. Stoops*, 11 Ind. 22; s. c., 71 Am. Dec. 341; *Maxwell v. Day*, 45 Ind. 509; *Lingenfelter v. Simon*, 49 Ind. 82; *Harrison v. Pope*, 4 Am. Law Reg. 313; *Hotchkiss v. Secor*, 8 Mich. 494; *Keerl v. Bridgers*, 10 Smed. & M. (Miss.) 612; *Wilson v. Jennings*, 4 Dev. L. (N. Car.) 90; *Tyson v. Pollock*, 1 P. & W. (Pa.) 375; *Nichols v. Cheairs*, 4 Sneed (Tenn.) 229; *Dillon v. Kauffman*, 58 Tex. 696; *Booth*

*v. Ridley*, 8 U. C., C. P. 464; *Port Darlington Harbor Co. v. Squair*, 18 U. C., Q. B. 533; *Horsey v. Heath*, 5 Ohio 353 (renewal); *McKee v. Hamilton*, 33 Ohio St. 7 (renewal). See *contra*, *Anderson v. Henshaw*, 2 Day (Conn.) 272.

Taking the note of the individual partner for goods sold to the firm is no discharge of the liability of the others unless an agreement to that effect is affirmatively shown. *Folk v. Wilson*, 21 Md. 538; s. c., 83 Am. Dec. 559. But recovery on the individual note may be shown. *Allen v. Owens*, 2 Spear L. (S. Car.) 270.

C loaned A of the firm of A & B, who were wheat buyers, \$300 to buy wheat for the firm. A gave C his note. The firm was then dissolved, and A paid part of the note and gave a new note for the balance. The court held the original loan a partnership debt and C had a claim on it against the firm for the balance unpaid. *Rose v. Baker*, 13 Barb. (N. Y.) 230.

But the novation is complete if the agreement of the parties is shown. *Higgins v. Packard*, 2 Hall (N. Y.) 547; *Sheehy v. Mandeville*, 6 Cranch (U. S.) 253; *Andrews v. Smith*, 9 Wend. (N. Y.) 53; *Gandolfo v. Appleton*, 40 N. Y. 533; *Bennet v. Cadwell*, 70 Pa. St. 253; *Hoskinson v. Eliot*, 62 Pa. St. 393; *Wilkins v. Reed*, 6 Me. 220; s. c., 19 Am. Dec. 211; *Chapman v. Durant*, 10 Mass. 47; *Bernard v. Torrance*, 5 Gill & J. (Md.) 383; *Isler v. Baker*, 6 Humph. (Tenn.) 85; *Collyer Partn.*, § 559, *et seq.*; *Byles on Bills* (6th Eng. ed.) 35, 305, 306; *Pothier Contr.*, p. 3, ch. 2, arts. 3 and 4, § 5.

The question of intent is a fact for the jury. *Port Darlington Harbor Co. v. Squair*, 18 U. C., Q. B. 533; *Dages v. Lee*, 20 W. Va. 584; *Stephens v. Thompson*, 28 Vt. 77; *Tyson v. Pollock*, 1 P. & W. (Pa.) 375; *Maxwell v. Day*, 45 Ind. 509; *Thompson v. Percival*, 5 B. & Ad. 925; *Keerl v. Bridgers*, 10 Smed. & M. (Miss.) 612; *Hotchkiss v. Secor*, 8 Mich. 494.

Where the partner gives his individual security as a mortgage the note is *prima facie* payment. *Loveridge v. Larned*, 7 Fed. Rep. 294; *Baxter v. Bell*, 86 N. Y. 195 (reversing 19 Hun N. Y. 367); *Pierce v. Cameron*, 7 Rich. L. (S. Car.) 114; *Dillon v. Kauffman*,

where the creditor accepts the note of each partner for his proportional share of the firm debt, all joint liability of the firm is at an end.<sup>1</sup> Of course, taking the note of an ostensible partner is no discharge of a dormant partner, as the creditor cannot be held to have discharged what he did not know he had got.<sup>2</sup>

**5. Note for Debt of a Prior Firm.**—When a new partner joins a firm, and a note is given in the name of the new firm for a debt of the old concern without the assent of the new partner, he is not bound by the note, except in the hands of an innocent purchaser for value before the maturity of the note,<sup>3</sup> but the new

58 Tex. 696; *Harrison v. Pope*, 4 Am. Law Reg. 313; *Maxwell v. Day*, 45 Ind. 609. *Semble contra*, *Loomis v. Ballard*, 7 U. C., Q. B. 366.

It is held in some cases that the creditor who takes the paper of the continuing partner is held to assent to the change in the firm. *Springer v. Shirley*, 11 Me. 294; *Hoopes v. McCann*, 19 La. An. 210 (where the note was taken in full settlement); *Townsend v. Stevenson*, 4 Rich. L. (S. Car.) 59 (here the firm note was surrendered), *Evans v. Drummond*, 4 Esp. 89. See *contra*, *Keating v. Sherlock*, 1 Cin. Sup. Ct. 257; *Leach v. Church*, 15 Ohio St. 169. But where the creditor expressly reserves his rights against the other partners the note is not payment. *Bedford v. Deakin*, 2 B & Ald. 210. *Boatman's Sav. Inst. v. Mead*, 52 Mo. 543.

1. *Bowyer v. Knapp*, 15 W. Va. 277; *Arnold v. Camp*, 12 Johns. (N. Y.) 409; s. c., 7 Am. Dec. 328; *Crooker v. Crooker*, 52 Me. 267; s. c., 83 Am. Dec. 509; *Ganet v. Taylor*, 1 Esp. 117.

The creditor agreed with one partner that if he would give his note for one-half the debt and pay it, he would release him from the other half. This was held binding, the court assigning as reasons, that this arrangement gave the creditor equality in the separate estate with individual creditors, and the maker's time being extended he cannot sue his partner for contribution. *Ludington v. Bell*, 77 N. Y. 138, s. c., 38 Am. Rep. 601; reversing 11 J. & Sp. (N. Y.) 557. It may be doubted whether either of these two reasons is valid. And see *Maxwell v. Day*, 45 Ind. 509.

Where a firm of two assigned for the benefit of creditors, with a condition that the assignment should enure to those alone who would look to each partner individually for half the balance, and the creditors covenanted to look to each for the half only, this was

held to be no severance of the debt until or unless the partners covenant individually to pay the half, and hence an action must be against both. *Le Page v. McCrea*, 1 Wend. (N. Y.) 164; s. c., 19 Am. Dec. 469.

"Upon the like ground, if the creditor should receive the separate security of each partner for his own share of the debt, in satisfaction thereof, all joint liability of the partnership for the debt would be henceforth gone. The doctrine is equally true in the converse case where a partnership is a creditor and the separate and distinct security of the debtor is taken to each partner severally for his share of the debt." *Story Part.*, § 155.

But where, after the dissolution of the firm, the retiring partner desired a full discharge from his liability on a certain note, which the continuing partner had agreed to assume and pay, and paid the holder of the note one half of it under an agreement to discharge him entirely, this was held to be no defence in an action against him on the note. *Fensler v. Prather*, 43 Ind. 119.

2. *Robinson v. Wilkinson*, 3 Price 538 (not limited to case of notes); *Parker v. Canfield*, 37 Conn. 250; s. c., 9 Am. Rep. 317 (renewal note); *Sneed v. Weister*, 2 A. K. Marsh. (Ky.) 277; *Scott v. Colmesnil*, 7 J. J. Marsh. (Ky.) 416; *Baring v. Crafts*, 9 Met. (Mass.) 380; *Watson v. Owens*, 1 Rich. L. (S. Car.) 111; *Nichols v. Cheairs*, 4 Sneed (Tenn.) 299; *Vaccaro v. Toof*, 9 Heisk. (Tenn.) 194. Perhaps even though the note is under seal. *Chamberlain v. Madden*, 7 Rich. L. (S. Car.) 395. See *contra*, as to sealed instrument. *Ward v. Motter*, 2 Rob. (Va.) 536. But a subsequent firm note revives the debt again. *Davidson v. Kelly*, 1 Md. 492.

3. *Shirreff v. Wilks*, 1 East 48; *Ex parte Goulding*, 2 Gl. & J. 118; *Wilson v. Lewis*, 2 M. & G. 197; s. c., as Wil-

partner may become liable if he recognizes the note and promises to pay it;<sup>1</sup> and where goods are purchased, but not paid for before the new partner is admitted, and the new firm takes the goods and gives its note in payment therefor, all the partners will be held on it.<sup>2</sup>

son v. Bailey, 9 Dowl. P. C. 18; Citizens' Nat. Bank v. Hine, 49 Conn. 236; Baxter v. Plunkett, 4 Houst. (Del.) 450; Bryan v. Tooke, 60 Ga. 437; Wright v. Brosseau, 73 Ill. 381 (the burden of proof is on the plaintiff to show that he took the note for value and without notice); Waller v. Davis, 59 Iowa 103; Guild v. Belcher, 119 Mass. 257; Fagan v. Long, 30 Mo. 222; Howell v. Sewing Machine Co., 12 Neb. 177; Abpt v. Miller, 5 Jones L. (N. Car.) 32; Hast v. Tomlinson, 6 Munf. (Va.) 418. Where the new note includes debts of the new and old firms together, the payee can recover to the extent of the valid consideration, if he acted in good faith in receiving the note. Guild v. Belcher, 119 Mass. 257; Wilson v. Lewis, 2 M. & G. 107.

"The firm of A & Co., with others, formed a new firm of B & Co., and A & Co. had a sum to its credit on the books of B & Co. D, a member of both firms, drew on B & Co. in favor of a creditor of A & Co. for an amount less than the credit on the books and accepted the draft in the name of the new firm. Held, the new firm was held for this was merely paying the debt of the new firm to the old. Hester v. Lumpkin, 4 Ala. 509.

1. Wilson v. Dozier, 58 Ga. 602; Cross v. Burlington Nat. Bank, 17 Kan. 336. If the new partner is present when the propriety of giving a note is discussed and he makes no objection, the jury are warranted in finding that he assented to the note. Shaw v. Gregory, 105 Mass. 96. Where a partner retired and a new partner was admitted to the firm, and an execution on a debt of the old firm was levied on the firm property, and the new firm received for the goods to the sheriff and promised to pay, they were held to pay the debt. Morrison v. Blodgett, 8 N. H. 238; s. c., 29 Am. Dec. 653.

A mere statement by the new partner that he had "no loose money about him but would like to give notes," for a debt of the old firm, is not an assent to such notes if given by another partner. Howell v. Sewing Machine Co., 12 Neb. 177.

2. Markham v. Hazen, 48 Ga. 570; Morris v. Marqueze, 74 Ga. 86; Silverman v. Chase, 90 Ill. 37; Johnson v. Barry, 95 Ill. 483; Rice v. Wolff, 65 Wis. 1.

Where, however, no note is given, and the mere receipt of goods purchased by the prior firm or individual does not bind the incoming partner, and where one person makes a contract and afterwards takes a partner, and the benefit of the contract enures to the firm, the other contracting party has thereby no right of action against the firm, but only against the original contracting party. Fifield v. Adams, 3 Iowa 487; Froun v. Davis, 97 Ind. 401; Taggart v. Phelps, 10 Vt. 318; Barlow v. Wainwright, 22 Vt. 88; s. c., 52 Am. Dec. 79; Goodenow v. Jones, 75 Ill. 48; Adkins v. Arthur, 33 Tex. 431; Duncan v. Lewis, 1 Duv. (Ky.) 183; Brooke v. Evans, 5 Watts (Pa.) 196; Beale v. Moulis, 10 Q. B. 976.

A and B conversed about forming a partnership, but came to no agreement. A then bought goods from the plaintiff in the name of A & B. The partnership was then formed, and these goods were put in as part of the firm assets. It was held that B was not liable for them, and would not have been, had he learned the facts, for he was under no obligation to repudiate responsibility. Gause v. Hobbs, 18 Kan. 500.

But if the delivery is made to the new firm on joint account at the request of the original contractor, the incoming partner is liable, as his partner has power to bind him. Johnson v. Barry, 95 Ill. 483; Watt v. Kirby, 15 Ill. 200 (*semble*).

A bought cattle of B, but they were not delivered until after A and C had formed a partnership, and the cattle were taken, killed and sold, by the firm which received the price. Held, that the firm was liable to B, for A had authority as member of the firm to annul the original purchase and take the cattle on the firm account. Smith v. Hood, 4 Ill. App. 360. And where there is a continuing contract to furnish goods, the new firm is held for deliveries to it under the contract. Dyke v.

**X. NOVATION AS APPLIED TO SURETYSHIP.**—Where a contract, the performance of which has been guaranteed by a third person, is altered or modified by the principal parties to it without the consent of the surety, he is thereby discharged from liability on the contract. He is entitled to say, "*non hæc in fœdera veni.*"<sup>1</sup> It

Brewer, 2 Car. & K. 828; *Helsby v. Mears*, 5 B. & C. 504 (as explained in *Beale v. Mouls*, 10 Q. B. 976); *cf.* *Winston v. Taylor*, 28 Mo. 82; s. c., 75 Am. Dec. 112, where cattle were delivered to a firm to be herded. One partner retired with the knowledge of the bailor, and some cattle were lost. In an attempt to hold the retired partner for the loss, it was held that as the bailment was for no definite time, the bailor must remove his property on the change in the firm, or look to the new firm. Directing the new firm to sell and remit was held a discharge of the retired partner.

So where a consignee of goods (a factor) takes a partner and the firm sells the goods, it will be held for the proceeds. *Dix v. Otis*, 5 Pick. (Mass.) 38; *Shoemaker Piano Mfg. Co. v. Bernard*, 2 Lea (Tenn.) 358.

But if a partner retires, he cannot exonerate himself by notifying the shipper that the new firm or continuing partners will receive the goods. *Dean v. McFaul*, 23 Mo. 76; *Hall v. Jones*, 56 Ala. 493.

Where the new firm agreed with the retiring partner to continue deliveries under a contract with the plaintiff and accepted payments from him, that gives the plaintiff no right of action against the new firm for breach of contract. *Parmalee v. Wiggernhorn*, 6 Neb. 322. And see *Goodenow v. Jones*, 75 Ill. 48.

Where goods were consigned to O for sale on commission, and before any order of sale was given, the consignor was notified that O had taken a partner P, and was led to believe in various ways that the firm had taken the consigned goods to sell, and then accepted the firm as consignees, it was held that, on the insolvency of O, P was estopped to show that O had converted the goods to his own use before the formation of the firm. *Coleman v. Pearce*, 26 Minn. 123.

**Assumption of Lease.**—Where one leases property and then forms a firm to occupy the property, the new partners do not become liable for the rent merely by occupying. *Pierce v. Als-*

*paugh*, 83 N. Car. 258; *Brooke v. Evans*, 5 Watts (Pa.) 196; *Barlow v. Walnwright*, 22 Vt. 88; s. c., 52 Am. Dec. 79.

A written agreement between a lessee of a store and an incoming partner that the partners should be equally liable for all joint obligations does not include rent accruing after the dissolution of this firm, although there was an oral understanding that the new partner should be liable during the term of the lease. *Durand v. Curtis*, 57 N. Y. 7.

Where, however, the firm holds a lease and one partner assigns his interest to the other, the landlord can recover the whole rent from this partner. *Dwight v. Mudge*, 12 Gray (Mass.) 23. And see *Lucas v. Coulter*, 104 Ind. 81, where it was held that the new partner had adopted the lease by his conduct. And see also *Wilgus v. Lewis*, 8 Mo. App. 336. And *Jackson v. Salmon*, 4 Wend. (N. Y.) 327, *contra*.

1. "Where, after breach of a contract, the performance of which is guaranteed, the creditor and principal debtor enter into a new contract, by which the amount of damages then due is made payable on a future day, and upon terms different from those imposed by the original agreement, such new contract presumptively merges the old. In such case, the new obligation, having been taken upon a sufficient consideration, becomes the exclusive medium by which the rights of the parties in respect to the payment of damages are to be ascertained. Such a contract is not collateral to the original, but in respect to the subject to which it appertains, it merges and supersedes the other . . . It thus appears that the sureties are sought to be held for the failure of their principal to discharge new obligations, not contemplated by the contract to secure the performance of which the bond was given. Into these are imported new terms. They suspended the right of the creditor to proceed against the principal to collect the original liability, in settlement of which they were given. Because they are new obligations, different in character

makes no difference that the alteration may be for the benefit of the surety; he is entitled to stand on the terms of his agreement.<sup>1</sup> The alteration or change in the contract must be in some material point,<sup>2</sup> but, bearing that in mind, a very slight change in the contract will discharge the surety.<sup>3</sup> The same is true of an instru-

from those, the performance of which was guaranteed by the bond, the sureties are not liable for their payment." *Weed Sewing Machine Co. v. Winchel*, 107 Ind. 260; *Steele v. Mills*, 68 Iowa 406; *Giles v. Crosby*, 5 Bosw. (N. Y.) 389; *Vose v. Florida R. Co.*, 50 N. Y. 369; *Warden v. Ryan*, 37 Mo. App. 466; *Roberts v. Donovan*, 70 Cal. 108; *Simonson v. Grant*, 36 Minn. 439; *Victor Sewing Machine Co. v. Laughan*, 9 Biss. (U. S.) 183; *Gallagher v. Roberts*, 2 Wash. (U. S.) 191; *Williams v. Little*, 35 Vt. 323; *Anderson v. Davis*, 9 Vt. 136; s. c., 31 Am. Dec. 612; *Brown v. Wright*, 7 Mon. (Ky.) 396; s. c., 18 Am. Dec. 190; *Curtis v. Brown*, 5 Cush. (Mass.) 488; *Roth v. Miller*, 15 S. & R. (Pa.) 100; *Sneed v. White*, 3 J. J. Marsh. (Ky.) 525; s. c., 20 Am. Dec. 175; *Taylor v. Hilary*, 1 C. M. & R. 741.

A surety guaranteed payment of the premiums upon a life policy, which had been assigned by the principal debtor to his creditor to secure payment of part of the debt. Subsequently, the creditor, without the knowledge of the surety, agreed with the debtor to take the security, with the liability of the debtor and surety to pay the premiums thereon, in substitution for the personal liability of the debtor, in respect of that portion of the debt, and released the debtor from personal liability in respect thereof. Held, that this arrangement discharged the surety. *Lawes v. Maughan*, 1 C. & E. 340 (DENMAN, J.).

"Any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge and consent, and which may prejudice him, or which may amount to a substitution of a new agreement for the one to which he subscribed, will discharge the surety, upon the principle of the maxim *non hæc in fœdera veni*." *Smith v. United States*, 2 Wall. (U. S.) 219; s. c., 4 Myers' Fed. Dec., §§ 727, 728; *Eneas v. Hoops*, 42 N. Y. Super. Ct. 517.

This is the statutory rule in some States, e. g., "A change of the nature or terms of a contract is called a *novation*; such novation without the consent

of the surety discharges him." *Georgia Code*, § 2153.

1. *Bethune v. Dozier*, 10 Ga. 235; *Rowan v. Sharp's Rifle Mfg. Co.*, 33 Conn. 1; *Atlanta Nat. Bank v. Douglass*, 51 Ga. 205; s. c., 21 Am. Rep. 234; *Wier Plow Co. v. Walmsley*, 110 Ind. 242.

So joining a new surety is held to discharge the original one. *Berryman v. Manker*, 56 Iowa 150; *Bank of Limestone v. Penick*, 2 Mon. (Ky.) 98; s. c., 15 Am. Dec. 136; *Willace v. Jewell*, 21 Ohio St. 163; s. c., 8 Am. Rep. 48; *Hall v. McHenry*, 19 Iowa 521; *Gardner v. Walsh*, 2 El. & Bl. 83. But see *contra*, *Governor v. Lagow*, 43 Ill. 134; *State v. Dunn*, 11 La. An. 549; *Sampson v. Barnard*, 98 Mass. 359; *Anderson v. Bellenger*, 87 Ala. 334; *Hessell v. Johnson*, 63 Mich. 623 (where one surety was substituted for another); *cf. Rhoads v. Frederick*, 8 Watts (Pa.) 448; *Keith v. Goodwin*, 31 Vt. 268; s. c., 73 Am. Dec. 345.

An administrator, after his bond had been approved by the court, struck out the name of one surety and had another person sign in his place. It was held that both these persons were liable on the bond. *Harrison v. Turberville*, 2 Humph. (Tenn.) 242.

2. *Warren v. Fant*, 79 Ky. 1; *Bailey v. Boyd*, 75 Ind. 125; *cf. St. Albans Bank v. Dillon*, 30 Vt. 122; *Joslyn v. Eastman*, 46 Vt. 258; *Leeds v. Dunn*, 10 N. Y. 371; *Succession of Daigle*, 15 La. An. 594; *Toomer v. Dickerson*, 37 Ga. 428; *Darwin v. Rippey*, 63 N. Car. 318.

3. Many cases have arisen respecting promissory notes. It has been held—

(1) Altering the rate of interest discharges the surety. *Harsh v. Klepper*, 28 Ohio St. 200.

(2) Or inserting an agreement to pay interest. *Jones v. Bangs*, 40 Ohio St. 139; s. c., 48 Am. Rep. 664 ("with ten per cent. interest from date"). *Kountz v. Hart*, 17 Ind. 329; *Hart v. Clouser*, 30 Ind. 210; *Glover v. Robbins*, 49 Ala. 219; s. c., 20 Am. Rep. 272; *Locknane v. Emmerson*, 11 Bush (Ky.) 69.

ment under seal, that any alteration in it discharges the surety.<sup>1</sup>

(3) So altering the time when interest is payable. *Dewey v. Reed*, 40 Barb. (N. Y.) 16; *Marsh v. Griffin*, 42 Iowa 403; *Neff v. Horner*, 63 Pa. St. 327; s. c., 3 Am. Rep. 555; *cf. Boalt v. Brown*, 13 Ohio St. 364; *Fulmer v. Seitz*, 68 Pa. St. 237; s. c., 8 Am. Rep. 172.

But the surety is not discharged where the principal made a separate written agreement to pay a different rate of interest, but the note itself was not changed. *Huff v. Cole*, 45 Ind. 300; *cf. Selser v. Brock*, 3 Ohio St. 302.

(4) Altering the date of the note. *Britton v. Dierker*, 46 Mo. 591; *Bank of Commonwealth v. McChord*, 4 Dana (Ky.) 91; s. c., 29 Am. Dec. 398. As that changes the time from which the statute of limitations begins to run. *Miller v. Gilleland*, 19 Pa. St. 119.

(5) The time of payment. *Stayner v. Joice*, 82 Ind. 35 (one day to one year).

(6) Or the place of payment. *Pahlman v. Taylor*, 75 Ill. 629 (adding the words "payable at 53 Lake St.>").

(7) Or the amount of the note. *Batchelder v. White*, 80 Va. 103 (from \$1,000 to \$1,500).

(8) Or the name of the payee. *Robinson v. Berryman*, 22 Mo. App. 509.

(9) Or changed the form of money in which the note is to be paid. *Bogarth v. Breedlove*, 39 Tex. 561; *Hanson v. Crawley*, 41 Ga. 303.

(10) Making a non-negotiable note negotiable. *Haines v. Dennett*, 11 N. H. 180.

Where, however, a surety signs a note in blank, he cannot complain of the way in which it is filled up. *Simpson v. Bovard*, 74 Pa. St. 351; *Agawam Bank v. Sears*, 4 Gray (Mass.) 95; *Patton v. Shanklin*, 14 B. Mon. (Ky.) 15; *Johns v. Harrison*, 20 Ind. 317; *Emmons v. Meeker*, 55 Ind. 321; *Waldron v. Young*, 9 Heisk. (Tenn.) 777.

**Ratification.**—The surety may ratify the alteration, and in such case he continues bound. *Pelton v. Prescott*, 13 Iowa 567; *Knoehel v. Kircher*, 33 Ill. 308. He may be held to have ratified by his acquiescence. *Jackson v. Johnson*, 67 Ga. 167.

After a note that had been altered matured, the holder brought suit at the instance of the surety, who gave bonds

to dissolve an attachment. The words added to the note were then erased at his request. It was held that the surety had ratified the alteration and could not take advantage of it. *Gardiner v. Harback*, 21 Ill. 129.

It is always competent to show that the alteration was made with the consent of the surety. *Brand v. Johnrowe*, 60 Mich. 210; *Fowler v. Brooks*, 13 N. H. 240.

But if at the time the surety does such acts as would amount to a ratification of the alteration, he does not know that it has been made, he will not be presumed to have ratified it. *Benedict v. Miner*, 58 Ill. 19; *Fowler v. Brooks*, 13 N. H. 240; *Merrimac Co. Bank v. Brown*, 12 N. H. 320.

Where a surety signed a note in pencil, promising to "ink it over" afterwards, and the note was altered, without his knowledge before he "inked it," it was held that he was discharged. *Boalt v. Brown*, 13 Ohio St. 364.

**Surrender.**—Where a note is taken and the old one is surrendered, the surety on it is discharged. *Rhodes v. Hart*, 51 Ga. 320.

But not where the new note is a forgery and purports to bear the name of the surety. *Kincard v. Yates*, 63 Mo. 45.

**Lease.**—Where by agreement a new tenant is substituted for the one in possession, the transaction amounts to a surrender of his lease by the latter and his surety is discharged. *Koenig v. Miller Bros. Brewing Co.*, 38 Mo. App. 182.

A surety on a lease is not discharged by an agreement to which he was not a party by which the rent is reduced. *Preston v. Huntington*, 67 Mich. 139. And this is so even where the rent is reduced by a parol agreement. *White v. Walker*, 31 Ill. 422. But not where the parol agreement has not been executed. *Chapman v. McGrew*, 20 Ill. 101.

**1. Bonds.**—*Martin v. Thomas*, 24 How. (U. S.) 315; *Smith v. United States*, 2 Wall. (U. S.) 219; *United States v. O'Neill*, 19 Fed. Rep. 567; *Walla Walla Co. v. Ping*, 1 Wash. 339; *State v. McGonigle*, 101 Mo. 353; *cf. Hill v. Calvert*, 1 Rich. Eq. (S. Car.) 56.

So where the penalty is doubled. *People v. Kneeland*, 31 Cal. 288. Or re-

**NOW.**—The word now, in its ordinary acceptance, means at this time, at the present moment, or at a time contemporaneous with something done.<sup>1</sup>

duced. *People v. Brown*, 2 Doug. (Mich.) 9; *Mitchell v. Burton*, 2 Head (Tenn.) 613.

Where a surety is bound by one bond for the performance by the principal of two distinct things, and the contract is varied as to one of the things to be performed, the surety is discharged as to such matter but not as to that in regard to which the contract has been changed. *Harrison v. Seymour*, L. R., 1 C. P. 518; *Skillett v. Fletcher*, L. R., 1 C. P. 217; s. c., L. R., 2 C. P. 469.

Where the bond is left blank as to the amount, it cannot be filled up without his consent. *Rhea v. Gibson*, 10 Gratt. (Va.) 215; *People v. Organ*, 27 Ill. 27; s. c., 79 Am. Dec. 391.

Except where it is understood that the principal is to fill the blank. *Wright v. Harris*, 31 Iowa 272.

But the rights of the surety are not affected by filling in his name in a blank left for that purpose. *Smith v. Crooker*, 5 Mass. 538; *State v. Pepper*, 31 Ind. 76.

**Official Bonds.**—"Officers are often required by statutes to give new bonds, and whether such bonds are supplemental, cumulative, and additional, or substitutes for the old bonds, is often a question of absorbing interest to the parties concerned in both. Of course, the question depends chiefly on the language of the statute itself. If it says that the new bond shall be given *instead* of the old, it is a substitute for the old bond and not a supplement to it; and in such case, and whenever by fair construction the meaning of the statute appears to be to furnish a substitute for the old bond, the sureties on the old are not bound after the new bond has been duly executed." *Murfree on Official Bonds*, § 221, citing *United States v. Wardwell*, 5 Mason (U. S.) 82.

And if the statute requires a new bond to be given on or before a certain date, the sureties on the old bond remain liable until the new bond is duly executed. *United States v. Nicholl*, 12 Wheat. (U. S.) 505; *United States v. Van Zandt*, 11 Wheat. (U. S.) 184; *United States v. Kirkpatrick*, 9 Wheat. (U. S.) 720.

Any material alteration in the bond

increasing in any way the liability of the surety or diminishing his remedies, discharges him. *Smith v. United States*, 2 Wall. (U. S.) 219; *Crawford v. Dexter*, 5 Sawy. (U. S.) 201.

The alteration of the duties of a public officer by the legislature will not discharge the sureties so long as his duties remain appropriate to the office. *People v. Vilas*, 36 N. Y. 459; s. c., 93 Am. Dec. 520; *vide Miller v. Stewart*, 9 Wheat. (U. S.) 680; *United States v. Hillegas*, 3 Wash. (U. S.) 70; *Postmaster General v. Reeder*, 4 Wash. (U. S.) 678.

**Authorities Consulted in the Preparation of This Article.**—There is no adequate treatise on the subject of novations, and materials of this article have been drawn from a number of text books, but largely from the digests. *Parsons on Contracts*, 7th ed.; *Chitty on Contracts*, 11th Am. ed.; *Wald's Pollock on Contracts*; *Wharton on Contracts*.

**Payment**—*Randolph on Commercial Paper*; *Daniel on Negotiable Instruments*; *Benjamin on Sales*, 4th Am. ed. (also *Bennett's Notes*). **Partnership**—*Lindley on Partnership*, 2nd Am. ed. **Insurance**—*Crawley Life Insurance*; *Bliss on Life Insurance*. **Statute of Frauds**—*Reed on the Statute of Frauds*. **Certified Checks**—*Morse on Banking*, 2nd ed. **Contracts for the benefit of third persons**—*Jones on Chattel Mortgages*, 3rd ed.; *Jones on Mortgages*, 4th ed.; *Wood Landlord and Tenant*, 2nd ed.; *Am. Law Reg. for 1884*, p. 1. **Suretyship**—*Brandt on Suretyship*; *DeColyar on Suretyship*; *Murfree on Official Bonds*.

1. *Pike v. Kennedy*, 15 Oreg. 420.

In a description of the obligee in a bond, as now residing in Jersey City, the word now seemed to have been used as explanatory of the temporary nature of his residence. *Varick v. Crane*, 4 N. J. Eq. 131.

**"Now or Heretofore Appurtenant."**—For construction of words "now or heretofore appurtenant," in a particular conveyance, see *Roe v. Siddons*, 60 L. T., N. S. 345.

**"Now are,"** in a tenant's agreement "to leave the premises in the same state and condition as they now are," may properly be taken as referring to the

**"NOW DUE."**—See DUE, 6 Am. & Eng. Encyc. of Law 39.<sup>1</sup>

commencement of the tenancy. *White v. Nicholson*, 4 M. & G. 95.

1. **"Now and in Future."**—Where a warehouse was held at a certain rent, "now and in future," this was held to amount to a tenancy from year to year. *Weller v. Stone*, 54 L. J. R., Ch. 497.

**"Now Exempted by Law."**—In the N. Y. Laws of 1887, ch. 713, the words "now exempted by law" do not apply to a foreign corporation, except from taxation by the laws of the jurisdiction of its origin. *Catlin v. Domestic etc. Soc.*, 113 N. Y. 625.

**"Now in Force."**—An Indiana statute provides that "all laws upon the subject of embezzlement, now in force, are hereby repealed: Provided, that all prosecutions now pending under the law as it now is, and all offences already committed, may be prosecuted under the law now in force." *Held*, that the words "now in force" must be taken to have the same meaning in the proviso as in the repealing clause, and, therefore, to refer to the old law, that is, the law which the statute repealed. *State v. Smith*, 72 Ind. 350.

**"Now Last Past."**—In a deed, a day "now last past" means, last preceding the day of the delivery, not of the date. *Steele v. Mart*, 4 B. & C. 272.

**"Now Possessed or Entitled."**—An assignment of all household goods and other estate and effects of or to which the assignor is "now possessed or entitled," or "belonging or due" to him, will not pass a contingent interest under a will. *Pope v. Whitcombe*, 3 Russ. 124; *Re Wright*, 15 Bea. 367.

**"Now Standing."**—"A mortgage of crops 'now standing and growing' in a field was held not to include grain which had at the time been cut." *Jones on Chat. Mort.*, § 62, citing *Lord v. Sutherland*, 2 Mon. 440.

**"As Now Laid Out."**—The grant of a way "as now laid out" precludes the grantor from maintaining any gates or other obstructions on the way which were not upon it at the time of the grant. *Welch v. Wilcox*, 101 Mass. 162; s. c., 100 Am. Dec. 113.

**In a Charter-Party.**—"Now in the port of A," these words in a charter party import a warrantee. *Behn v. Burness*, 3 B. & S. 751. So do the words "Now on passage." *Gorrisen v. Perrin*, 2 C. B., N. S. 681.

**In a Statute.**—Now in statutes refers

to the time when the act takes effect. *Clark v. Lord*, 20 Kan. 390, 396. See also *Savings Bank v. New London*, 20 Conn. 115.

**In a Will.**—"Where a testator speaks of an actually existing state of things, his language should be construed as referring to the date of the will, as 'the house where I now reside,' the estate whereof 'I am now seized.' A gift to descendants 'now living' excludes those born after the will. When 'now' is used incorrectly in connection with the word 'heir,' the latter word is made to surrender its strict meaning, and the term is applied to the heir apparent at the date of the will. But the word 'now' is never construed so as to produce intestacy." *Beach on Wills* 156, and cases there cited.

**"Family Now at Home."**—Where a testator provided that a farm should be let to a good tenant, the rent to be used for the maintenance of the "family now at home," it was held that a daughter was entitled to share in the rents who, though residing on the farm at the time of making the will and testator's death, afterwards moved away permanently; and that the words *designatio personarum*. *Dawson v. Fraser*, 18 Ont. 496.

The word "now" in a devise of "*the property I now reside upon*" was not allowed to control the other parts of the will, and was held not sufficient to oust the statute by virtue of which the will is to speak from the death. *Hatton v. Bertram*, 7 Can. L. T. (Occ. N.) 199.

**"I Now Possess."**—"Admit that in reference to the real estate devised the word 'now,' as between those having equal claims on the testator's bounty, might as well be construed to refer to the time of his death as to the date of his will, it would be otherwise as between the heir and one claiming under a devise to a party who did not take by purchase, and who could not have taken by inheritance. In every such case the word 'now' should be construed to refer to the state of things existing at the date of the will." *Quinn v. Hardenbrook*, 54 N. Y. 83.

**In a Will.**—"The word 'now,' any property I now possess," would pass all the property possessed by the testator at the time of his death." *Per KAY, J., Re Portal to Lamb*, 53 L. J., Ch. 1163—reversed without affecting this proposition,



**N. P.**—(See also ABBREVIATIONS).—The characters “N. P.” are an abbreviation for the term notary public. They are in common use and well understood. They as clearly indicate the office of notary public as do the characters J. P. that of justice of the peace.<sup>1</sup>

**NUISANCES**—[See the cross-references for this title incorporated in the following analysis.]

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**I. ELEMENTS; GENERAL PRINCIPLES**—1. **General Definition.**—The term nuisance, in legal phraseology, is applied to that class

30 Ch. D. 50—*citing* *Wagstaff v. Wagstaff*, L. R., 8 Eq. 229; *Re Ord*, 12 Ch. D. 22; *Everett v. Everett*, 7 Ch. D. 428; *Goodlad v. Burnett*, 1 K. & J. 341; *Re Otley and Ilkley Committee*, 34 Bea. 525. But see *Wms. Exrs.* 225. It will, however, be observed that this interpretation is based on the rule embodied in section 24, *Wills act* (1 Vict., ch. 26), which says that every will “with reference to the real estate and personal estate comprised in it,” shall speak from the death.

For other purposes—*e.g.*, ascertaining persons or classes, or for fixing a particular description of property, 1 Jarm. 332, 334—“it may be stated, as a general rule, that wherever a testator refers to an actually existing state of things, his language is referential to the date of the will, and not to his death, as this is then a prospective event. Such, it is clear, is the construction of the word ‘Now,’ or any other expressions pointing at present time. 1 Jarm. 318. See also 154 Ib., where it is said that a testamentary “gift to children ‘now living’ applies to such as are in existence at the date of the will, and those only.”

So “now occupied by A” are words of description and relate to the date of the will. *Hutchinson v. Barrow*, 6 H.

& N. 583. See further, *Cole v. Scott*, 1 Mac. & G. 518.

“I now possess.” *Hepburn v. Skirving*, 4 Jur., N. S. 651.

But in the case of a residuary gift, “now” does not always have the effect of making the gift speak from the date of the will. *Miles v. Miles*, L. R., 1 Eq. 462; *Cox v. Bennett*, L. R., 6 Eq. 422; *Saxton v. Saxton*, 13 Ch. D. 359. See further, *Dart* 309.

A devise of “the lands which I have” speaks from the death, and not the date of the will, and therefore includes lands acquired after the will. *Doe d. York v. Walker*, 12 M. & W. 591. And on the balance of the authorities (and, *semble*, of good sense) that larger interpretation would not be narrowed to the date of the will if the phrase were “the lands which I *now* have.” *Castle v. Fox*, L. R., 11 Eq. 542; *Miles v. Miles*, L. R., 1 Eq. 462; *Cox v. Bennett*, L. R., 6 Eq. 422; *Wedgwood v. Denton*, L. R., 12 Eq. 290; *Saxton v. Saxton*, 13 Ch. D. 359; *Backwell v. Child*, 1 Amb. 260; *Struthers v. Struthers*, 5 W. R. 809; *Re Russell*, 19 Ch. D. 432. But see, *per contra*, *Cole v. Scott*, 1 M. & G. 518; *Emuss v. Sniith*, 2 De G. & S. 722.

1. *Rowley v. Berrian*, 12 Ill. 198–200

2. *Noise*, 944.
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13. *Collecting Crowds*, 958.
14. *Exciting Public Alarm*, 958.
 

*Adulterous Relations*. See LEWD ETC. COHABITATION, vol. 13, p. 274.

*Animals*. See ANIMALS, vol. 1, 571.

*Disorderly Houses*. See DISORDERLY HOUSES, vol. 5, p. 693.

*Eavesdropping*. See EAVES-DROPPING, vol. 6, p. 153.

*Gaming Houses*. See GAMING, vol. 8, p. 1033.

*Health, Nuisances Affecting*. See BOARD OF HEALTH, vol. 2, p. 429; HEALTH.

*Highways, Obstructions in*. See HIGHWAYS, vol. 9, p. 362.

*Hospital*. See HOSPITAL, vol. 9, p. 771.

*Indecent Exposure*. See EXPOSURE OF PERSON, vol. 7, p. 533.

*Liquor Nuisances*. See INTOXICATING LIQUORS, vol. 11, p. 567.

*Livery Stable*. See LIVERY STABLE, vol. 13, p. 934.

*Navigable Waters, Obstructions in*. See NAVIGABLE WATERS.

*Negligence, Nuisances Arising from*. See also NEGLIGENCE.

*Obscene Publications*. See OBSCENITY.

*Percolations*. See also—

CEMETERIES, vol. 3, p. 49.  
 DRAINS AND SEWERS, vol. 6, p. 2.  
 GAS COMPANIES, vol. 8, p. 1268.  
 OIL COMPANIES.  
 REAL PROPERTY.  
 SUBTERRANEAN WATERS.  
 SURFACE WATERS.  
 WATERS AND WATER-COURSES.

*Poisons*. See POISONS.

*Private Ways*. See PRIVATE WAYS.

*Profanity*. See PROFANITY.

*Real Property, Encroachments on or Nuisances Affecting*. See also EASEMENTS, vol. 6, p. 139.  
 NEGLIGENCE.  
 REAL PROPERTY.  
 TREES.  
 TRESPASS.

*Trespass, Nuisances Coincident With*. See also REAL PROPERTY; TRESPASS.

*Waters, Nuisances Relating to*. See—  
 BOOM COMPANIES, vol. 2, p. 469.  
 BRIDGES, vol. 2, p. 540.  
 DAMS, vol. 4, p. 971.  
 FERRY, vol. 7, p. 941.  
 FISH, vol. 8, p. 23.  
 ICE, vol. 9, p. 852.  
 LAKES AND PONDS, vol. 12, p. 610.  
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of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or injury to a right of another or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt, that the law will presume a consequent damage.<sup>1</sup>

1. Wood's Law of Nuisances (2nd ed.) 1.

A nuisance may be said to be anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights.

Cooley on Torts, p. 565. It will be noticed that this definition is so broad as to include many wrongs, not regarded as nuisances, such as trespass, malicious prosecution, false imprisonment, etc. "Nuisance, *nocumentum*, or annoyance, signifies anything that worketh hurt, inconvenience or damage. . . . Private nuisances . . . may be defined as anything done to the hurt or annoyance of the lands, tenements or hereditaments of another. 3 Black. Com. (Cooley's ed.) p. 215. This definition aims to embrace actionable nuisances

not connected with real property rights, as, for instance, a vicious animal. "A private nuisance is an act done, unaccompanied by an act of trespass, which causes a substantial prejudice to the hereditaments, corporeal or incorporeal of another." Adams' Equity, p. 210. This is at once too broad and too narrow—too broad as embracing slander of title, and too narrow in that it is limited to injuries to inheritable property rights.

What amount of annoyance or inconvenience will constitute a nuisance cannot be precisely defined, being a question of degree, depending on varying circumstances. *Columbus Gas Light etc. Co. v. Freeland*, 12 Ohio St. 392.

In Abbott's Law Dictionary, tit.

Nuisance, the word is regarded as indefinable, but it is said that "the notions presented by the term, properly used, seem to be, first, that there is some use of one's property or rights; and, second, that it is carried beyond the limits which a just regard to the welfare of the community or of individuals affected prescribes."

"Any offensive erection, which, from its nature, may be an annoyance, and, from its situation, actually becomes so, is a nuisance." Taylor's *Landlord & Tenant* (5th ed.), § 201.

In *Vin. Abr.*, tit. Nuisance, it is said: "Nuisance is threefold: 1. Publick, or general; 2. Common; 3. Private or special. Publick is that which is to the nuisance of the whole realm. Common is that which is to the common nuisance of all passing by. Private is that which is to a house or mill," etc.

A nuisance is anything which worketh hurt, inconvenience, or damage to another; as, if one does an act, in itself lawful, which, being done in a particular place, necessarily tends to the damage of another's property, it is a nuisance. *Coker v. Birge*, 9 Ga. 425; *Norcross v. Thoms*, 51 Me. 503.

Anything constructed on a person's premises which of itself, or by its intended use, directly injures a neighbor in the proper use and enjoyment of his property, is a nuisance. *Grady v. Wolsner*, 46 Ala. 381; s. c., 7 Am. Rep. 593. See also *Stone v. Bumpus*, 40 Cal. 428; *Hackney v. State*, 8 Ind. 494; *Knox v. Mayor et al.* of N. Y., 55 Barb. (N. Y.) 404; *State v. Commrs.*, *Riley* (S. Car.) 146.

It is not necessary to constitute a private nuisance that the acts or state of things complained of should be noxious in the sense of being injurious to health. It is enough that there is a material interference with the ordinary comfort and convenience of life—"the physical comfort of human existence," by an ordinary and reasonable standard. *Walte v. Selfe*, 4 De G. & Sm. 315; *Crump v. Lambert*, L. R., 3 Eq. 409. There must be something more than mere loss of amenity. *Salvin v. North Brancepeth Coal Co.*, 9 Ch. 705. But there need not be positive hurt or disease. *Pollock on Torts*, p. 331.

But the mere fact that the plaintiff was already exposed to similar annoyances or inconveniences from other sources is not sufficient to defeat the action. The previous existence of a nul-

sance cannot be a justification to the defendant for creating an additional one. *Walter v. Selfe*, 4 De G. & Sm. 315; *Crossby v. Lightowler*, L. R., 2 Ch. 478; *Wood v. Wand*, 3 Exch. 748; 18 L. J. Exch. 305.

"In matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter—namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves—whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in the immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground of complaint, because, to himself individually, there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade or occupation or business is a material injury to property, there unquestionably arises a very different consideration. I think that in a case of that description the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors, would not apply to circumstances the immediate result of which is sensible injury to the value of the property." LORD WESTBURY, in *St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 642.

In the same case LORD CRANWORTH, referring to a case which had come before him while baron of the

**2. Public Nuisances.**—Public or common nuisances affect the community at large, or some considerable portion of it, such as the inhabitants of a town; and the person therein offending is liable to criminal prosecution. A public nuisance does not necessarily create a civil cause of action for any person; but it may do so under certain conditions. A private nuisance affects only one person or a determinate number of persons, and is the ground of civil proceedings only. Generally it affects the control, use, or enjoyment of immovable property; but this is a not necessary element according to the modern view of the law.<sup>1</sup>

exchequer, said: "It was proved incontrovertibly that smoke did come, and in some degree interfere with a certain person; but I said, 'You must look at it, not with a view to the question whether abstractedly that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in' the town in question.

Whether a thing is or is not a nuisance does not depend on the notions of people living in a designated locality. *Owen v. Phillips*, 73 Ind. 284.

VICE CH. KNIGHT BRUCE, in *Walter v. Selve*, 4 De G. & Sm. 322: "Both on principle and authority, the important point next for decision may properly, I conceive, be put thus: Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, or as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?"

1. Pollock on Torts, 324: "A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all her majesty's subjects." English Criminal Code (Indictable Offences) Bill, 1879.

In *King v. Morris etc. R. Co.*, 18 N. J. Eq. 397, where the question was whether a locomotive which threw out sparks along the road was a public nuisance or not, the chancellor said: "This is not a public nuisance, although it may injure a great many persons. The injury is to the individual property of each. The nuisance is public when it affects the rights enjoyed by citizens as part of the public."

In *Lansing v. Smith*, 8 Cow. (N. Y.) 146, it was said that a public nuisance is that which injures whatever portion of the public may come in contact with it.

*Hackney v. State*, 8 Ind. 494 defines a public nuisance at common law as "anything offensive to the sight, smell or hearing, erected or carried on in a public place where the people dwell or pass, or have a right to pass, to their annoyance."

A public nuisance is what injures the citizens generally who may be so circumstanced as to come within its influence. *Westcott v. Middleton*, 43 N. J. Eq. 478.

4 Black. Com. 167 says: "Common nuisances are a species of offences against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires." See also 1 Hawk. P. C. 197; 1 Russell on Crimes 294, 295; Bacon's Abr. Nuisances, 2 Roll. Abr. 83.

"In order to constitute a public nuisance, the injurious results to the public must always be of such a character and extent that, if affecting the rights of an individual only, they would form the basis of a private action. The only distinction between a public and private nuisance arises from the difference in effect. In the one case, it is confined to a single individual or to an injury to individual rights, while in the other it affects the rights of individuals only as members of the public. It is not so much a question whether a large number of persons happened to be annoyed by the act, as whether the act *itself* was such, and in such a *place*, as that the natural effect thereof would be to annoy or offend all who came within its sphere." Wood's Law of Nuisance, p.

76.

A nuisance, to be a public nuisance, must be in a public place, or where the public frequently congregate, or where members of the public are likely to come within the range of its influence; for if the act or use of property be in a remote and unfrequented locality, it will not, unless *malum in se*, be a public nuisance.<sup>1</sup>

In *Soltau v. De Held*, 2 Sim., N. S. 133, the Vice Chancellor said: "To constitute a public nuisance, the thing must be such as, in its nature or its consequences, is a nuisance, an injury, or a damage, to all persons who come within the sphere of its operations, though it may be so in a greater degree to some than it is to others."

In the case of the Attorney General *v. Ewart Booming Co.*, 34 Mich. 462, COOLEY, C. J., defined a public nuisance as "something which subjects the public to some degree of inconvenience or annoyance."

Urinating in a spring near a public highway from which travellers are accustomed to drink, was held an indictable nuisance in *State v. Taylor*, 29 Ind. 517; as was selling unwholesome provisions, not fit to be eaten by man, in *State v. Smith*, 3 Hawks (N. Car.) 378.

The draining of school privies into a brook flowing through a village was held to be a public nuisance. *New Brighton v. Kasey*, 3 N. Y. Supp. 399.

Telegraph poles are not public nuisances. *Com. v. Boston*, 97 Mass. 555. Nor telephone poles. *Irwin v. Great So. Tel. Co.*, 37 La. An. 63. An unguarded area so near to an alley as to be dangerous may constitute a public nuisance. *Bond v. Smith*, 44 Hun (N. Y.) 219. But a basement staircase opening on a sidewalk is not necessarily a nuisance. *Everett v. Marquette*, 53 Mich. 450. A Salvation Army parading on Sunday was held, in *People v. Rochester*, 44 Hun (N. Y.) 166, not to be a public nuisance. It is not necessarily a nuisance to make a speech in the street. *Fairbanks v. Kerr*, 70 Pa. St. 86; s. c., 10 Am. Rep. 664. The projection of a bow window over a street in violation of law is not necessarily a nuisance. *Jenks v. Williams*, 115 Mass. 217. Scaffolding suspended from the eaves of a house is not necessarily a nuisance. *Hexamer v. Webb*, 101 N. Y. 377; s. c., 54 Am. Rep. 703. Pipes in which naphtha stood, when pumps by which it was carried through pipes through a city were not in use,

were held not to constitute a nuisance. *Lee v. Vacuum Oil Co.*, 7 N. Y. Supp. 426.

1. Thus a brewhouse, glasshouse, chandler's shop, sty for swine, are common or public nuisances when set up in such inconvenient parts of a town that they necessarily incommode the neighborhood. *Bacon's Abr. Nuisances A*; *Ellis v. State*, 7 Blackf. (Ind.) 534; *Greene v. Nunnemacher*, 36 Wis. 50; *Com. v. Perry*, 139 Mass. 198.

In *Ray v. Lynes*, 10 Ala. 63, it was held that a noisome trade is a public nuisance in a thickly settled community but not in a remote place. Thus an act or use of property may be a public nuisance on a city street but not on a country road. Such as keeping swine. *Regina v. Wigg*, 2 Salk. 460.

So in *King v. Pierce*, 2 Shower 327, it was held that a soap boilery was a public nuisance if maintained in the principal part of a city, but not if on the outskirts.

A cemetery is not *per se* a public nuisance, but may be in a certain locality. *Begein v. Anderson*, 28 Ind. 79; *Dunn v. Austin* (Tex. 1889), 11 S. W. Rep. 1125; *Musgrove v. St. Louis Church*, 10 La. An. 431; *New Orleans v. Wardens*, 11 La. An. 244; *Monk v. Packard*, 71 Me. 309; s. c., 36 Am. Rep. 315; *Kingsbury v. Flowers*, 65 Ala. 479; s. c., 39 Am. Rep. 14. See also *CEMETERIES*, 3 Am. & Eng. Encyc. of Law 55.

So a tallow factory, though lawful in itself, becomes a public nuisance when in a thickly settled locality. *Allen v. State*, 34 Tex. 230; *Howard v. Lee*, 3 Sandf. (N. Y.) 281; *Smith v. Cummings*, 2 Pars. Eq. Cas. (Pa.) 92; *Allen v. State*, 34 Tex. 230.

In *United States v. Hart*, Pet. (C. C.) 390, it was held that fast driving, though not a nuisance *per se*, may be a nuisance in the streets of a city.

In *State v. St. Louis Board of Health*, 16 Mo. App. 8, the question was whether or not a brick kiln was a public nuisance. The court, after holding that it was not in itself, discussed very fully the effect of locality in regard to nuisances. In the course of its

But the mere fact that the act or use of property is unpleasant to the public or renders property in the vicinity less valuable will

opinion, the court said: "Even what is a nuisance *per se* may be carried on in a remote locality so as to be no common annoyance to the public. And, on the other hand, what is not a nuisance *per se*, such a trade as has been harmlessly and beneficially carried on for years in a particular locality, may become a public nuisance without any change in the way it is conducted, by reason of public streets being laid out near it, or numerous dwellings erected in its vicinity so that it becomes a serious annoyance."

A blacksmith's shop may be a public nuisance in certain localities in a city, but not on a side street. *Foucher v. Grass*, 60 Iowa 505; *Whitney v. Bartholomew*, 21 Conn. 213; *Ray v. Lynes*, 10 Ala. 63.

In *Tipping v. St. Helen Smelting Co.*, 4 B. & S. 608, it was held that the court will always consider the convenience of the place in determining whether the act or use of property be a public nuisance.

So keeping unprotected a large quantity of gunpowder in a building situated near others is a nuisance *per se*. *Myers v. Malcolm*, 6 Hill (N. Y.) 292; s. c., 41 Am. Dec. 744; *Weir's Appeal*, 74 Pa. St. 230.

So a tree or post on the margin of a crowded street may be a public nuisance, although it would not be on a retired street. *Franklin Turnpike Co. v. Crockett*, 2 Sneed (Tenn.) 263; *Com. v. Reed*, 34 Pa. St. 275; s. c., 95 Am. Dec. 661.

So a soap-boiling establishment in a populous portion of a large city is a nuisance *per se*. *Howard v. Lee*, 3 Sandf. (N. Y.) 281.

So the manufacture of poudrette (superphosphate of lime) in such manner that the fumes escape into the outside air, is a public nuisance in an inhabited district. *Coe v. Schultz*, 47 Barb. (N. Y.) 64.

A tannery is not *per se* a nuisance, but may become one by reason of its location. *State v. Street Commrs.*, 36 N. J. L. 283.

A livery stable in a city is not a nuisance *per se*, but if near dwellings it may become one. *Coker v. Birge*, 10 Ga. 336; *Kirkman v. Handy*, 11 Humph. (Tenn.) 406; s. c., 54 Am. Dec. 45; *Shivery v. Streeper*, 24 Fla. 103;

*Dargan v. Waddill*, 9 Ired. L. (N. Car.) 244; s. c., 49 Am. Dec. 421; *Rounsaville v. Kohlheim*, 68 Ga. 668; s. c., 45 Am. Rep. 505.

A slaughterhouse in a remote locality is not a nuisance *per se*, but if in the populous part of a city or town it is *prima facie* a public nuisance. *Dubois v. Budlong*, 10 Bosw. (N. Y.) 700; s. c., 15 Abb. Pr. (N. Y.) 445; *Pruner v. Pendleton*, 75 Va. 516; s. c., 40 Am. Rep. 738; *Catlin v. Valentine*, 9 Paige (N. Y.) 575; s. c., 38 Am. Dec. 567; *Bushnell v. Robeson*, 62 Iowa 542; *Com. v. Upton*, 6 Gray (Mass.) 473; *Dennis v. State*, 91 Ind. 291; *Attorney General v. Stewart*, 20 N. J. Eq. 415; *Babcock v. New Jersey Stockyard Co.*, 20 N. J. Eq. 296; *Fay v. Whitman*, 100 Mass. 76; *Bishop v. Banks*, 33 Conn. 118; s. c., 87 Am. Dec. 197.

A wagon loaded with matter that emits an offensive odor, though not in itself a public nuisance, may become so on a public street. *Lippincott v. Lasher*, 44 N. J. Eq. 20.

In *Beadmore v. Tredwell*, 31 L. J., Ch. 892, a brick kiln within three hundred and fifty yards of a residence was held a nuisance.

In *Basshan v. Hall*, 22 L. T. 116, a brick kiln was held *prima facie* a nuisance within one hundred yards of a dwelling. See also *Bamford v. Tumley*, 2 B. & S., Q. B. 62; *Brady v. Weeks*, 3 Barb. (N. Y.) 157; *Cambell v. Seaman*, 63 N. Y. 584; s. c., 20 Am. Rep. 567.

In *State v. Wetherall*, 5 Harr. (Del.) 487, it was held generally that any trade or business carried on in a town, or populous neighborhood, or near a public road or highway, which produces noxious or offensive smells, to the annoyance of the neighborhood, or persons travelling along the public road, is a common nuisance.

In *Ashbrook v. Com.*, 1 Bush (Ky.) 139; s. c., 83 Am. Dec. 740, the court said: "The pursuit of a noxious trade is lawful so long as it does not interfere with the rights of the public; but when it does so interfere with these superior rights, it becomes illegal, and no length of time can sanctify it." See 2 Greenl. Ev., p. 472, § 473; *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201; *State v. Close*, 35 Iowa 570; *Moses v. State*, 58 Ind. 185.

not alone be a sufficient invasion of a public right to constitute it a public nuisance. Provided the act or use of property be not in itself illegal, the law will not, for slight cause, interfere with the business or actions of any man. To constitute a public nuisance, there must be a substantial injury to the public at large.<sup>1</sup>

**3. Private Nuisances.**—A private nuisance, of the sort which is redressed at the suit of the party, is anything done on one's premises or elsewhere, or put into circulation, or omitted to be done contrary to a legal duty, wherefrom, through the separate action of nature or of the common course of events, an injury follows to or directly menaces another; or, it is any indictable nuisance which has wrought a special harm to the individual.<sup>2</sup>

The conception of private nuisance was formerly limited to injuries done to a man's freehold by a neighbor's acts, of which stopping or narrowing rights of way and flooding land by the diversion of water courses appear to have been the chief species. In the modern authorities it includes all injuries to an owner or occupier in the enjoyment of the property of which he is in possession, without regard to the quality of the tenure. The ways in which this may happen are indefinite in number, but fall for practical purposes into certain well recognized classes.<sup>3</sup>

1. *Walter v. Selfe*, 4 Eng. L. & Eq. 15, was a case where the smoke arising from a brick kiln was complained of as a nuisance. The court decided that it was, basing the decision upon the fact that while the annoyance was not perhaps injurious to the health, yet it was more than fanciful. *BRUCE, VICE-CHANCELLOR*, said the decision turned upon this question: "Ought this convenience to be considered, in fact, as more than fanciful, or as one of mere delicacy or fastidiousness—as an inconvenience materially interfering with the ordinary comfort, physically, or human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober and simple notions among the English people? And I am of opinion that this point is against the defendant."

In *Morris etc. R. Co. v. Prudden*, 20 N. J. Eq. 530, the court said that to constitute a public nuisance there "must not only be a violation of the plaintiff's rights, but such a violation as will be attended with substantial and serious damage. Mere diminution of the value of the property of the party complaining, by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief." So *McLaughlin v. Charlotte etc. R. Co.*, 5 Rich. L. (S. Car.) 583.

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In *Robinson v. Baugh*, 31 Mich. 201, where the question was as to a public nuisance, the court said: "The subject cannot be safely dealt with by resorting to subtle refinements and nice distinctions. Extreme claims must give way. Those activities which are right in themselves and belong to the neighborhood and are reasonable in their mode may not be quite agreeable to the fastidiousness of some or the special or peculiar susceptibilities of others, but those thus affected must bear their little discomforts if they choose to stay where they are so caused . . . and of course the existence of these slight personal annoyances can afford no ground for saying that the concerns causing them are not suitably situated, and are therefore nuisances."

In *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201, the court said: "The discomforts must be physical; not such as depend upon taste or imagination."

In *Price v. Grantz*, 118 Pa. St., 402, the court held that a trifling injury or unpleasantness will not justify a court in holding that an otherwise lawful business is a public nuisance.

2. *Bishop on Non-Contract Law*, § 411.

3. *Pollock on Torts* 328



A public nuisance may be a private nuisance as well, when viewed in its relations to an individual specially injured by it. Nuisances having such double relation are denominated by Mr. Wood mixed nuisances.<sup>1</sup>

**4. Intent or Motive Immaterial.**—The intent or motive with which the act is done is immaterial to the determination of the question of nuisance or no nuisance. One acting strictly within his legal rights may not be held liable in an action by his neighbor, even if what he did was done maliciously and with intent to injure the neighbor;<sup>2</sup> while, on the other hand, if that done in fact creates a nuisance, either in itself or by reason of its surroundings, it does not matter how innocent the intent, or that the trade or occupation causing the annoyance is, apart from that annoyance, an innocent or laudable one. "The building of a lime kiln is good and profitable; but if it be built so near a house that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it."<sup>3</sup> "A tan house is necessary, for all men wear shoes; and nevertheless it may

1. "There is a class of acts which may properly be denominated mixed nuisances, being both public and private in their effects. Public, in that they produce injury to many persons or all the public; and private, because, at the same time, they produce a special and particular injury to private rights, which subjects the wrongdoer to indictment by the public, and to damages at the suit of the persons injured." Of this class are obstructions placed in a highway, which produce a special injury to one person, by injuring his horse, carriage or himself, while others of the public are only hindered, inconvenienced or delayed. Also establishments which, by reason of the nature of the business carried on, produce such noxious smells and vapors as to annoy the whole community, and at the same time are a special injury to those residing or doing business in their immediate vicinity, by rendering their houses untenable, or their enjoyment so uncomfortable that they sustain a special and particular damage apart from and beyond the rest of the public.

2. In *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505, which was a private action against one who, on his own land, had obstructed water from reaching plaintiff's land, the court said: "It may be laid down as a position not to be controverted, that an act, legal in itself, violating no right, cannot be made actionable on the ground of the motive

which induced it. If the act is lawful, although it may be prejudicial, it is *damnum absque injuria*." It is said in Comyns' Digest, under the head of "Nuisance," that an action on the case does not lie for the reasonable use of any right, though it be to the annoyance of another. See also *Mahan v. Brown*, 13 Wend. (N. Y.) 261; s. c., 28 Am. Dec. 461, where the defendant had built a high fence for the sole purpose of obstructing the lights of his neighbor's house, and it was held that no action would lie, where the lights were not injured and no right had been acquired by grant or user, and that the motive with which the act was done was immaterial. In *Greenleaf v. Francis*, 18 Pick. (Mass.) 117, there is a dictum to the contrary, but the point was not adjudged. See also *Ashby v. White*, 1 Smith's Lead. Cas. 472, and notes thereto; *Radcliff v. Mayor etc. of Brooklyn*, 4 N. Y. 195; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Ellis v. Duncan*, 21 Barb. (N. Y.) 230; *Scott v. Shepherd*, 2 W. Black. 894; *Lambert v. Bessey*, T. Raym. 423; *Weaver v. Ward*, Hobart 134; *Fletcher v. Rylands*, L. R., Exch. 263; *Gibbon v. Pepper*, 2 Salk. 637; *Underwood v. Hewson*, 1 Stra. 596; *Leame v. Bray*, 3 East 595; *Vandenburgh v. Truax*, 4 Den. (N. Y.) 464; s. c., 47 Am. Dec. 268; *Guille v. Swan*, 19 Johns. (N. Y.) 381; *Bonnell v. Smith*, 53 Iowa 281; *Olmsted v. Rich*, 6 N. Y. Supp. 826.

3. *Aldred's Case*, 9 Co. Rep. 59a.

be pulled down if it be erected to the nuisance of another. In like manner of a glass house; and they ought to be erected in places convenient for them."<sup>1</sup> So it is an actionable nuisance to keep a pig sty so near my neighbor's house as to make it unwholesome and unfit for habitation, though the keeping of swine may be needful for the sustenance of man.<sup>2</sup> Learned and charitable foundations are commended in sundry places of our books; but the fact that a new building is being erected by a college for purposes of good education and the advancement of learning, will not make it the less a wrong if the sawing of stone by the builders drives a neighboring inhabitant out of his house.<sup>3</sup>

**5. Injury Must be "Common."**—In order to constitute a public nuisance, the act or use of property must be an annoyance common to the public generally. The test is not the number of persons annoyed, but the possibility of annoyance to the public by invasion of its rights.<sup>4</sup>

**6. Care Not an Element.**—If the facts be sufficient to constitute a public nuisance, the defendant may not show that the business is carried on in the most approved manner. Care is not an element. The fact that injurious results proceed from the act will be sufficient.<sup>5</sup>

1. *Jones v. Powell*, Palm. 539; *Bamford v. Turnley*, 3 B. & S. 66.

2. *Aldred's Case*, 9 Co. Rep. 59a; *Broder v. Saillard*, 2 L. R., Ch. Div. 692.

3. *Pollock on Torts* 333.

4. *Rex v. White*, 1 Burr. 333; *Rex v. Lloyd*, 4 Esp. 200; *Com. v. Farris*, 5 Rand. (Va.) 691; *Com. v. Webb*, 6 Rand. (Va.) 726; *State v. Baldwin*, 1 Dev. & B. (N. Car.) 195.

"I shall here only remind the student that common nuisances are such inconvenient and troublesome offences as annoy the whole community in general, and not merely some particular person." 4 Black. Com. 167.

In *Com. v. Smith*, 6 Cush. (Mass.) 80, an indictment charging a public nuisance to the "disturbance of divers citizens" was held insufficient. The court held that the indictment must allege "great damage to all the citizens," etc.

In *People v. Jackson*, 7 Mich. 432, which was an indictment for obstructing an alley, the court said: "To make an obstruction like this an indictable offence, it must injuriously affect some public right—some right in which the public in their aggregate capacity have a common interest, as distinguished from a mere individual or private right. If it affects only the rights of an individual, or of a definite number of individuals less than the whole, in their

individual capacity, the several persons actually injured have their remedy by private action, but no indictment lies. 4 Black. Com. 5; 1 Bish. Cr. L., § 348. Of course it is not necessary that all should be actually injured, but the tendency of the act must be to affect injuriously a right which all are entitled to exercise if they see fit."

Thus in *Rex v. Lloyd*, 4 Esp. 200, it was held that where the business of a tin-smith annoyed a few persons living in the vicinity, it was not sufficient annoyance to make the trade a public nuisance. In this case only three persons were annoyed. The court held that it was not an invasion of any public right.

*Soltau v. DeHeld*, 2 Sim., N. S. 133, held that a peal of bells was not a public nuisance. The test is not the number of persons annoyed, but the fact that it is in a public place and annoying to all who come within its sphere.

In *Seifried v. Hayes*, 81 Ky. 377; s. c., 50 Am. Rep. 167, it was held that the fact that five neighbors unite in a suit to enjoin a nuisance does not prove that the nuisance is public. See also *Regina v. Webb*, 2 C. & K. 933; *Rex v. Medley*, 6 C. & P. 292; *State v. Rye*, 35 N. H. 368; *State v. Strong*, 25 Me. 297; *Phillips v. State*, 7 Baxt. (Tenn.) 151; *Com. v. Lyon*, 1 Pitts. (Pa.) 466.

5. *Cahill v. Eastman*, 18 Minn. 324;

**7. Benefits Not to be Considered.**—The fact that the act or use of property complained of may be or is beneficial or necessary to the public will not excuse or justify the continuance of a public nuisance.<sup>1</sup>

**8. Place; Convenience.**—Nor is it an answer to the charge of maintaining a nuisance to say that the offending work or manufacture is carried on at a place in itself proper and convenient for the purpose. In the sense of the law a place is not convenient

s. c., 10 Am. Rep. 184; *McAndrews v. Collierd*, 42 N. J. L. 189; s. c., 36 Am. Rep. 508; *Tenant v. Goldwin*, 2 Ld. Raym. 1089; *Sutton v. Clark*, 6 Taunt. 29; *Cox v. Burbridge*, 32 L. J., C. P. 89; 1 Hale's P. C. 430; *Comyns' Dig.*, Droit M. 2; *Fitzherbert's Nat. Brevium* 128.

In *Fletcher v. Ryland*, 1 L. R., Exch. 265, BLACKBURN, J., said: "Some years ago actions were brought against the owners of some alkali works in Liverpool for the damage alleged to have been occasioned by the chlorine fumes from their works. The defendants proved that they, at great expense, erected contrivances by which the fumes of chlorine were condensed and sold as muriatic acid, and they called a great body of scientific evidence to show that their apparatus was so perfect that no fumes could possibly escape from their chimney. But the jury found otherwise, and no attempt was made to disturb the verdict, on the ground that the defendants had taken all the precautions that prudence and skill could suggest to keep the fumes in, and that they were not liable, unless negligence was shown. If they had, the answer would have been that he whose stuff it is must keep it at his peril."

The doctrine that the fact that an offensive trade is carefully conducted and managed so as to cause as little annoyance to the public as possible, does not prevent it from being condemned as a public nuisance, is well stated in *Moses v. State*, 58 Ind. 185.

1. *Works v. Junction R. Co.*, 5 McLean (U. S.) 425.

In *State v. Kaster*, 35 Iowa 221, the offence charged was keeping pigs to the great discomfort of the public. The evidence for the prosecution showed facts which would constitute a public nuisance. The defendant then proposed to show that the enclosure charged as a nuisance "was a great and essential accommodation to the public."

The court held that this testimony must be excluded.

In *Seacord v. People*, 121 Ill. 623, where the indictment set forth a public nuisance occasioned by rendering dead animals, the court, in an exhaustive opinion, said: "It is also insisted, with great apparent earnestness, that the acts of defendant are justified by the immediate urgency for the disposition of the dead animals, out of regard for the public health and convenience. . . . The law does not, however, balance conveniences, and it makes no difference if the work is really in the interest of society or necessary for the preservation of the public health. It is now well settled 'that the circumstance that the thing complained of furnishes upon the whole a greater convenience to the public than it takes away,' is no answer to an indictment for a nuisance."

In *Attorney General v. Leeds*, 39 L. J., Ch. 254, the town of Leeds was indicted for a public nuisance created by the discharge of sewerage into a river and thereby polluting the stream. The defence was that there was no other practical way to drain the town, and the health of the inhabitants depended upon maintaining this outlet for its sewerage. It was held to be no defence, the court holding that in prosecutions or actions for nuisance, the court would not balance conveniences.

In *Rex v. Russel*, 6 B. & S. 566, it was held that where a great public benefit ensues, the benefit will balance the injury, but this case was expressly overruled in *Rex v. Ward*, 4 Ad. & El. 384. So in *Rex v. Tindall*, 6 Ad. & El. 143; *Rex v. Morris*, 1 B. & Ad. 441. But see *Pilcher v. Hart*, 1 Humph. (Tenn.) 524.

In *Reg. v. Train*, 2 B. & S. 640, it was held that a railway track in a highway so laid out as to cause horses to slip was a nuisance, and the fact that the railroad benefited the public was no defence. *Republica v. Caldwell*, 1 Dall. (U. S.) 150; *Regina v. Barry*, 9

for the burning of bricks, or smelting of copper, or carrying on of chemical works if a nuisance to those near by is created.<sup>1</sup>

L. Rep. 122; *Hart v. Mayor etc. of Albany*, 9 Wend. (N. Y.) 571; s. c., 24 Am. Dec. 165.

1. *Ellis v. State*, 7 Blackf. (Ind.) 534.

In *Rex v. Cross*, 2 Car. & P. 483, the court stated the rule thus: "If a certain noxious trade is already established in a place remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects; or if a public road be made so near to it that the carrying on of the trade becomes a nuisance to the person using the road: in those cases the party would be entitled to continue his trade, because his trade was legal before the erection of the houses in the one case, and the making of the road in the other."

The case of *Com. v. Upton*, 6 Gray (Mass.) 473, was an indictment for nuisance in the keeping of a slaughter house. It appeared that when the slaughter house was built and for a long time after, there were no other buildings and no public way in the vicinity. At a later period and before the time of the alleged commission of the offence complained of, a highway was located and buildings were erected in the neighborhood. The defendant claimed that on this state of facts there was no nuisance. The court held that the facts did not constitute a defence. The remarks of the court in *Rex v. Cross*, 2 Car. & P. 484, were declared to be mere *obiter dicta*, and unsupported by authority or reason.

In *Taylor v. People*, 6 Park. Cr. (N. Y.) 347, the defendant indicted for creating and maintaining a nuisance, attempted to show the original convenience of the place. The court, by DANIELS, J., in an exhaustive opinion said: "The supposition that persons who erect and occupy their dwellings where they may be affected by a nuisance already erected and maintained, have no legal right to complain of the annoyance it may occasion them, seems to have been derived from what was incidentally and unnecessarily said by ABBOTT, Ch. J., in the case of *Rex v. Cross*, 2 Car. & P. 226. The case was decided at *nisi prius*, and this point was in no manner involved in it . . . Such a doctrine would render the property of others subordinate to the purposes of him who might, before they had erected their

dwellings, have devoted his own to an offensive and unwholesome business. There is no sound principle of law that will protect any man in thus depriving others of the substantial use and enjoyment of their property. A person erecting a nuisance upon his own property when all other human habitations were so far removed from it as not to be annoyed or disturbed by the nuisance, would not be indictable for the erection merely because others afterwards took up their residence within the reach of its noisome and unwholesome vapors; for while it annoyed no one it could not strictly and legally be affirmed to be a nuisance. But after the adjacent territory should become devoted to domestic or business uses, and the inhabitants should be disturbed, annoyed and rendered uncomfortable by the continuance of the establishment, no good reason would exist for protecting the person then maintaining it from an indictment and conviction for a nuisance on account of such continuance. While an offensive or unwholesome trade or business is carried on at a point so remote from others as in no manner to affect or disturb them, the pursuit is lawful: but it necessarily becomes unlawful whenever the adjacent owners may so far devote their own property to the purposes of business or residence as to render its continuance incompatible with such purposes. This necessarily results from the legal principle which secures to all the right of devoting their property to the ordinary uses to which property is appropriated."

In *Brady v. Weeks*, 3 Barb. (N. Y.) 157, the act complained of was the maintenance of a slaughter house in a city. The defence offered to show that the vicinity had become peopled since the establishment of the slaughter house. The court held such evidence to be inadmissible, and said: "As the city extends, such nuisances should be removed to the vacant ground beyond the immediate neighborhood of the residences of citizens. This public policy as well as the health and comfort of the population of the city demand."

*Tipping v. St. Helen Smelting Co.*, L. R., 1 Eq. 66, was a case where the plaintiff purchased and removed to land near some copper works which emitted noxious gases; the plaintiff at the time

**9. Coming to a Nuisance.**—In ascertaining whether the property of one complaining is in fact injured, or his comfort and convenience materially interfered with by an alleged nuisance, the character of the neighborhood and the pre-existing circumstances are entitled to consideration; but the previous existence of a nuisance does not preclude complaint for an additional nuisance of the same kind, nor does it matter that third persons are also wrongdoers, nor that the very nuisance complained of existed before the person complaining came into the neighborhood. It was at one time held that if a man came to the nuisance, as was said, he had no remedy; but this has long ceased to be the law as regards both the remedy by damages and by injunction.<sup>1</sup>

of going upon the land knew of the existence of these copper works. The vice-chancellor held that the fact that the plaintiff had come to the nuisance did not bar him from relief, and this is the law both as to public and private nuisances. *Crumden's Case*, 2 Camp. 89; *Sudley's Case*, *Lid.* 168; *Lynch's Case*, 6 City Hall Rec. (N. Y.) 61. See also *Smith v. Phillips*, 8 Phila. (Pa.) 10; *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Bliss v. Hall*, 5 Scott 500; *Bamford v. Turnley*, 3 B. & P. 66; *Carey v. Ledbetter*, 13 C. B., N. S. 470; *Shotts Iron Co. v. Inglis*, 7 App. Ca. Sc. 528.

1. *Pollock on Torts* 331; *Walter v. Selfe*, 4 De G. & Sin. 315; *St. Helen Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Bankhardt v. Houghton*, 27 Beav. 425; *Rex v. Cross*, 2 C. & P. 483; *Rex v. Watts*, 2 C. & P. 486; *Roberts v. Clarke*, 17 L. T., N. S. 384; *Rolf v. Rolf*, 5 Coke 101; *Bliss v. Hall*, 5 Scott 500; *Howell v. McCoy*, 3 Rawle (Pa.) 256; *Smith v. Phillips*, 8 Phila. (Pa.) 10; *Appeal of Ladies' Decorative Art Club*, 22 W. N. C. (Pa.) 75; *Hillegass v. Helley*, 5 Pa. St. 97; *Alexander v. Kerr*, 2 Rawle 83; s. c., 19 Am. Rep. 616; *Com. v. Upton*, 6 Gray (Mass.) 473; *Boston Rolling Mills v. Cambridge*, 117 Mass. 395; *Brady v. Weeks*, 3 Barb. (N. Y.) 157; *Mulligan v. Elias*, 12 Abb. Pr., N. S. (N. Y.) 259; *Campbell v. Seaman*, 2 Thomp. & C. (N. Y.) 231; 63 N. Y. 568; s. c., 26 Am. Rep. 567; *Filson v. Crawford*, 5 N. Y. Supp. 882; *Vedder v. Vedder*, 1 Den. (N. Y.) 257; *King v. Morris etc. R. Co.*, 18 N. J. Eq. 397; *Southard v. Morris Canal*, 1 N. J. Eq. 518; *Angel v. Pennsylvania R. Co.*, 38 N. J. Eq. 58; *Crosley v. Bessey*, 49 Me. 539; s. c., 77 Am. Dec. 271; *Bliss v. Hall*, 4 Bing. N. C. 183; *Bushnell*

*v. Robeson*, 62 Iowa 540; *Newell v. Smith*, 15 Wis. 101; *Gilbert v. Showerman*, 23 Mich. 448; *Edwards v. Allonez Min. Co.*, 38 Mich.—; *Pilcher v. Hart*, 1 Humph. (Tenn.) 524; *Woodruff v. North Bloomfield Gravel Min. Co.*, 18 Fed. Rep. 753.

"The party who at the time suffers the inconvenience of a nuisance is entitled to complain of it, and it is immaterial whether it was or was not a nuisance to him in its origin. Therefore it is of no importance to the right of action that the plaintiff has come into the neighborhood since the nuisance was created; he has the right to locate himself wherever he can do so to his satisfaction, and no one can have the authority to set limits to his choice of location by interposing something which is offensive. Moreover, it would detract very seriously from the value of the property if the owner, desiring to dispose of it, could not transfer all his rights, including his right to protection, in its complete enjoyment, but must, when a nuisance is created near him, either await the result of proceedings for its abatement or dispose of his land with the nuisance practically assented to, and for a price which the nuisance has assisted in establishing. Nothing can be plainer than if the grantor could have complained when he conveyed, the grantee may complain afterwards; and to whatever use the grantor might have put the land, as being suitable and proper for the locality, the grantee is at liberty to choose and adopt. Nevertheless, if one were to purchase an estate in the neighborhood of a nuisance for the express purpose of litigation, and should demand the extraordinary process of injunction to put a stop to another's business, it may be that the court of equity, in its discretion, would refuse

him this relief, while conceding his undoubted right to a remedy in damages." Cooley on Torts 612, 613.

A leading case is *Barwell v. Brooks*, 1 L. T., N. S. 454, decided in 1843. An *ex parte* injunction had been granted against the operation of a brick kiln near the plaintiff's land, which was afterwards dissolved, on the ground that the plaintiff purchased his land after the use of the defendant's land for burning brick was publicly known. But subsequently the court made the injunction perpetual, holding that "coming to a nuisance" does not deprive a person of the right to complain of it.

In *Tipping v. St. Helen Smelting Co.*, L. R., 1 Ch. 66, the nuisance complained of was a copper foundry, which the complainant admitted he knew the existence of when he purchased the property on which he lived at the time of filing his bill for abatement. VICE CHANCELLOR PAGEWOOD held, and was sustained on appeal (11 H. L. Cas. 642), that the fact that the complainant had come to the nuisance did not deprive him of a right to equitable relief; that the facts that the parties had purchased from the same vendor, and that the defendant purchased for the express purpose of erecting copper works, and had actually erected them before the complainant purchased, did not present the same question as might have arisen if their vendor had himself erected the works before selling. Also that his knowledge, when he sold to the defendant, that the latter intended to erect copper works would not estop him or his subsequent grantee from complaining of the works as a nuisance. And see *Sturges v. Bridgman*, L. R., 11 Ch. 865.

In *Brady v. Weeks*, 3 Barb. (N. Y.) 156, which was a suit to enjoin the defendant from slaughtering cattle in a building in the city of New York, the defendant claimed that, as the plaintiffs did not come into the neighborhood until after the slaughterhouse was established, they were estopped to complain of its effects. On this point PAGE, J., said: "When the slaughterhouse was erected, it was remote from the thickly settled part of the city; but it seems that the city has now grown up to it, and that the necessities of the population require the occupation of the lots in its immediate vicinity for dwellings. When it was erected it accommodated no one, but now it interferes with the enjoyment of life and property,

and tends to deprive the plaintiffs of the use and benefit of their dwellings. There can be no real necessity for conducting such an offensive business as slaughtering cattle in this part of the city, which is now occupied by valuable and costly dwellings. As the city extends, such nuisances should be removed to the vacant ground beyond the immediate neighborhood of the residences of the citizens. This public policy, as well as the health and comfort of the population of the city, demands, and it seems that whenever *any* offensive trade becomes an injurious nuisance to any person, such person has a remedy by an action on the case for damages, or by a writ of nuisance to have the nuisance abated, upon the principle that every continuance thereof is a new or fresh nuisance."

In *Smith v. Phillips*, 8 Phila. (Pa.) 10, the plaintiff was a lessee from year to year of the premises injured by the nuisance (chemical works), and it was urged by the defendant that he ought not to recover because he had voluntarily renewed his lease after the erection of the nuisance, and thus placed himself in a position to be injured by it; and also because, by paying the same rent as before the nuisance existed, he had practically admitted that he did not suffer any serious injury from it. But the court denied that either of these defences was good or that they even affected the measure of damages.

One who hires land on which a railroad company maintains a nuisance may maintain an action if the nuisance is not abated. It is no defence that he need not have hired the land. *Central R. Co. v. English*, 73 Ga. 366.

The fact that plaintiff purchased and located on his land after the city had established its dump ground will not preclude his recovering damages for the negligent manner in which it uses the place for that purpose, whereby it becomes a nuisance. *Sherman v. Langham* (Tex. 1890), 13 S. W. Rep. 1042.

Where offensive matter from A's privy percolated into B's cellar six inches away, B having built while the privy existed, and when the nuisance was noticeable, it was held that A should be ordered to stop the percolation. *Perrine v. Taylor*, 43 N. J. Eq., 128.

The fact that the neighborhood to be affected by offensive smells from the business which defendant proposes to establish already contains other establishments where disagreeable or noxious

Neither is it a defence to an indictment for a public nuisance that when the business constituting it was established it was remote from habitations and public roads, and that the persons suffering from it afterwards built their dwellings within the range of its stench or noisome effects.<sup>1</sup>

**10. Whether Question Is of Law or Fact.**—What is a public nuisance is a question of law for the court, but the existence of facts which the court may declare sufficient to constitute a public nuisance is a question of fact for the jury.<sup>2</sup>

**11. What Not a Defence.**—It is no defence to an indictment for a public nuisance that the defendant was pecuniarily unable to

trades are carried on is not sufficient reason for denying an injunction, unless the neighborhood has been for years so wholly given up to such establishments that the addition of the one proposed by the defendant will not sensibly increase the discomfort. *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201; *Mulligan v. Elias*, 12 Abb. Pr., N. S. (N. Y.) 259.

But equity will not enjoin the rebuilding of a mill useful to the public, upon the old mill site, on the ground that it will be injurious to the health of complainant's family only, especially where the mill existed at the time he purchased the premises which he occupies at the commencement of the suit. *Eason v. Perkins*, 2 Dev. Eq. (N. Car.) 38. See also *Bradsher v. Lee*, 3 Ired. Eq. (N. Car.) 301.

In an action for damages caused to adjoining property by the explosion of a powder magazine unlawfully maintained, the facts that the plaintiff knew of the existence of the nuisance at the time he bought his property, and that he was interested in similar magazines in the same neighborhood, are not a bar to his right of action. *Lafin & Rand Powder Co. v. Tearney*, 131 Ill. 322.

1. *Taylor v. People*, 6 Park. Cr. (N. Y.) 347; *Com. v. Upton*, 6 Gray (Mass.) 473. In the latter case, the business had been carried on for twenty years before the neighborhood was settled up, but the court held that made no difference.

But in *Ellis v. State*, 7 Blackf. (Ind.) 534, it was held that the defendant, who was indicted for establishing a noxious trade near certain dwellings, could show in bar of the prosecution that the dwelling houses were built after the establishment of the alleged nuisance. And in *Platte & Denver Ditch Co. v. Anderson*, 8 Colo. 131, it was held that one

who buys land near which is an authorized ditch is entitled to no damages from those maintaining the ditch, if it is as carefully kept up as is possible in the circumstances. The uniform current of authority, both in Great Britain and the United States, is, however, the other way.

2. *People v. Carpenter*, 1 Mich. 273; 3 Kent's Com. 430.

Where A built four houses upon a lot of land, no cellars being built, but a vacant space being left below the basement floors, and four complaints were brought against A, each charging him with permitting stagnant water to stand upon a distinct lot of land, it was held that the court did not err in declining to rule that there was only one lot of land and but one offence committed, and in charging that the question was one of fact. *Com. v. Colby*, 128 Mass. 91.

In *Pilcher v. Hart*, 1 Humph. (Tenn.) 524, the court held that it was the province of the jury to determine whether the erection of a whariboat be a nuisance or not.

But in *State v. Woodward*, 23 Vt. 92, the court held that where the act constituting the nuisance was taking lands dedicated to the public, it was the province of the court to declare such act a nuisance.

In *Gateswood v. Blincoe*, 2 Dana (Ky.) 159, the question was as to the abatement of a public nuisance. ROBERTSON, C. J., said: "Whether the evidence was sufficient to prove that the milldam was a nuisance . . . or whether, if it were a nuisance, it was public or private merely, and, if the latter, whether defendants . . . were prejudiced by it . . . are questions of fact," to be decided by the jury and not by the court.

In *Hart v. Mayor etc. of Albany*, 3 Paige (N. Y.) 218, the chancellor said:

abate it;<sup>1</sup> nor that the public will derive some advantage from it;<sup>2</sup> nor that the municipal authorities have not exercised their power of assigning a place for the carrying on of the offensive business complained of;<sup>3</sup> nor that similar nuisances have been permitted or acquiesced in by the public;<sup>4</sup> nor that he has leased the premises on which the nuisance exists, and cannot lawfully enter to abate it;<sup>5</sup> nor that he has used every possible degree of care to prevent it from doing injury.<sup>6</sup>

A principal or master is criminally liable for a public nuisance committed by his agent or servant having general authority to do the act or manage the business from which the nuisance arises; and this although the principal or master has no actual knowledge of what his subordinate has done, or even though it has been done contrary to his general orders, or to his understanding of the plans.<sup>7</sup>

Conversely, one indicted for a nuisance cannot defend on the ground that he acted as the agent of another in maintaining the nuisance though this circumstance may serve to lessen the punishment.<sup>8</sup>

**12. Nuisances Per Se.**—As to the meaning of the term nuisance *per se*, there seems to be some confusion in the books. The tendency of modern times has been to restrict its use and to apply it only to such things as are nuisances at all times and under all circumstances and irrespective of their location and surroundings, as for example, things prejudicial to public morals, as disorderly houses; or dangerous to life, as powder magazines or nitro-glycerine works, or injurious to public rights, as obstructions to highways and navigable streams.

Strictly speaking, a trade or occupation, lawful in itself and which becomes a nuisance because of its location or the manner in which it is conducted, is not a nuisance *per se*, though it may be a *prima facie* nuisance. The confusion seems to be due to the loose way in which the term has sometimes been used and to the growth of the tendency to restrict its use and meaning.<sup>9</sup>

"The question of nuisance or no nuisance is always a question of fact."

1. Baltimore etc. Turnpike Co. v. State, 63 Md. 573.

2. Rex v. Ward, 4 Ad. & El. 384; Rex v. Tindall, 6 Ad. & El. 143; Rex v. Morris, 1 B. & Ad. 441; Republica v. Caldwell, 1 Dall. (U. S.) 150; State v. Kaster, 35 Iowa 221; Works v. Junction R. Co., 5 McLean (U. S.) 425; State v. Bell, 5 Port. (Ala.) 365; Duluth v. Mallet, 43 Minn. 204.

3. State v. Hart, 34 Me. 36.

4. People v. Mallory, 4 Thomp. & C. (N. Y.) 567.

5. Thompson v. Gibson, 7 M. & W. 455; Smith v. Elliott, 9 Pa. St. 345.

6. McAndrews v. Collard, 42 N. J. L., 189; s. c., 36 Am. Rep. 508; Cogswell v. New York etc. R. Co., 103 N. Y. 10; s. c., 57 Am. Rep. 901.

7. Rex v. Medley, 6 C. & P. 292; Reg v. Stephens, L. R., 1 Q. B. 702; s. c., 7 B. & S. 710; 14 L. T., N. S. 593.

8. State v. Bell, 5 Port. (Ala.) 365; Duluth v. Mallet, 43 Minn. 204. And see Martin v. Benoist, 26 Mo. App. 262.

9. Huckenstine's Appeal, 70 Pa. St. 102; s. c., 10 Am. Rep. 669. Street Commrs., 7 Vroom (N. J.) 283; Wier's Appeal, 74 Pa. St. 230; Com. v. Van Sickle, Brightly (Pa.) 69; Fairbanks v. Kerr, 70 Pa. St. 86; s. c.,



A bowling-alley, billiard-room, or like place of amusement kept for gain or hire may, or may not be, a nuisance according to

10 Am. Rep. 664; *Waupun v. Moore*, 34 Wis. 450; s. c., 17 Am. Rep. 446.

**English Doctrines.**—The English courts formerly held many trades and uses of property nuisances *per se* which are not now regarded as such, though as to some of them the *prima facie* presumption still is that they are nuisances if located or carried on in towns. Thus, a smelting house for lead. *Poynton v. Gill*, 2 Roll. Abr. 140. Or for copper. *David v. Grenfell*, 6 C. & P. 607. A candle factory. *Toyhale's Case*, Cro. Car. 510; *Rankett's Case*, Pasch. 3. A tobacco factory. *Jones v. Powell*, Palm. 537; *Hutt*, 136. A tannery. *Rex v. Pappineau*, 2 Stra. 686. A brewery. *Jones v. Powell*, Palm. 537; *Hutt*, 136. A slaughterhouse. *Swinton v. Pedie*, 15 Shaw & D. (Sc.) 575. A glass house. 1 Hawk. P. C. 363; *Reg v. Wilcox*, 1 Salk. 458. A smith's forge. *Bradley v. Gill*, Lutw. 69. A lime kiln. *Aldred's Case*, 9 Coke 59. A pig sty. *Aldred's Case*, 9 Coke 59; 1 Hawk. P. C. 363. A privy. *Stynan v. Hutchinson*, 2 Selw. 1047; and many other things of an equally lawful character have been designated as nuisances *per se*.

In *Arnot v. Brown*, 1 Macf. (Sc.) 229, the modern changes of view are indicated by the court in its ruling that "a candle manufactory is not necessarily a nuisance. Science has gone far to prevent many things from being a nuisance that were formerly of that description. It is not, therefore, very easy to determine beforehand whether or not any given thing shall prove a nuisance."

**American Rulings.**—In the United States, the courts have held that the following, among other things, are not necessarily and *per se* nuisances:

A blacksmith shop. *Foucher v. Grass*, 60 Iowa 505; *Whitney v. Bartholomew*, 21 Conn. 213; *Ray v. Lynes*, 10 Ala. 63. A brick kiln. *State v. St. Louis Board of Health*, 16 Mo. App. 8. A gunpowder factory. *Wier's Appeal*, 74 Pa. St. 230; *Huckentine's Appeal*, 70 Pa. St. 102; s. c., 10 Am. Rep. 669. A slaughterhouse. But it is, *prima facie*, if within corporate limits. *Pruner v. Pendleton*, 75 Vt. 516; s. c., 40 Am. Rep. 738; *Bushnel v. Robeson*, 62 Iowa 540; *Seifried v. Hays*, 81 Ky. 377; s. c., 50 Am. Rep. 167; *Reichart v. Geers*, 98 Ind. 73;

s. c., 49 Am. Rep. 736. A tannery. *State v. Street Commrs.*, 36 N. J. L. 283. A public or private cemetery. *Begein v. Anderson*, 28 Ind. 79; *Musgrove v. St. Louis Church*, 10 La. An. 431; *New Orleans v. Wardens* 11 La. An. 244; *Monk v. Packard*, 71 Me. 309; s. c., 36 Am. Rep. 315; *Kingsbury v. Flowers*, 65 Ala. 479; s. c., 39 Am. Rep. 14. A stable in a city. *Dargan v. Waddell*, 9 Fred. L. (N. Car.) 244; s. c., 49 Am. Dec. 421; *Rounsaville v. Kohlheim*, 68 Ga. 668; s. c., 45 Am. Rep. 505. An undertaker's establishment in a populous city. *Westcott v. Middleton*, 43 N. J. Eq. 478. A livery stable adjoining a hotel or dwelling house in a city. *Shivery v. Streepier*, 24 Fla. 103. A hospital. *Bessonies v. Indianapolis*, 71 Ind. 189. Storing gunpowder on one's own premises. *Heeg v. Licht*, 16 Hun (N. Y.) 257; s. c., 36 Am. Rep. 654. Coasting in a public street. *Jackson v. Castle*, 80 Me. 119.

A ditch dug in a borough street to lay a waterpipe from a spring to a private house, in pursuance of a municipal licence is not a public nuisance *per se*. *Smith v. Simmons*, 103 Pa. St. 32; s. c., 49 Am. Rep. 113. Nor are hitching racks on the side of a public city square. *Harrison Co. Ct. v. Wall* (Ky. 1889), 12 S. W. 130. Nor a pipe discharging water from the roof of a building to the sidewalk and there forming ice, the pipe not obstructing the sidewalk and being properly constructed. *Wenzlick v. McCotter*, 87 N. Y. 122; s. c., 41 Am. Rep. 358. An excavation near a public highway may constitute a nuisance *per se* if unguarded. *State v. Soc. for Estab. Useful Mfg.*, 42 N. J. L. 504; *Atty. Gen. v. Stewart*, 20 N. J. Eq. 415.

In the latter case it was said by the court that "there are certain things and certain trades which are considered as nuisances of themselves, as a slaughterhouse in a thickly settled town, a pig-sty near a dwelling house; and, perhaps, to these may be added a fat-melting or rendering house when carried on extensively in a populous neighborhood or near inhabited dwellings. But these are not nuisances simply because they are erected within the limits of an incorporated city, and the question whether they will be a nuisance depends upon the extent of business carried on there and the manner in which it is con-

the nature of the amusement, the manner in which the place is conducted, and its location.<sup>1</sup>

**13. Purprestures**—(a) *Definition*.—A purpresture has been judicially defined as “an enclosure, by a private party, of a part of that which belongs to, and ought to be open and free, to the enjoyment of the public at large. It is not necessarily a public nuisance. A public nuisance must be something which subjects the public to some degree of inconvenience or annoyance; but a purpresture may exist without putting the public to any inconvenience whatever.”<sup>2</sup>

ducted.” *Catlin v. Valentine*, 9 Paige Ch. (N. Y.) 575; s. c., 38 Am. Dec. 567.

1. Wood on Nuisance (2nd ed.), § 43; *State v. Hall*, 32 N. J. L. 158; *State v. Haines*, 30 Me. 65; *Updike v. Campbell*, 4 E. D. Smith (N. Y.) 570. The case of *Tanner v. Village of Albion*, 5 Hill (N. Y.) 121, held otherwise. This case was founded on a statement in *Jacob Hall's Case*, reported in 1 Mod. 76, 2 Keb. 846, and *Ventris* 169; but these cases are not recognized as authority at the present time.

In *Smith v. Com.*, 6 B. Mon. (Ky.) 21, it was held that a person keeping a house wherein offences punished by fine occur, maintains a public nuisance. So *State v. Bailey*, 21 N. H. 343. So in *McClellan v. State*, 49 N. J. L. 471, it was held that a public resort for betting, betting having been declared unlawful by statute, was a nuisance *per se*. So a house where liquor is illegally sold is a nuisance *per se*. *Meyer v. State*, 42 N. J. L. 145; *McLaughlin v. State*, 45 Ind. 338; *Com. v. McDonough*, 13 Allen (Mass.) 581.

A public saloon, in which persons play pool and bagatelle, sometimes for use of apparatus and sometimes for drink, is, under the New York Code, a nuisance *per se*. *People v. Cutler*, 28 Hun (N. Y.) 465.

2. *Atty. Gen. v. Evart Booming Co.*, 34 Mich. 462.

In the above case it was held, however, that the appropriation by a private corporation of a portion of the bed of a small stream, not navigable except for floating rafts, etc., was neither a purpresture nor a nuisance, in the absence of proof that such appropriation unreasonably abridged or inconvenienced the public use; also that as some appropriation of the bed of the stream was essential to the reasonable operation of the business of booming com-

panies, the State having by general law provided for the incorporation of such companies, must be regarded as having waived its right to complain of a reasonable appropriation of that kind.

#### Additional Definitions of Purpresture.

—The following definitions have also been given by the courts:

An encroachment upon, and an enclosure of the property of the crown in a highway, river or harbor. *Attorney General v. Utica Ins. Co.*, 2 Johns Ch. (N. Y.) 381.

An unauthorized encroachment upon, and appropriation of land or water which is common and public. *Moore v. Jackson*, 2 Abbott's N. Cas. (N. Y.) 215.

The encroachment by any person, by building or otherwise, on a street or some part of it, or such an enclosure, impediment or obstruction of it thereby, as to amount to the exclusion and hinderance of the citizens and the public from the full and beneficial enjoyment of it as a public street. *Drake v. Hudson River R. Co.*, 7 Barb. (N. Y.) 548.

In *Attorney General v. Chamberlaine*, 4 K. & J. 292, it is observed by the court that any invasion of, or encroachment on, the soil of the sea-shore or bed of an estuary or navigable tidal river between high and low water mark while the title thereto remains in the crown, is a purpresture.

Purpresture signifies a close, or enclosure; that is, when one encroacheth and maketh that serviceable to himself which belongs to many. And because it is properly, when there is a house builded or an enclosure made of any part of the king's demesne, or of a highway, or a common street, or public water, or such like things, it is derived of the French word *pourpris*, which signifies an enclosure; but specially applied, as is aforesaid, by the common

(b) *Remedies*.—The remedies for injuries or offences of this character are by indictment;<sup>1</sup> by proceedings at law known as an “information of intrusion,” resulting in abatement;<sup>2</sup> and also by proceedings in equity for abatement and injunction, on information of the attorney general, and sometimes, but not usually or necessarily, at the relation of a private person.<sup>3</sup>

<sup>1</sup>law. (Quoting Coke on Lit., vol. 3.) Mayor etc. of Columbus v. Jaques, 30 Ga. 506.

The Encyclopædic Dictionary states that its derivation is from the French *pourprendre*, to seize, to surround; *pourprisure*, an enclosure. In law, “a wrongful enclosure of, or encroachment on, the property of another.” It will be seen that this definition overlooks the very essential point that the property enclosed or encroached upon must be public property.

A purpresture is any encroachment upon real property or rights and easements incident thereto belonging to the public, by an enclosure or erection thereon, which, if made upon the property of an individual, would be a trespass. Wood Nuisance (2nd ed.), § 77.

**Recognizing Difference Between Purprestures and Public Nuisances.**—The author first quoted also emphasizes the distinction between purprestures and public nuisances, and says that a purpresture, “strictly, is an encroachment upon a public right in lands or navigable streams, that does not operate as an obstruction or injury to individual members of the public, but only to some right incident and peculiar to it in its aggregate capacity as such. The distinction between nuisances and purprestures is really broad, although at first thought there may appear to be no material difference, and courts have very often fallen into grave errors from a failure to observe the real boundaries between the two.” Section 80.

It may be doubted, however, whether the fact that an encroachment on the public domain works also a special private injury, renders it any the less a purpresture in the technical sense.

In Hargrave's Law Tracts, *De Jure Maris*, p. 85, the author says: “It is not every building below the low-water mark that is *ipso facto* in law a nuisance; for that would destroy all the quays that there are in all the ports of England; for they are all built below high water mark, for otherwise vessels could not come at them to unload; and some are built below low-water mark,

and it would be impossible for the king to license the building of a new wharf or quay, whereof there are a thousand instances, if *ipso facto* it were a common nuisance because it straitens the port, for the king cannot license a common nuisance. Indeed, where the soil is the king's, the building below the high-water mark is a purpresture, an encroachment and intrusion upon the king's soil, which he may either demolish, seize, or assent to, at his pleasure; but it is not *ipso facto* a common nuisance, unless, indeed, it be a damage to the port or navigation.”

In Bouvier's Law Dictionary the word is defined as “an enclosure by a private individual of a part of a common or public domain.”

Abbott's Law Dictionary gives it as “a taking wholly away. The act of a private individual in enclosing or building upon part of a common or public domain, and thus taking it away from the public.”

Purpresture in a forest signifieth any encroachment upon the king's forest, whether by building, enclosing, or using any liberty without lawful warrant so to do. *Termes de la Ley*.

Lord Coke (2 Co. Inst. 28) gives as instance of a purpresture, the erection of a building by an individual between high and low-water mark on the side of a public river.

See, also, 2 Bouv. Inst. n. 2382; Hargrave, Law Tracts, 84; Skene, *Purpresture*; Glanville, lib. 9, ch. 11, p. 239, note; Spelman, Gloss. *Purpresture*.

1. Reg. v. United Kingd. Tel. Co., 6 L. T. 376; 3 F. & F. 732; Com. v. Church, 1 Pa. St. 105; Com. v. Bowman, 5 Pa. St. 202; State v. Yarnell, 12 Ired. L. (N. Car.) 130.

2. Waterman's Eden on Injunctions, 259; Wood, Nuisances (2d ed.), § 78. This remedy was for purprestures on lands belonging to the crown, as distinguished from mere highways and other public places. 2 Story's Eq. Jur. (13th ed.), § 922.

3. *Equity*.—Attorney General v. Richards, 2 Anst. 603; Attorney Gen-

But a court of equity will not interfere in this way when the nuisance or purpresture is of such a nature that it may be removed with equal facility by other means or legal authority.<sup>1</sup>

In those cases where the purpresture did not produce actual damages to the public, but amounted merely to an encroachment upon a portion of the public domain, it was sometimes allowed to remain and be "arrented;" that is, a reasonable compensation for its continuance ascertained and paid on behalf of the public.<sup>2</sup>

(c) *Indictment*.—It has been said that a purpresture is not necessarily a nuisance, and that in order to render it indictable it must be shown to have caused the public actual annoyance or

eral *v. Philpot*, cited in 2 Anst. 607; Anonymous, 3 Atk. 750; Coulson *v. White*, 3 Atk. 21; Ryder *v. Bentham*, 1 Vez. 543; Halt's case, 2 Vez. 193; Attorney General *v. Johnson*, 2 Wils. Ch. 101; Attorney General *v. Shrewsbury Bridge Co.*, 21 Ch. D. 752; Attorney General *v. Forbes*, 2 Myl. & C. 129; United States *v. Ranch Co.*, 25 Fed. Rep. 465, 26 Fed. Rep. 218; Railway Co. *v. Ward*, 2 Black (U. S.) 485; State *v. Woodward*, 23 Vt. 92; State *v. Atkinson*, 24 Vt. 448; Attorney General *v. Woods*, 108 Mass. 436; Attorney General *v. Tarr* (Mass.), 19 N. E. Rep. 358; Attorney General *v. Tudor Ins. Co.*, 104 Mass. 239; Lead Co.'s Appeal, 96 Pa. St. 116; Craig *v. People*, 47 Ill. 487; Dunning *v. City of Aurora*, 40 Ill. 481; State *v. Goodnight* (Tex.), 11 S. W. Rep. 119; City of Demopolis *v. Webb* (Ala.), 6 So. Rep. 408; State *v. Mayor etc. of Mobile*, 5 Port. (Ala.) 279; 2 Inst. 38, 272; Harg. Law Tracts, 84, 87; 2 Waterman's Eden on Injunctions, ch. 11.

**Chancery and the Exchequer.**—In Attorney General *v. Forbes*, 2 Myl. & C. 129, LORD COTTENHAM said: "With respect to the question of jurisdiction, it was broadly asserted that an application to this court to prevent a nuisance to a public road was never heard of. A little research, however, would have found many such instances. Many cases might have been produced, in which the court has interfered to prevent nuisances to public rivers and to public harbors. And the court of exchequer, as well as this court, acting as a court of equity, has a well established jurisdiction, upon a proceeding by way of information, to prevent nuisances to public harbors and public roads; and in short, generally to prevent public nuisances."

"The ground of this jurisdiction of

courts of equity in cases of purpresture, as well as of public nuisances, undoubtedly is their ability to give a more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigation." Story's Eq. Jur. (13th ed.), § 924.

That the information may be upon the relation of private parties, see 2 Story's Eq. Jur. (13th ed.), § 924; Soltan *v. De Held*, 9 Eng. L. & Eq. 104; s. c., 2 Sim., N. S. 133; Knox *v. City of New York*, 55 Barb. (N. Y.) 404; City of New York *v. Baumberger*, 7 Robt. (N. Y.) 219; Hudson River R. Co. *v. Loeb*, 7 Robt. (N. Y.) 418; Savannah R. Co. *v. Shiels*, 33 Ga. 601; Ewell *v. Greenwood*, 26 Iowa 377.

**Interest of Relator.**—But the relator must have a special interest in the matter beyond that of the general public Baines *v. Baker*, Amb. 158; Attorney General *v. Cleaver*, 18 Ves. 211; Spencer *v. L. & B. R. Co.*, 18 Sim. 193; Sampson *v. Smith*, 18 Sim. 272; Bigelow *v. Hartford Bridge Co.*, 14 Conn. 565; O'Brien *v. Norwich etc. R. Co.*, 17 Conn. 372; Seeley *v. Bishop*, 19 Conn. 135; Frink *v. Lawrence*, Conn. 117.

1. Attorney General *v. Metropolitan R. Co.*, 125 Mass. 515; Attorney General *v. Bay State Brick Co.*, 115 Mass. 431. See also Attorney General *v. Great Eastern R. Co.*, 11 Ch. D. 449; Attorney General *v. Cockemouth Board*, L. R., 18 Eq. 172; Attorney General *v. Ely R. Co.*, L. R., 4 Ch. 194.

2. Attorney General *v. Richards*, 2 Anst. 603; Hargrave's Law Tracts, *De Jure Maris*, p. 85; 2 Waterman's Eden on Injunctions 260; 2 Story's Eq. Jur. (13th ed.), § 922; Wood on Nuisances, (2nd ed.), § 80.

damage.<sup>1</sup> But, with a few exceptions, whenever the question has been presented to the courts in criminal or equitable proceedings, they have either intimated or expressly ruled that to encroach upon any part of the public domain is a public nuisance *per se*, and, it would seem to follow, indictable.<sup>2</sup>

1. Wood on Nuisances (2nd ed.), ch. 3; Attorney General *v.* Everts Booming Co., 34 Mich. 402. And see dictum of BAYLEY, J., in *Blundell v. Catterall*, 5 B. & Ald. 268; s. c., 7 Eng. Com. L. 21, that "where an erection is made on the seashore without authority, the crown may treat it as a furpresture, and prosecute it accordingly; but it has never yet been held abatable or indictable, because it happens to interfere with the supposed common law right of bathing."

**Existence of Natural Obstruction.**—In *State v. Shinkle*, 40 Iowa 131, it was held not to be an indictable offence to obstruct a public highway in a portion thereof which on account of natural obstacles cannot be used by the public, BECK, J., said: "The act of erecting the structure did not obstruct the road; the obstruction was complete before the act was done. To punish a man for such an act would be contrary to the spirit of the law. He has injured no one; he has deprived no one of the exercise of any right, for the abstract right claimed it was impossible for any one to exercise."

**Arkansas.**—In *State v. Holman*, 29 Ark. 58, it was held that after the repeal of a statute making it an indictable offence to obstruct a public road, an indictment for such an obstruction would lie only where it was alleged that the defendant's act caused annoyance and interference with the rights of the entire community.

**Infrequency of Injury.**—In *Rex v. Tindall*, 6 Ad. & El. 143; s. c., 1 N. & P. 719, the defendant was indicted for a nuisance by erecting and continuing piles and planking in a harbor, and thereby obstructing it and rendering it dangerous. The jury found specially that by the defendant's works the harbor was, "in some extreme cases," rendered less secure. The court held that the defendant was not criminally liable for consequences so slight, uncertain and rare, and that a verdict of not guilty must be entered.

**Benefits to Public.**—In the case of *Rex v. Russell*, 6 Barn. & C. 566, which was an indictment for obstruct-

ing the navigation of the river Tyne by erecting staiths for the loading of coal into vessels, BAYLEY, J., charged the jury that "the use of the public water is not for passage only, but for many other purposes; and many of these purposes are entitled to supersede the right of passage and to narrow the right of passage to those parts which may not be requisite for greater and more beneficial purposes. Where there is a space of water of very considerable extent, some part may be most usefully applied for the purposes of commerce, and that which is so applied may be over and above that which is sufficient for navigation; and where a great public benefit results from the abridgment of the exercise of the rights of passage, the great public benefit makes that abridgment no nuisance, but a useful, beneficial and proper purpose." On motion for a new trial, this charge was sustained, though LORD TENTERDEN, C. J., took a contrary view.

2. **Nuisance of Furpresture Cannot be Left to Jury.**—In *State v. Woodward*, 23 Vt. 92, which was an indictment for an erection on public land, the court dispose of the question by saying: "Where the act complained of is the taking of property devoted to public use, and applying it to his own, the respondent is not entitled to have the question as to whether the erection is a nuisance submitted to the jury. Such an act is a nuisance in law, for the commission of which there can be no justification." This was approved and followed in *State v. Atkinson*, 24 Vt. 448.

**Use Gained by Removal of Natural Obstruction.**—In *Com. v. Wilkinson*, 16 Pick. (Mass.) 175, it was held that an indictment would lie for maintaining buildings within the limits of a highway though the portions thereof covered by them were entirely outside of the travelled path, and they had been built by removing a high bank.

The same principle is adhered to in *Brownlow v. Tomlinson*, 1 M. & G. 484; *Rex v. Wright*, 3 B. & Ald. 681; *Rex v. Carlisle*, 6 Car. & P. 636.

**II. NUISANCES IN RELATION TO PARTICULAR SUBJECTS—1. In General.**—The variety of things, acts and omissions which may constitute a nuisance is so great as to render an enumeration impossible, no particular combination of sources of annoyance being necessary to constitute a nuisance, and the possible sources of annoyances not being exhaustively defined by any rule of law.

In making a particular classification of nuisances, the distinctions between that which is simply a trespass, and that which, while a trespass, is also a nuisance, must be borne in mind. Again, there are many acts and omissions which, in the accepted classification of legal topics, fall more accurately and readily into the subject of negligence than that of nuisance. Frequently the terms trespass and nuisance coincide in reference to a particular subject matter, certain nuisances being also continuing trespasses.

The scope of the term nuisance, however, is wider than that of trespass. "A man shall have an assize of nuisance for building a house higher than his house, and so near his, that the rain which falleth upon that house falleth upon the plaintiff's house."<sup>1</sup> And it is stated to be a nuisance if a tree growing on one's land overhangs a public road or the land of an adjoining owner.<sup>2</sup> In this class of cases, nuisance means nothing more than encroachment upon the rights of the public or upon one's neighbor. Generally, in former times, when forms of action were strict, and a mistake in choosing the proper form was fatal, there was a greater variety and choice of remedies in the case of such continuing trespasses as were denominated nuisances than in ordinary trespasses. Still, there is a real distinction between trespass and nuisance even when they are combined; the cause of action in trespass is

In *People v. Vanderbilt*, 28 N. Y. 396; s. c., 38 Barb. (N. Y.) 282, which was a proceeding to restrain the defendant from enlarging a pier or crib in New York harbor, the court held that the pier, being in public waters, was a purpresture and was a nuisance; and that the trial court properly excluded evidence to show that the pier had not been, and would not be when enlarged, any inconvenience to the public or interference with navigation. And see *Hart v. Mayor of Albany*, 9 Wend. (N. Y.) 571; *People v. Cunningham*, 1 Den. (N. Y.) 524.

In *Rex v. Ward*, 4 Ad. & El. 384, it was held, on indictment for erecting an embankment in a navigable river, that a finding by the jury that the embankment was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, amounted to a verdict of

guilty; also that it was no defence that, although the embankment was in some degree a hinderance to navigation, it was advantageous in a greater degree to other uses of the port.

The enclosure by private persons of vacant public school lands belonging to the State, expressly forbidden by statute, was held to be both a purpresture and a nuisance, in *State v. Goodnight* (Tex.), 11 S. W. Rep. 119.

An indictment will lie at common law for obstructing a navigable sound, by placing posts therein, whether navigation has been actually interfered with or not, if it is thereby rendered less secure and less expeditious. *State v. Narrows Island Club*, 100 N. Car. 477; s. c., 5 S. E. Rep. 411.

1. *Penruddock's Case*, 5 Coke Rep. 100 b; *Fay v. Prentice*, 1 C. B. 829.

2. *Lonsdale v. Nelson*, 2 B. & C. 302.

interference with the right of a possessor in itself, while in nuisance it is the incommmodity which is proved in fact to be the consequence, or is presumed by the law to be the natural and necessary consequence of such interference: thus, an overhanging roof or cornice is a nuisance to the land it overhangs because of the necessary tendency to discharge rainwater upon it.<sup>1</sup>

"Smoke, unaccompanied with noise or noxious vapor, noise alone, offensive vapors alone, although not injurious to health, may severally constitute a nuisance to the owner of adjoining or neighboring property."<sup>2</sup> The persistent ringing and tolling of large bells,<sup>3</sup> the loud music, shouting, and other noises attending the performances of a circus,<sup>4</sup> the collection of a crowd of disorderly people by a noisy entertainment of music and fireworks, to the grave annoyance of dwellers in the neighborhood,<sup>5</sup> have all been held to be nuisances. The use of a dwelling house in a street of dwelling houses, in an ordinary and accustomed manner, is not a nuisance, though it may produce more or less noise and inconvenience to a neighbor. But the conversion of part of a house to an unusual purpose, or the simple maintenance of an arrangement which offends neighbors by noise or otherwise to an unusual and excessive extent, may be an actionable nuisance.<sup>6</sup>

2. **Noise.**—Whether noise alone constitutes a nuisance depends on circumstances. Trifling or occasional noises incident to the ordinary use of property, or pursuance of a trade or calling, do not, ordinarily, though those in the neighborhood are disturbed; but even a lawful trade not especially noisy, may constitute a nuisance if pursued at unseasonable hours; and the quality or character of the noise may be an important element on the question of nuisance or no nuisance. The fact that certain persons annoyed are supersensitive is not to be taken into account, the average susceptibility being the test. So a noise may be a nuisance if made mischievously or maliciously, while a similar noise might not be if made in carrying on a lawful calling. The matter of locality has much to do with the question. A noisy trade brought into a quiet neighborhood of dwelling houses may there be a nuisance, while it would not be elsewhere.<sup>7</sup>

1. Pollock on Torts 329.

2. ROMILLY, M. R., in *Crump v. Lambert* (1867), L. R., 3 Eq. 409.

3. *Soltau v. De Held*, 2 Sim., N. S. 133; and see *infra*.

4. *Inchbald v. Barrington*, L. R., 4 Ch. 388.

5. *Walker v. Brewster*, L. R., 5 Eq.

24.

6. Pollock on Torts 334.

7. In *Soltau v. De Held*, 2 Sim., N. S. 133, the ringing of bells by a Catholic church in London was enjoined. And so in *Harrison v. St. Mark's Church*, 12 Phila. (Pa.) 259; s. c., 43 Am. Rep. n.

522. See also *Martin v. Nutkin*, 2 P. Wms. 266.

In *Leete v. Pilgrim Congregational Church*, 14 Mo. App. 590, the ringing of church chimes and the striking of the church clock between 9 P. M. and 7 A. M. was enjoined. But in *Rogers v. Elliott*, 146 Mass. 349, it was held that there was no private right of action on the part of a sick person, whose illness was aggravated by the refusal of the custodian of the church to refrain from ringing the bells. In *Davis v. Sawyer*, 133 Mass. 289; s. c., 43 Am. Rep. 519, the ringing of a heavy factory bell early in

the morning was adjudged a nuisance. In *Weason v. Washburn Iron Co.*, 13 Allen (Mass.) 95; s. c., 90 Am. Dec. 181, the owner of an inn was held to have a cause of action against the proprietors of a rolling-mill, which shook the inn building and hindered sleep. In *Dennis v. Eckhardt*, 3 Grant Cas. (Pa.) 390, a tinsmith and sheetiron-worker was enjoined from hammering and pounding, to the annoyance of his neighbors. In *Dargan v. Waddill*, 9 Ired. (N. Car.) 244; s. c., 49 Am. Dec. 421, the stamping of horses in a livery stable near the plaintiff's dwelling was adjudged an actionable nuisance. In *Bishop v. Banks*, 33 Conn. 121; s. c., 87 Am. Dec. 197, noises from a cattle pen to the disturbance of the plaintiff's rest were also adjudged a nuisance. In *Rex v. Smith*, 2 Stra. 704, and in *Rex v. Higginson*, 2 Burr. 1233, one was indicted for the use of a speaking trumpet by night to the disturbance of the neighborhood. See also *Bankus v. State*, 4 Ind. 114. In *Carrington v. Taylor*, 11 East 571, and in *Keeble v. Hickeringill*, 11 East 574, it was held an actionable nuisance to prevent by noise, the taking of wild ducks. In *Wallace v. Auer*, 10 Phila. (Pa.) 356, it was held a nuisance to pursue the business of a goldbeater in a quiet neighborhood of dwelling-houses. In *Fish v. Dodge*, 4 Den. (N. Y.) 311; s. c., 47 Am. Dec. 254, there was a recovery against one who used a part of a building as a blacksmith's shop and let the rest of it for the finishing of steam boilers. In *Bradley v. Gill*, *Lutwyche* 69, the conversion of a dwelling-house into a smith's forge was adjudged a nuisance. In *Elliotson v. Feetham*, 2 Bing. N. C. 134, the working and hammering of iron and steel was held a nuisance, and so in *Scott v. Firth*, 10 L. T., N. S. 240. In *Gullick v. Tremlett*, 20 W. R. 358, an artist was decreed an injunction against a veterinary surgeon who hammered iron on an anvil. In *Robertson v. Campbell*, 13 F. C. (Sc.) 61, a printing press near a dwelling house was held a nuisance, and so in *Johnstone v. Constable*, 3 D. (Sc.) 1263. In *Cooper v. North British R. Co.*, 1 Macph. 499, the business of hardening rails was adjudged a nuisance. In *Eaden v. Firth*, 1 H. & M. 573, the operation of a steam hammer was enjoined, and in *Kinloch v. Robertson*, *Kames Sel. Dec.* 175, a forge and anvil on the lower floor of a building, the upper tenement of which was used as a

residence, was held an actionable nuisance. Again, in *Roskell v. Whitworth*, 19 W. R. 804, a steam hammer near a Catholic church, dwelling-house and school was held a nuisance. In *Inchbald v. Barrington*, L. R., 4 Ch. 388, a circus was enjoined, and in *Walker v. Brewster*, L. R., 5 Eq. 31, an injunction was granted against fetes, accompanied with music, dancing and fire-works, to the depreciation in value of the plaintiff's residence. In this case, however, the decision was not placed alone on the ground of the noise, but the collection of crowds was a material element. In *McKeon v. See*, 51 N. Y. 300; s. c., 10 Am. Rep. 659, the sawing of marble, accompanied by a jar which shook the plaintiff's building, was held a nuisance which should be enjoined. In *Tanner v. Village of Albion*, 5 Hill (N. Y.) 123, and *State v. Haines*, 30 Me. 65, the noise from a bowling alley was held to be a nuisance. In *Barham v. Hodges*, 14 Alb. L. J. 137, the playing of skittles was adjudged a nuisance. In *Brill v. Flagler*, 23 Wend. (N. Y.) 354, the barking of a dog by night; though in *Street v. Tugwell*, 2 Selw. 1138, *LORD KENYON* held to the contrary. In *Truman v. London*, 50 L. T., N. S. 89, the noise of cattle at a dock and railroad sidetrack were enjoined as a nuisance. See also *Normantown etc. v. Pope*, 48 L. T., N. S. 666; *Geddis v. Bann*, L. R., 3 App. 445; *Hammersmith v. Brown*, 4 Eng. & Irish App. 192.

A steam whistle may constitute a nuisance if used in such a place and manner as to make it such. *Parker v. Union Woolen Works*, 42 Conn. 399; *Knight v. Goodyear etc. Mfg. Co.*, 38 Conn. 438; s. c., 9 Am. Rep. 406.

The uttering of loud cries on a public street is punishable as a public nuisance. *Com. v. Harris*, 101 Mass. 29; *Com. v. Oakes*, 113 Mass. 8; *Com. v. Spratt*, 14 Phila. (Pa.) 365. As is profane cursing and swearing in public. See also *PROFANITY*. *State v. Graham*, 3 Sneed (Tenn.) 134; *State v. Powell*, 70 N. Car. 67.

Gathering in a noisy way at a pigeon shooting match to the serious annoyance of dwellers in the vicinity is a nuisance. *Rex v. Moore*, 3 B. & Ad. 184. So is a skating rink erected within a few yards of a dwelling-house. *Snyder v. Cabell*, 29 W. Va. 48. So are public drinking saloons where dissolute persons carouse and make loud noises both by day and night. *State v. Bertheol*, 6 Blackf. (Ind.) 474; *State v.*



3. **Smoke**—(a) *In General*.—The owner of land has the right to the enjoyment of the air above it in a reasonably pure and wholesome condition; anything which deprives him of this enjoyment by polluting the air with smoke, dust, smells, noxious gases, or vapors, thus producing injury to property, health or comfort, is a nuisance.<sup>1</sup>

Buckley, 5 Harr. (Del.) 508. And so is the noise and jar of an electric light engine interfering with conversation and sleep in a neighboring house. *Yocum v. Hotel St. George Co.*, 18 Abb. N. Cas. (N. Y.) 340. The business of blacksmithing and horseshoeing may be a nuisance. *Whitney v. Bartholomew*, 21 Conn. 213; *Bowen v. Mauzy*, 117 Ind. 258; *New Orleans v. Lambert*, 14 La. An. 244; *Ray v. Lynes*, 10 Ala. 63; *Whitaker v. Hudson*, 65 Ga. 43; *Foucher v. Grass*, 60 Iowa 505.

The case of *First Baptist Church v. Utica etc. R. Co.*, 6 Barb. (N. Y.) 313, is perhaps the only case wherein it is asserted that mere noise cannot, under any circumstances, constitute a nuisance, and this case was overruled in another case between the same parties, reported in 5 Barb. (N. Y.) 77, though in fact decided after the case in 6 Barb.; nor has the case in 6 Barb. been recognized since as an authority on this point. And see also the following additional cases on the same subject: *Dittman v. Repp*, 50 Md. 516; *Butterfield v. Klaber*, 52 How. Pr. (N. Y.) 255; *Baltimore v. Radecke*, 49 Md. 217; *Pool v. Higginson*, 8 Daly (N. Y.) 113; *Gaunt v. Finney*, L. R., 8 Ch. 8; *Adams v. Michael*, 38 Md. 123; s. c., 17 Am. Rep. 516; *Broder v. Saillard*, L. R., 2 Ch. Div. 692; *Davidson v. Isham*, 9 N. J. Eq. 186; *Rhodes v. Dunbar*, 57 Pa. St. 274; s. c., 98 Am. Dec. 221; *Ross v. Butler*, 98 N. J. Eq. 294; s. c., 97 Am. Dec. 654; *Styan v. Hutchinson*, 2 Selwyn's N. P. 119; *Rex v. Pierce*, 2 Shower 327; *Dawson v. Moore*, 7 C. & P. 25; *Com. v. Taylor*, 5 Binn. (Pa.) 277; *Duncan v. Hayes*, 22 N. J. Eq. 26; *Gaunt v. Finney*, L. R., 8 Ch. App. 8; *Mumford v. Oxford etc. R. Co.*, 1 H. & N. 34; *Martin v. Nutkin*, 2 P. Wms. 266; *White v. Cohen*, 19 Eng. L. & Eq. 146; *Burditt v. Swenson*, 17 Tex. 489; s. c., 67 Am. Dec. 665; *Sparhawk v. Union etc. R. Co.*, 54 Pa. St. 401; *Ohio etc. R. Co. v. Simon*, 40 Ind. 278; *Attorney General v. Sheffield Gas Co.*, 19 Eng. L. & Eq. 649; *Bankus v. State*, 4 Ind. 114; *Farrell v. Foster* (Pa.), cited 34

Leg. Int. 88; *Ball v. Ray*, L. R., 8 Ch. 467; *Gullick v. Tremlett*, 2 W. R. 358; *Curtis v. Winslow*, 38 Vt. 690; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201; *Doellner v. Tynan*, 38 How. Pr. (N. Y.) 176; *Gilbert v. Showerman*, 23 Mich. 448; *Heather v. Pardon*, 37 L. T., N. S. 393.

1. *St. Helens Smelting Co. v. Tipping*, 4 B. & S. 608, 616; 12 L. T., N. S. 776; 116 E. C. L. 608; *Walter v. Selfe*, 4 Eng. L. & Eq. 15; *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436; *Houghton v. Bankhard*, 3 L. T., N. S. 266; *Morris v. Barnes*, 26 L. T., N. S. 622; *Tennant v. Hamilton*, 7 C. & F. 122; *Luscombe v. Steer*, 17 L. T., N. S. 229; *Roberts v. Clarke*, 18 L. T., N. S. 49; *Watson v. Gas Light Co.*, 5 U. C., Q. B. 523; *Pentland v. Henderson*, 27 Jur. 241; *Sampson v. Smith*, 8 Sim. 272; *Ward v. Lany*, 35 Jur. 408; *Bamford v. Turnley*, 3 B. & S. 62, 66; *Catlin v. Valentine*, 9 Paige (N. Y.) 575; s. c., 38 Am. Dec. 567; *Smith v. McConathy*, 11 Mo. 517.

In discussing the question of the right to pure air, the courts of this country have often quoted the language of *Knight Bruce, V. C.*, in *Walter v. Selfe*, 4 Eng. Law & Eq. 15, who there assumed that in order to render actionable the injury complained of, it should cause "an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober and simple notions among the English people."

In *Embry v. Owen*, 4 Eng. Law & Eq. 486, *Parke, B.*, observes that: "A man cannot occupy a dwelling and consume fuel in it for domestic purposes, without its in some degree impairing the natural purity of the air; he cannot erect a building or plant a tree near the house of another, without in some degree diminishing the quantity of light he enjoys; but such small interruptions give no right of action; for they are necessary incidents to the common enjoyment by all."

While some degree of smoke in the atmosphere, greater or less, according to the commercial character and the size of the community, is an evil unavoidably connected with life in modern times, and especially with life in cities; yet the law does not hesitate to declare smoke a nuisance when it permeates the atmosphere in unreasonably dense volumes, or is for any reason so carelessly or unskilfully disposed of as to produce an interruption of the comfortable enjoyment of life or property.

"By an atmosphere free from artificial impurities is meant, not air as free and pure as it naturally is, entirely devoid of impregnation from artificial cause, but an atmosphere as free and pure as could reasonably be expected, in view of the location and its business." Wood's Law of Nuisance (2nd ed.), § 496.

The difficulty of stating a rule which shall determine just what degree of inconvenience or annoyance in this class of cases must be endured as an evil necessarily incident to civilized life, in more or less thickly settled communities, is well expressed by POLLOCK, C. B., in his dissenting opinion in *Bamford v. Turnley*, 113 Eng. C. L. 66, as follows: "The compromises that belong to social life, and upon which the peace and comfort of it mainly depend, furnish an indefinite number of examples where some apparent natural right is invaded, or some enjoyment abridged, to provide for the more general convenience or necessities of the whole community; and I think the more the details of the question are examined the more clearly it will appear that all the law can do is to lay down some general and vague proposition which will be no guide to the jury in each particular case that may come before them."

In *Crump v. Lambert*, L. R., 3 Eq. 409, LORD ROMILLY, M. R., granted an injunction to restrain the issuing of smoke and noxious effluvia from a factory chimney, and the making of disagreeable noises in the factory, though the building was located in a manufacturing town, it being made to appear that such smoke, effluvia and noise seriously increased the discomfort caused by pre-existing nuisances of a similar character. The learned judge said: "The real question in all the cases is the question of fact, viz: whether the annoyance is such as to materially interfere with the ordinary comfort of human existence. This is what is es-

tablished in *St. Helen's Smelting Co. v. Tipping*, and that is the question to be tried in the present case."

A more precise and satisfactory rule governs in cases where the damage complained of is done not to the plaintiff's mere enjoyment of pure air, but to his tangible property, as where smoke or vapor has damaged shade trees. In such cases the rule is that the injury must be tangible and substantial, "apparent to an ordinary person, and not merely such damage as can only be perceived by means of scientific or microscopic investigation." *Salvin v. North Brancepeth Coal Co.*, 31 L. T. N. S. 154. In that case the plaintiff complained that the defendant's coke burning works emitted such quantities of smoke and sulphuric acid as to greatly damage the trees on his plantation adjoining the works. The affidavits considered by the master of the rolls and by the court on appeal, showed that a vast amount of smoke and vapor from defendant's works and from many others of a similar nature passed over the premises, but it was not shown that a single tree had been killed or outwardly injured thereby; and the court refused to consider evidence of experts based upon microscopical and other scientific investigations, tending to show the probable injury to the growth of the trees if the nuisance were continued. LORD JUSTICE JAMES said: "When the master of the rolls said that the damage must be visible, it appears to me that he was quite right, and, as I understand it, it amounts to this, that although when you once establish the fact of actual substantial damage, it is quite right and legitimate to have recourse to scientific evidence upon the question of causes to which that damage is to be referred. Yet if you are obliged to start with scientific evidence, such as that procured by the microscope of the naturalist or the tests of the chemist, for the purpose of establishing the damage itself, that will

In the case of smoke, dust, or noxious vapors, the law recognizes only a tangible or visible injury.<sup>1</sup> There must be, also, to justify the interposition of the law, an unreasonable use by the defendant of his property—that is, an unreasonable use in view of the circumstances relied on to sustain the charge of nuisance; for example, if one sort of fuel will produce a smoke less obnoxious than another sort, it is his duty to use the least troublesome;<sup>2</sup> so a smoke which left a bad taste in the mouths of those breathing it,<sup>3</sup> and a peculiarly pungent smoke,<sup>4</sup> were held nuisances. The degree of personal discomfort necessary to make a lawful business a nuisance is one of fact in the circumstances, not of law.<sup>5</sup> A rule of law cannot be laid down.<sup>6</sup> There must be a sensible diminution of the comfortable enjoyment of the plaintiff's premises, or such physical discomfort as to detract sensibly from the ordinary enjoyment of life. The tangible injury to property required may consist of a discoloration of buildings or furniture, or of clothes or goods, an injury to vegetation, a deposit of cinders.<sup>6</sup> It is not enough that the rental value of the plaintiff's property is impaired,<sup>7</sup> or that a fastidious taste or delicate sensibility is disturbed.<sup>8</sup> The subject has often been before the courts.<sup>9</sup>

not suffice. It must be an actual damage, capable of being shown by a plain witness to a plain common jurymen. The damage must also be substantial, and it must be, in my view, actual—that is to say, the court has no right whatever, in dealing with questions of this kind to have regard to contingent, prospective or remote damages.”

The leading case on this subject is *St. Helen's Smelting Co. v. Tipping*, 12 L. T., N. S. 776; 11 H. of L. Cas. 642, which holds that the injury must be “sensible.”

1. See preceding note.

2. *Rhodes v. Dunbar*, 57 Pa. St. 274; s. c., 98 Am. Dec. 221, where the foundation of the complaint against the smoke from a planing mill was on account mainly of the fuel, viz: chips, shavings and sawdust used.

3. *Savile v. Kilner*, 26 L. T., N. S. 277, where the court said: “If smoke produces an unpleasant taste in the mouths of persons passing the works, why are they not to be protected? It is only necessary to establish the fact that it is hurtful to life, or detrimental to its comfortable enjoyment.”

4. *Cartwright v. Gray*, 12 Grant's Ch. (Ont.) 400.

5. *Burnham v. Hotchkins*, 14 Conn. 318; *House v. Metcalf*, 27 Conn. 639; *Requena v. Los Angeles*, 45 Cal. 55; *Blanc v. Klumpke*, 29 Cal. 156; *People*

*v. Davidson*, 30 Cal. 379; *Pilcher v. Hart*, 1 Humph. (Tenn.) 524.

6. *Wood on Nuisances* (2nd ed.), § 592.

7. *Ross v. Butler*, 19 N. J. Eq. 294; s. c., 97 Am. Dec. 654; *Rhodes v. Dunbar*, 57 Pa. St. 274; s. c., 98 Am. Dec. 221. But the diminution in rental value may constitute an element of damage, and may be, where a nuisance is proved of which the law will take cognizance, the measure of damage in some cases. *Houghton v. Bankhead*, 3 L. T., N. S. 266.

8. *Walter v. Selfe*, 4 Eng. L. & Eq. 15. And see cases cited in preceding notes.

9. In *Galbraith v. Oliver*, 3 Pittsb. (Pa.) 79, where it was sought to restrain the use of bituminous coal in a flouring mill, the subject was discussed in the light of the necessities of American trade and life. In *Sampson v. Smith*, 8 Sim. 272, a chimney, the top of which was lower than surrounding chimneys, was enjoined as a nuisance. In *Whitney v. Bartholomew*, 21 Conn. 213, there was a verdict against the owner of a blacksmith's shop, the chimneys of which passed cinders, ashes and smoke in large quantities. *Rhodes v. Dunbar*, 57 Pa. St. 274; s. c., 98 Am. Dec. 221, was the case of a planing mill, the chimneys of which created similar damage. In *Saville v. Kilner*, 26 L. T., N. S. 277, the smoke from glass-works

(b) *From Brick Burning.*—The business of brick-burning may constitute a nuisance by the creation of smoke and noxious gases, vapors or odors, to the injury of property or to the discomfort of neighbors. The cases are cases of private nuisance; but this, doubtless, is owing to the fact merely that the question has not come before an appellate court in a criminal prosecution.

The rule of law is only that applicable to nuisances generally. At an early day it was suggested that brick-burning could not be deemed a nuisance where it was done upon the land from which the brick were taken; but this notion has no place in the law as it stands to-day; nor is convenience of place an excuse any more than in other cases of the exercise of trades and occupations, which become nuisances by reason of their location and surround-

furnaces was adjudged a nuisance, and in *Cartwright v. Gray*, 12 Grant's Ch. (Ont.) 400, the smoke from a carpenter's shop containing a planing machine and circular saw propelled by steam. In the following cases smoke alone has been held a nuisance: *Hyatt v. Myers*, 71 N. Car. 271, and *Rhodes v. Dunbar*, 57 Pa. St. 275; s. c., 98 Am. Dec. 221, smoke from a planing mill; in *Hutchins v. Smith*, 63 Barb. (N. Y.) 252, from a lime-kiln; *Regina v. Waterhouse*, L. R., 7 Q. B. 545, from dye-works; *Higgins v. Guardians*, 22 L. T., N. S. 753, from salt works; *Rhett v. Davis*, 5 S. (Sc.) 217, from cook ovens; *Crump v. Lambert*, L. R., 3 Eq. 409, from a blast furnace; *Norris v. Barnes*, L. R., 7 Q. B. 637, from bichrome works; *Ward v. Lang*, 35 Jur. 408, from chemical works; *Barlow v. Kinnear*, 2 Kerr (N. B.) 94, from a steam mill; *Ross v. Butler*, 19 N. J. Eq. 294; s. c., 97 Am. Dec. 654, from pottery works; *Ottawa Gas Light Co. v. Thompson*, 39 Ill. 598, from gas works; *Duncan v. Hayes*, 22 N. J. Eq. 26, from a steam planing mill; *Shuttleworth v. Cocker*, 9 Dow. P. C. 88, from a mill; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95; s. c., 90 Am. Dec. 181, from iron works; *Norcross v. Thoms*, 51 Me. 503; s. c., 81 Am. Dec. 588, from a blacksmith's shop; *Richards' Appeal*, 57 Pa. St. 105; s. c., 98 Am. Dec. 202, from iron works; *Thiebaut v. Canova*, 11 Fla. 143, from a steam mill; *Rich v. Basterfield*, 2 C. & K. 257, from a dwelling-house chimney; *Whalen v. Keith*, 35 Mo. 87, a smoke-stack near a dwelling; *Monteath v. Lang*, 37 Jur. 265, from a furnace; *Lang v. Muirhead*, 2 S. (Sc.) 73, from a chimney; *Sampson v. Savage*, 37 Eng. L. & Eq. 374, from chimneys of work shops, and so in *Ben-*

*nett v. Thompson*, 37 Eng. L. & Eq. 51; *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201, from gas works; and so in *Hudson v. Madison*, 12 Sim. 417; *Jones v. Powell*, Palm. 539, from a glass house; *Gullick v. Tremlett*, 20 W. R. 358, from a forge; *Butler v. Rogers*, 9 N. J. Eq. 487, from a blacksmith's shop.

In *Daniels v. Keokuk Water Works*, 61 Iowa 549, the court refused to relieve one who complained of smoke and gases escaping from a smoke-stack belonging to water works, on which the city was dependent for its water supply; in *Dunsmore v. Central Iowa R. Co.*, 72 Iowa 182, the court refused to sustain a verdict in favor of one who contended that a coal-chute on a railroad near his dwelling-house was an actionable nuisance; and in *Richards' Appeal*, 57 Pa. St. 105; s. c., 98 Am. Dec. 202, the court refused to enjoin the use of semi-bituminous coal in iron works, though the plaintiff proved a sensible injury, and might have been entitled to some damages at law. And see *Baltimore etc. R. Co. v. Fifth Baptist Church*, 108 U. S. 317; *Sullivan v. Royer*, 72 Cal. 248; *Hurlburt v. McKone*, 55 Conn. 31; *Carhart v. Auburn Gas Light Co.*, 22 Barb. (N. Y.) 297; *Beir v. Cooke*, 37 Hun (N. Y.) 38; *Cogswell v. New York etc. R. Co.*, 103 N. Y. 10; s. c., 59 Am. Rep. 751; *Swaine v. Great Northern R. Co.*, 33 L. J., Ch. 399; *Adams v. Michael*, 38 Md. 123; s. c., 17 Am. Rep. 515; *Barnes v. Akroyd*, 26 L. T., N. S. 692.

The English Public Health act of 1875, § 91, makes a chimney of a manufacturing establishment which does not consume its smoke as far as practicable an abatable nuisance. See, on the construction of this statute, *Weekes v. King*, 53 L. T. 31.

ings.<sup>1</sup> The business is not a nuisance *per se*,<sup>2</sup> and the question becomes one of fact in the circumstances, the test being the actual injury done.<sup>3</sup> An injury to trees, plants and shrubs may give a cause of action.<sup>4</sup>

4. **Dust.**—To fill the air with dust or chaff in the pursuit of a trade or occupation, or otherwise, to the injury of others, is a nuisance.<sup>5</sup> This rule is illustrated in the cases appertaining to smoke and noxious vapors.

5. **Vapors.**—In the case of nuisances consisting of noxious vapors, the rule is similar to that laid down in the cases relating to smoke, and differs only in its application to the subject matter. At an early day the courts enunciated the rule with reference to

1. The earliest case on the subject of brick burning is that of the Duke of Grafton *v.* Hilliard, decided in 1736, not reported, but referred to in Attorney General *v.* Cleaver, 18 Ves. Jr. 210, wherein LORD ELDON says that the court in the Duke of Grafton's case held that "the manufacture of bricks, though near the habitations of men, if carried on for the purpose of making habitations for them, is not a public nuisance." It is very doubtful, however, if any such decision was made or such language used. See note to Walter *v.* Selfe, 4 Eng. L. & Eq. 18, from which it would appear that the facts of the unreported case were that an injunction had been granted in the first instance restraining brick burning, but was dissolved upon the defendant's showing that it would really produce no annoyance or injury to the plaintiff.

The leading case is Walter *v.* Selfe (1851), 15 Jur. 416; 4 Eng. L. & Eq. 18, where an injunction was granted against the burning of bricks in such a manner as to annoy the plaintiff or injure his buildings and shrubbery.

In *Great Britain*, with the exception of the case of Hole *v.* Barlow (1858). 4 C. B., N. S. 336, the decisions are harmonious. Hole *v.* Barlow is entitled to no weight at the present time, having been overruled in effect four years after its decision in Beardmore *v.* Tredwell, 31 L. J., Ch. 892, and overruled directly in Bamford *v.* Turnley, 31 L. J., Q. B. 286. In Cavey *v.* Ledbitter, 13 C. B., N. S. 470, in Roberts *v.* Clark, 18 L. T., N. S. 49, Bareham *v.* Hall, 22 L. T., N. S. 116, and Luscombe *v.* Steer, 17 L. T., N. S. 229, the doctrine of Hole *v.* Barlow was again departed from, and has been to the present time.

There is a Pennsylvania case, Huckentine's Appeal, 70 Pa. St. 102; s. c.,

10 Am. Rep. 669, where language not essential to the decision was so used as to make it possible that in that State the rule recognized elsewhere would not prevail. Here an injunction was refused on the ground that the burden of proving injury and damage had not been sustained. This language was disapproved in Campbell *v.* Seaman, 2 N. Y. Sup. Ct. Rep. 231 (affirmed on appeal, 63 N. Y. 368; s. c., 20 Am. Rep. 567).

This was a case where the plaintiffs owned improved lands adjacent to the defendant's brickyard upon which he burned brick by the use of mineral coal, thus generating sulphurous acid gas, poisonous to vegetation. This gas was carried by the wind over and upon the plaintiffs' land, and had already destroyed many of their ornamental trees, and would apparently continue to destroy them. The defendant's premises had been used as a brickyard for more than 25 years, and before the plaintiffs acquired their land. It was held that the defendant should be enjoined from burning mineral coal, and that the beneficial nature of the business was no defence. Upon the question of *reasonable* use of one's property, the court (per POTTER, J.) said: "A reasonable use can never be construed to include those uses which produce destructive vapors and noxious smells that result in material injury to the property, and to the comfort of the existence of those who dwell in the neighborhood."

To the same effect is Fuselier *v.* Spalding, 2 La. An. 773. And see State *v.* St. Louis Board of Health, 16 Mo. App. 8.

2. Donald *v.* Humphrey, 14 F. (Sc.) 1206.

3. See n. 1 and cases cited, *supra*.

4. Pollock *v.* Lester, 11 Hare 266.

5. Wood on Nuisances (2nd ed.), §

this subject.<sup>1</sup> Here, also, the injury must be substantial and apparent, and the natural result of that which is charged to create the nuisance;<sup>2</sup> nor here can the usefulness of the trade or manufacture producing the nuisance excuse its existence where injury results.<sup>3</sup> A nuisance of this sort of which the law will take cogni-

513; *Com. v. Mann*, 4 Gray (Mass.) 213, an indictment for screening coal and thus creating a dust; *Hutchins v. Smith*, 63 Barb. (N.Y.) 253, where dust from a limekiln created damage; and *Cooper v. Randall*, 53 Ill. 24, where chaff and smut from a flouring mill annoyed the occupants of a dwelling-house; *Cooper v. North British R. Co.*, 36 Jur. 169.

1. The earliest reported is *Ric De D. v. Richards*, 4 Assize Book, fol. 3, p. 3, where it was held that a nuisance consisting of vapors arising from a limekiln and escaping over the plaintiff's premises and burning and scorching his trees was well assigned. In *Poynton v. Gill*, 2 Rolle's Abr. 140, it was held that an action lay for melting lead so near the plaintiff's land that it spoiled his grass and trees, and caused him the lives of two horses and a cow. In *Rex v. Wilcox*, 2 Salk. 458, one maintaining a glasshouse from which smoke and vapors escaped, was held properly convicted of maintaining a public nuisance. In *Rex v. Pierce*, 2 Shower 327, the vapors from a soap-boiling establishment were held a public nuisance. There is an anonymous case reported in 1 Ventris 26, sustaining a presentment against a glass manufacturer; and in *Eldred's Case*, 9 Coke 59, it was said that a limekiln was a nuisance when so near a dwelling-house as to render it uninhabitable by reason of smoke. See also *Robbin's Case*, 15 Viner's Abr. 27, and *Jones v. Howell*, Hutt. 135.

2. *Scott v. Shepherd*, 3 Wilson 403; *Vandenburgh v. Truax*, 4 Den. (N.Y.) 464; s. c., 47 Am. Dec. 268; *Gibbons v. Pepper*, 1 Ld. Raym. 38; *St. Helen Smelting Co. v. Tipping*, 11 H. L. Cas. 642; 4 B. & S. 608; 116 E. C. L. 608; *Salvin v. North Brancepeth Coal Co.*, 31 L. T., N. S. 154; *Oldaker v. Hunt*, 19 Beavan 485; *Rex v. Medley*, 6 C. & P. 292; *Ashby v. White*, 2 Ld. Raym. 938; *Attorney General v. Cambridge Gas Co.*, L. R., 6 Eq. 292; *Ross v. Butler*, 19 N. J. Eq. 294; s. c., 97 Am. Dec. 654; *Cleveland v. Citizens Gas Light Co.*, 20 N. J. Eq. 201; *Wolcott v. Melick*, 11 N. J. Eq. 204; s. c., 66 Am. Dec.

790; *Cartwright v. Gray*, 12 Grant's Ch. (Ont.) 400.

3. *McKeon v. See*, 4 Robt. (N. Y.) 469; *Cooke v. Forbes*, L. R., 5 Eq. Cas. 166; *Poynton v. Gill*, 2 Rolle's Abr. 140; *Attorney General v. Colney Hatch Lunatic Asylum*, L. R., 4 Ch. App. 147. See on the general subject, *Campbell v. Seaman*, 63 N. Y. 368; s. c., 20 Am. Rep. 567; *Savile v. Kilner*, 26 L. T., N. S. 277; *Smith v. Phillips*, 8 Phila. (Pa.) 10; *Huckenstine's Appeal*, 70 Pa. St. 102; s. c., 10 Am. Rep. 669; *Bankart v. Houghton*, 27 Beav. 425; *Houghton v. Bankart*, 3 L. T., N. S. 266; *Ward v. Lang*, 35 Jur. 408; *Cooper v. N. B. R. Co.*, 2 Macph. 117; *Mulligan v. Elias*, 12 Abb. Pr. (N. Y.) 259; *Hutchins v. Smith*, 63 Barb. (N. Y.) 251; *Walter v. Selfe*, 4 Eng. L. & Eq. 15; *Rex v. White*, 1 Burrows, 333; *Beardmore v. Tredwell*, 7 L. T., N. S. 207; 3 Giff. 683; *Tennant v. Hamilton*, 7 C. & F. 122; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; *Ross v. Butler*, 19 N. J. Eq. 294; s. c., 97 Am. Dec. 654; *Crump v. Lambert*, L. R., 3 Eq., 409; *Works v. Junction R. Co.*, 5 McLean (U. S.) 425; *Catlin v. Valentine*, 9 Paige (N. Y.) 575; s. c., 38 Am. Dec. 567; *Brady v. Weeks*, 3 Barb. (N. Y.) 157; *Pinckney v. Ewens*, 4 L. T., N. S. 741; *Barnford v. Turnley*, 31 L. J., Q. B. 286; 3 B. & S. 62; *Respublica v. Caldwell*, 1 Dall. (U. S.) 150; *Rex v. Tindall*, 6 Ad. & El. 145; *Rex v. Williams*, 6 C. & P. 626; *Crossly v. Lightowler*, L. R., 3 Eq. 279; *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Rex v. Neil*, 2 C. & P. 485; *People v. Mallory*, 4 Thomp. & C. (N. Y.) 567; *Charity v. Riddle*, 14 F. C. (Sc.) 237; *Downie v. Oliphant*, 17 F. C. (Sc.) 491; *Gilbert v. Showerman*, 23 Mich. 448; *Doellner v. Tynan*, 38 How. Pr. (N. Y.) 176; *Robinson v. Baugh*, 31 Mich. 290; *Holsman v. Boiling Bleaching Springs Co.*, 14 N. J. Eq. 335; *Attorney General v. Leeds Corporation*, L. R., 5 Ch. App. 583; *Roberts v. Clark*, 18 L. T., N. S. 49; *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436; *Rex v. Ward*, 4 Ad. & El. 385; *Rex v. Morris*, 1 B. & Ad. 441; *Rex v. Grosvenor*, 2 Stark. 511; *Folkes v. Chad*, 3 Doug. 157; *Rex v. Dewsnap*, 16 East 194; *Rex v. Williams*, 6 C. & P. 626;

zance may be created not only by a manufacture or occupation, but by collecting or setting back water.<sup>1</sup>

6. *Stenches*.—(a) *In General*.—The creation of stenches and noisome odors has been recognized always as a nuisance. The cases are very numerous where this class of nuisances has been discussed,<sup>2</sup> and a trade or manufacture so conducted as to produce offensive stenches will be enjoined, or deemed a subject for damages, or an indictment, as the case may be. Here, as in the case of smoke, dust or vapors, the difficulty is not in defining the rule of law, but in applying it. The stenches or odors must be sensibly offensive or produce such actual physical discomfort as to interfere materially with comfort;<sup>3</sup> and, this being so, it is not required that the odors be positively hurtful or unwholesome.<sup>4</sup>

(b) *Slaughterhouses*.—A slaughter-house *prima facie* is a nuisance: if in a public place, a public nuisance; if where indi-

Stockport Water Works Co. v. Potter, 7 H. & N. 167; Barwell v. Brooks, 1 L. J. 75; People v. Detroit White Lead Works (Mich. 1890), 46 N.W. Rep. 735.

1. See WATERS AND WATER-COURSES; DAMS.

2. Among the earlier English cases are that of Aldred's Case, 9 Coke 58a, a case of a pigstye; Pappineau's Case, Stra. 686, a tannery; Morley v. Pragnell, Cro. Car. 510, and Tohales' Case, cited in Cro. Car. 510, tallow chandleries; Jones v. Powell, Hutt. 136, a tobacco mill; Stynan v. Hutchinson, 2 Selwyn 1047, a privy; Rex v. Neil, 2 C. & P. 485, varnish making; Rex v. Ward, 1 Burr. 333, chemical works; Rankett's Case, 2 Rolle's Abr. 140, 141, melting stinking tallow; Rex v. Cross, 2 C. & P. 483; and Rex v. Watts, 2 C. & P. 486, slaughter-houses; and Rex v. Ward, 1 Burr. 333, vitriol works.

3. Catlin v. Valentine, 9 Paige (N. Y.) 576; s. c., 38 Am. Dec. 567, a case of a slaughter-house; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257, and Columbus Gas Light etc. Co. v. Freeland, 12 Ohio St. 392, of gas works; Kirkman v. Handy, 11 Humph. (Tenn.) 406; s. c., 54 Am. Dec. 45, a livery stable; and see Com. v. Brown, 13 Met. (Mass.) 365; Wolcott v. Melick, 11 N. J. Eq. 204; s. c., 66 Am. Dec. 790; Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. 201.

4. Pickard v. Collins, 23 Barb. (N. Y.) 444; Story v. Hammond, 4 Ohio 376; Peck v. Elder, 3 Sandf. (N. Y.) 126; Cropsey v. Murphy, 1 Hilt. (N. Y.) 126; Francis v. Schoellkopf, 53 N. Y. 152; Jamieson v. Hill, 12 F. C. (Sc.) 424; Knight v. Gardner, 19 L. T., N. S. 673; Hart v. Taylor, 4 Mur. (Sc.) 313; State

v. Wetherall, 5 Harr. (Del.) 487; Brady v. Weeks, 3 Barb. (N. Y.) 157; Manhattan Gaslight Co. v. Barker, 36 How. Pr. (N. Y.) 233; Manhattan Mfg. Co. v. Van Keuren, 23 N. J. Eq. 251; Eames v. New England Worsted Co., 11 Met. (Mass.) 570; Walter v. Selfe, 4 De G. & S. 321; Smith v. McConathy, 11 Mo. 517; Taylor v. People, 6 Park. Cr. (N. Y.) 347; McCredie v. McBrau, 32 Jur. 184; Pickard v. Collins, 23 Barb. (N. Y.) 444; Broadbent v. Imperial Gas Co., 7 De G. M. & G. 436; Stowe v. Miles, 39 Conn. 426; Pentland v. Henderson, 17 D. (Sc.) 543; 27 Jur. 241; Smith v. Humbert, 2 Kerr (N. B.) 602.

In Catlin v. Valentine, 9 Paige (N. Y.) 575; s. c., 38 Am. Dec. 567, WALTHORTH, CH., said, upon an application for an injunction against the erection of a slaughter-house: "To constitute a nuisance, it is not necessary that the noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life uncomfortable."

By the 112th section of the English Public Health act of 1875, it is provided that persons establishing within the district of an urban authority, without its consent in writing, the trade of blood boiler, bone boiler, fellmonger, soap boiler, tallow melter, or tripe boiler, or any other noxious or offensive trade or manufacture, shall be liable to a penalty. It was held in Braintree Local Board v. Boyton, 52 L. T. 98, that a fish-frying business was not a noxious or offensive business within the meaning of the section.

vidual citizens are annoyed, a private nuisance as to them.<sup>1</sup> Slaughterhouses are frequent subjects of legislative or municipal regulation.

(c) *Miscellaneous Offensive Occupations.*—These rules have been applied, with such variations only as the circumstances of the particular cases in which they have been invoked have required, to tannerics,<sup>2</sup> tallow factories and melting houses;<sup>3</sup> soap boiling,<sup>4</sup> fat boiling,<sup>5</sup> and bone boiling<sup>6</sup> establishments; glue works,<sup>7</sup> gas works,<sup>8</sup>

1. See, for an exposition of the law as applied to slaughterhouses, *Catlin v. Valentine*, 9 Paige (N. Y.) 575; s. c., 38 Am. Dec. 567; *Brady v. Weeks*, 3 Barb. (N. Y.) 157.

In the following cases slaughterhouses have been adjudged nuisances in view of the circumstances arising therein: *Allen v. State*, 34 Tex. 230; *Dubois v. Budlong*, 15 Abb. Pr. (N. Y.) 445; *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Swinton v. Pedie*, M. L. & Rob. 1018; *Cropsey v. Murphy*, 1 Hilt. (N. Y.) 126; *Taylor v. People*, 6 Park. Cr. (N. Y.) 347; *Munson v. People*, 5 Park. Cr. (N. Y.) 16; *Attorney General v. Steward*, 20 N. J. Eq. 415; *Kelt v. Lindsay*, 17 F. C. (Sc.) 677; *Pentland v. Henderson*, 27 Jur. 241; *Com. v. Upton*, 6 Gray (Mass.) 476; *Fay v. Whitman*, 100 Mass. 76; *Schuster v. Metropolitan Board of Health*, 49 Barb. (N. Y.) 450; *State v. Wilson*, 43 N. H. 415; s. c., 82 Am. Dec. 163; *State v. Shelbyville*, 4 Sneed (Tenn.) 176; *Smith v. McConathy*, 11 Mo. 517; *Bishop v. Banks*, 33 Conn. 121; s. c., 87 Am. Dec. 197; *Liverpool New Cattle Market Co. v. Hodson*, L. R., 2 Q. B. 131; *Anthony v. Brecon Market Co.*, L. R., 2 Exch. 167; *Rex v. Cross*, 2 C. & P. 483; *Rex v. Watts*, 2 C. & P. 486; *Scott v. Cox*, 15 F. C. (Sc.) 535; *State v. Kaster*, 35 Iowa 221; *Pruner v. Pendleton*, 75 Va. 516; s. c., 40 Am. Rep. 738; *Minke v. Hopeman*, 87 Ill. 450; *Green v. Lake*, 54 Miss. 540; s. c., 28 Am. Rep. 360. And see also on the subject of slaughterhouses, *Rex v. Cross*, 2 C. & P. 483; *Rex v. Watts*, 2 C. & P. 486; *Reichert v. Geers*, 98 Ind. 73; s. c., 49 Am. Rep. 736; *Phillips v. State*, 7 Baxt. (Tenn.) 151; *Taylor v. People*, 6 Park. Cr. (N. Y.) 347; *Somerville v. O'Neil*, 114 Mass. 353; *Watertown v. Sawyer*, 109 Mass. 320; *Ashbrook v. Com.*, 1 Bush (Ky.) 139; *Kelt v. Lindsay*, 17 F. C. (Sc.) 677; *Babcock v. New Jersey Stock Yard Co.*, 20 N. J. Eq. 296; *State v. Wetherall*, 5 Harr. (Del.) 487; *Seifried v. Hays*, 81 Ky. 377.

2. *Ellis v. State*, 7 Blackf. (Ind.) 534; *Rex v. Pappineau*, 1 Stra. 686; *Francis v. Schoellkopf*, 53 N. Y. 152; *Fisher v. Clark*, 41 Barb. (N. Y.) 332; *Jones v. Powell*, Hutt. 136; *Scott v. Cox*, 15 F. C. 535; *Thomas v. Brackney*, 17 Barb. (N. Y.) 654; 3 Steph. N. P. 2362; *Pinckney v. Ewens*, 4 L. T., N. S. 741; *State v. Street Commrs.*, 36 N. J. L. 283; *Pennoyer v. Allen*, 56 Wis. 502; s. c., 43 Am. Rep. 728; *Bliss v. Hall*, 4 Bing. N. C. 183.

3. *Morley v. Pragnell*, Cro. Car. 510; *Allen v. State*, 34 Tex. 230; *Dana v. Valentine*, 5 Metc. (Mass.) 8; *Arnot v. Brown*, 1 Stuart (Sc.) 696; *Winslow v. Bloomington*, 24 Ill. App. 647; *Radenhurst v. Coate*, 6 Grant's Ch. (Ont.) 140; *Trotter v. Farnie*, 5 W. S. (S. Car.) 649; *Bliss v. Hall*, 5 Scott 500; *Blunt v. Hay*, 4 Sandf. Ch. (N. Y.) 363.

4. *Howard v. Lee*, 3 Sandf. (N. Y.) 281; *Blunt v. Hay*, 4 Sandf. Ch. (N. Y.) 362; *Rex v. Pierce*, 2 Shower 327; *Smith v. Cummings*, 2 Pars. Eq. Cas. (Pa.) 92.

5. *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Dubois v. Budlong*, 15 Abb. Pr. (N. Y.) 445; *Prescott's Case*, 2 City Hall Rec. (N. Y.) 161; *Richard's Case*, 6 City Hall Rec. (N. Y.) 61; *Cropsey v. Murphy*, 1 Hilt. (N. Y.) 126; *Ellis v. State*, 7 Blackf. (Ind.) 534; *Downie v. Oliphant*, 17 F. C. (Sc.) 491; *State v. Neidt* (N. J.), 19 Atl. Rep. 318.

6. *Regina v. Bruce*, 13 L. Can. 313; *Regina v. Micklin*, 6 W. W. A. B. L. 68; *Meigs v. Lister*, 23 N. J. Eq. 320; 25 N. J. Eq. 489; *Czarniecki's Appeal* (Pa. 1887), 11 Atl. Rep. 660.

7. *Scott v. Leith Commrs. of Police*, 4 F. 1068; *Hart v. Taylor*, 4 Mur. (Sc.) 313; *Glasgow Water Works Co. v. Aird*, 18 F. C. (Sc.) 115; *Colville v. Middletown*, 19 F. C. (Sc.) 339; *Charity v. Riddle*, 14 F. C. (Sc.) 237.

8. *Morris v. Brower*, *Anthon's N. P.* (N. Y.) 368. See vol. 4, Abb. N. Y.



pigsties and cattle yards,<sup>1</sup> barns,<sup>2</sup> and livery stables;<sup>3</sup> collections of stagnant water,<sup>4</sup> and various other things of a like sort.<sup>5</sup>

Dig. 597; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; People v. New York Gas Light Co., 64 Barb. (N. Y.) 55; Broadbent v. Imperial Gas. Co., 7 De G. M. & G. 436; Watson v. Gas Co., 4 U. C. Rep. 168; Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. 201; Manhattan Gas Light Co. v. Barker, 36 How. Pr. (N. Y.) 238; Columbus Gas Light etc. Co. v. Free-land, 12 Ohio St. 392; Pensacola Gas Co. v. Pebley, 25 Fla. 381; Bohan v. Port Jervis Gas Light Co. (N. Y. 1890), 25 N. E. Rep. 246; Brown v. Illius, 27 Conn. 84; s. c., 71 Am. Dec. 49; Millington v. Richards G. Co., 25 Gas J. 215; Sherman v. Fall River Iron Works, 5 Allen (Mass.) 213; Shuter v. Philadelphia, 3 Phila. (Pa.) 228; Carhart v. Auburn Gas Light Co., 22 Barb. (N. Y.) 297; Rex v. Medley, 6 Carr. & P. 292; Ottawa Gas Light Co. v. Thompson, 39 Ill. 598; Ottawa Gas Light Co. v. Graham, 28 Ill. 73; s. c., 81 Am. Dec. 263; Hunt v. Lowell Gas Light Co., 8 Allen (Mass.) 69; Wragg v. Commercial G. Co., 33 Gas J. 119. See also GAS COMPANIES, 8 Am. & Eng. Encyc. of Law 1268.

1. Regina v. Wigg, 2 Ld. Raym. 1163; State v. Payson, 37 Me. 361; Cready v. McBroom, 32 Jur. (Sc.) 184; Com. v. Van Sickle, 4 Pa. L. J. 104; Commr. v. Perry, 139 Mass. 108; Com. v. Alden, 143 Mass. 113; Baker v. Bohannan, 69 Iowa 60; Trulock v. Merte, 72 Iowa 510; State v. Kaster, 35 Iowa 221; Ohio etc. R. Co. v. Simon, 40 Ind. 278; Illinois Cent. R. Co. v. Grabill, 50 Ill. 241, 248; Sutterloh v. Mayor etc. of Cedar Keys, 15 Fla. 306.

2. Gifford v. Hulet (Vt. 1800), 19 Atl. Rep. 230; Pickard v. Collins, 23 Barb. (N. Y.) 444; Draper v. Sperring, 4 L. T., N. S. 365; Curtis v. Winslow, 38 Vt. 690.

3. Kirkman v. Handy, 11 Humph. (Tenn.) 406; s. c., 54 Am. Dec. 45; Burditt v. Swenson, 17 Tex. 489; s. c., 67 Am. Dec. 665; Coker v. Birge, 10 Ga. 336; Dargan v. Waddill, 9 Ired. (N. Car.) 244; s. c., 49 Am. Dec. 421; Norwood v. Dickey, 18 Ga. 528; Harrison v. Brooks, 20 Ga. 537; Morris v. Brower, Anthon's N. P. (N. Y.) 368. See vol. 4. Abb. N. Y. Dig. 597; Aldrich v. Howard, 8 R. I. 246; s. c., 86 Am. Dec. 615; Shiras v. Olinger, 50 Iowa 571; s. c., 33 Am. Rep. 138; Keiser

v. Lovett, 85 Ind. 240; s. c., 44 Am. Rep. 10; St. James Church v. Arrington, 36 Ala. 548; Hastings v. Aiken, 1 Gray (Mass.) 163; Flint v. Russell, 5 Dill. (U. S.) 151; Rounsaville v. Kohlheim, 68 Ga. 668; s. c., 45 Am. Rep. 505; Shivery v. Streeper, 24 Fla. 103; Robinson v. Smith, 7 N. Y. Supp. 38; Filson v. Crawford, 5 N. Y. Supp. 882.

4. Douglass v. State, 4 Wis. 387; Shaw v. Cumiskey, 7 Pick. (Mass.) 76; Rooker v. Perkins (Va.), 14 Wis. 79; Com. v. Webb, 6 Rand. 726; Stephen's Case, 2 Leigh (Va.) 759; Miller v. Truehart, 4 Leigh (Va.) 569; Green v. Savannah, 6 Ga. 1; Neal v. Henry, Meigs (Tenn.) 17; Rhodes v. Whitehead, 27 Tex. 304; s. c., 84 Am. Dec. 631; Com. v. Reed, 34 Pa. St. 275; s. c., 75 Am. Dec. 661; Harris v. Thompson 9 Barb. (N. Y.) 350; People v. Townsend, 3 Hill (N. Y.) 479; Stoughton v. State, 5 Wis. 291; Beach v. People, 11 Mich. 106.

5. In Ballamy v. Comb, 17 F. C. (Sc.) 159, an establishment for roasting the black ashes of soap was adjudged a nuisance by reason of the offensive smoke emitted; in Jamieson v. Hillcote, 12 F. C. (Sc.) 424, an establishment wherein animal blood was prepared as an ingredient of prussian blue was adjudged a nuisance; in Farquhar v. Watson, 17 F. C. (Sc.) 69, an establishment for the preparation of tripe for market; in Com. v. Brown, 13 Met (Mass.) 365, a place where neats foot oil was made; in Weil v. Ricord, 24 N. J. Eq. 169, a place where hides were cured; in Ruff v. Phillips, 50 Ga. 130, a guano warehouse; in People v. Board of Health, 33 Barb. (N. Y.) 344, a place where manure was deposited; in State v. Boll, 59 Mo. 321, a dairy; in State v. Luce (Del. 1885), 6 Cent. Rep. 862, an establishment for the manufacture of fish into scrap as fertilizer; in Knight v. Gardner, 19 L. T., N. S. 673, the nuisance was an establishment for the deodorizing of night soil; in Rex v. Neil, 2 C. & P. 485, varnish works; in Rex v. White, 1 Burrows 333, chemical works; in Smith v. McConathy, 11 Mo. 517, a distillery; in Manhattan Mfg. Co. v. Van Keuren, 23 N. J. Eq. 255; poudrette works; in Flight v. Thomas, 10 Ad. & El. 590, an establishment for the manufacture of mixen; in Grindley v. Booth, 12 L. T., N. S.

(d) *Privies and Cesspools*.—So a privy or cesspool is *prima facie* a nuisance, and is liable to be adjudged such unless so arranged as not to constitute an annoyance by reason of the escape of smells or of matter on neighboring premises or to the corruption of wells and springs.<sup>1</sup>

7. *Excessive Heat*.—Other instances of nuisances arising from the use of property are the maintenance of such an excessive degree of heat in a building as to prevent the owner of an adjoining building from using his property for ordinary purposes.<sup>2</sup>

8. *Explosive and Inflammable Substances*.—The keeping of explosive or inflammable substances in such a way as to render them dangerous, or the maintenance of a powder magazine endangering neighboring property.<sup>3</sup>

469, an establishment for the boiling of horseflesh and carrion; in *Styan v. Hutchinson*, 2 Selwyn 1047, a tobacco mill; in *Rex v. Morris*, Ventris 26, a brewery; in *Kennedy v. Phelps*, 10 La. An. 227, a place where hides were cured; in *Warwick v. Wah Lee*, 10 Phila. (Pa.) 160, a Chinese laundry in a basement over which was the complainant's store; and in *Gullick v. Tremlett*, 20 W. R. 358, a place where horses' hoofs were burnt; in *Ahle v. Reinbach*, 76 Ill. 322. In *Jarvis v. St. Louis etc. R. Co.*, 26 Mo. App. 253, it was held an actionable nuisance to bury a dead cow on one's own place near a dwelling house, and so in *Ellis v. Kansas City R. Co.*, 63 Mo. 131; s. c., 21 Am. Rep. 436.

1. *Jones v. Powell*, Hutt. 135; *Tenant Goldwin*, 2 Ld. Raym. 1089; *Norton v. Scholesfield*, 9 M. & W. 665; *Wormersley v. Church*, 17 L. T., N. S. 190; *Wahle v. Reinbach*, 76 Ill. 322; *Gordon v. Vestry of St. James*, 13 L. T., N. S. 511; *Marshall v. Cohen*, 44 Ga. 489; s. c., 9 Am. Rep. 170; *Cook v. Montagu*, 26 L. T., N. S., 471; *Draper v. Sperling*, 4 L. T., N. S. 365; *Rex v. Pedly*, 1 Ad. & El. 822; *Smith v. Humbert*, 2 Kerr (N. B.) 602; *Reed v. People*, 1 Park. Cr. (N. T.) 481; *Perrine v. Taylor*, 43 N. J. Eq. 128; *Haugh's Appeal*, 102 Pa. St. 42; s. c., 48 Am. Rep. 193; *Alstrom v. Grant*, 4 El. & Bl. 128; *Mackey v. Greenhill*, 30 Jur. 746; *Guardians v. Bowles*, 20 L. T., N. S. 609; *Ball v. Nye*, 99 Mass. 582; s. c., 97 Am. Dec. 56.

2. In *Grady v. Walsner*, 46 Ala. 381; s. c., 7 Am. Rep. 593, defendant's dwelling and plaintiff's store adjoined, being separated by an ordinary partition wall. Defendant operated a cooking range in his house, in such close prox-

imity to the partition that the heat from the range as it was ordinarily used injured the goods in plaintiff's store, and rendered the temperature therein unpleasantly high. It was held that such use of the range, though it was for ordinary domestic purposes, was a nuisance and that the landlord who put it there was liable for the damage, as well as the tenant in whose possession it was.

In *Reinhardt v. Mentasti*, 61 L. T., N. S. 328, the owners of a hotel in the city of London erected a stove in their hotel kitchen which, though used in a reasonable and careful manner, produced such a heat as to render the wine cellar of an adjoining dwelling house unfit for use as such. It was held that such use of the kitchen would be restrained. In this case the question of reasonable use of one's own property was carefully discussed by *KERKRICHT*, J., and the following conclusion arrived at: "It seems to me, therefore, that notwithstanding some passages to the contrary, the application of the principle governing the jurisdiction of the court in cases of nuisance does not depend on the question whether the defendant is using his own reasonably or otherwise. The real question is, does he injure his neighbor?"

3. *Crowder v. Tinkler*, 19 Ves. Jr. 617; *Regina v. Lister*, 3 Jur. 570; *Hepburn v. Lordan*, 2 Hem. & M. 345; *Anonymous*, 12 Mod. 342; *Rex v. Taylor*, 2 Stra. 1167; *Williams v. East India Co.*, 3 East 192; *Biggs v. Mitchell*, 31 L. J., M. C. 163; *Vaughan v. Menlove*, 3 Bing. N. C. 468; s. c., 32 Eng. C. L. 468; *Trueman v. Gunpowder*, Thatch. Cr. Cas. 14; *Cuff v. Newark etc. R. Co.*, 35 N. J. L. 17; s. c., 10 Am. Rep. 205; *McAndrews v.*

**9. Fires.**—Fires so maintained in buildings or in the operation of machinery as to be dangerous.<sup>1</sup>

Collerd, 42 N. J. L. 189; s. c., 36 Am. Rep. 508; *Cook v. Anderson*, 85 Ala. 99.

In *Myers v. Malcolm*, 6 Hill (N. Y.) 292; s. c., 41 Am. Dec. 744, the substance was powder kept in the upper story of a carriage shop surrounded by frame buildings. It was held that such keeping was negligent. In *People v. Sands*, 1 Johns. (N. Y.) 78; s. c., 3 Am. Dec. 296, it was held that to charge the keeping of fifty barrels of powder near a street was not sufficient to charge a nuisance, there being no allegation that it was negligently kept. But in *Heeg v. Licht*, 80 N. Y. 579; s. c., 36 Am. Rep. 654, it was held that the element of negligence cut no figure in the case, and that the fact that the defendant maintained a powder magazine on his premises, and that it exploded to the plaintiff's injury, created a cause of action irrespective of the question of negligence, and the court said that neither *People v. Sands*, which raised only a question of criminal pleading, nor *Fillo v. Jones*, 2 Abb. C. & App. Dec. (N. Y.) 421, was authority for a contrary doctrine.

In *Bradley v. People*, 56 Barb. (N. Y.) 72, a conviction for maintaining a powder house near a city was sustained; in *Comminge v. Stevenson*, 70 Tex. 642, it was held that a powder magazine within four hundred feet of a dwelling house constituted an actionable nuisance. In *Emory v. Hazard Powder Co.*, 24 S. Car. 476, it was held that a powder magazine might be a nuisance, although one household only was endangered thereby.

In *Wier's Appeal*, 74 Pa. St. 230, the court, in view of the locality and the quantity of gunpowder to be kept in a powder magazine half a mile from dwellings, but in a neighborhood where further building was to be expected, granted an injunction.

In *Cheatham v. Shearon*, 1 Swan (Tenn.) 213, the court said that a powder house in a populous part of a city, wherein were stored large quantities of powder, was *per se* a nuisance, and founded its decision on the elementary treatises and on the anonymous case reported in *Holt's Reports* 499, where one was indicted for a nuisance for keeping several barrels of gunpowder in a house till he could convenient-

ly send them to the city. And a similar decision was reached in *Laffin-Rand Powder Co. v. Tearney* (Ill.), 23 N. E. Rep. 389.

1. *Varney v. Thompson*, 13 F. C. (Sc.) 491; *Hepburn v. Lordan*, 13 L. T., N. S. 59; *Reg. v. Lister*, 1 Dears. & B. C. C. 209; *Cartwright v. Gray*, 12 Grant's Ch. Cas. (Ont.) 400; *Hawey v. Dewoody*, 18 Ark. 252; *League v. Journeyneay*, 25 Tex. 172; *Ryan v. Copes*, 11 Rich. L. (S. Car.) 217; s. c., 73 Am. Dec. 106; *Hoyt v. Jeffers*, 30 Mich. 181; *Burroughs v. Housanionic etc. R. Co.*, 15 Conn. 124; s. c., 38 Am. Dec. 64; *Sheldon v. Hudson River R. Co.*, 29 Barb. (N. Y.) 226; *Teal v. Barton*, 40 Barb. (N. Y.) 137; *Illinois Cent. R. Co. v. Mills*, 42 Ill. 407; *Illinois Cent. R. Co. v. McClelland*, 42 Ill. 355; *Chicago etc. R. Co. v. McCahill*, 56 Ill. 28; *Toledo etc. R. Co. v. Corn*, 71 Ill. 493; *Frankfort etc. Turnpike Co. v. Philadelphia etc. R. Co.*, 54 Pa. St. 345; s. c., 93 Am. Dec. 708; *Pennsylvania R. Co. v. Hape*, 80 Pa. St. 373; s. c., 21 Am. Rep. 100; *Anderson v. Cape Fear Steamboat Co.*, 64 N. Car. 399; *Galpin v. Chicago etc. R. Co.*, 19 Wis. 638; *Spaulding v. Chicago etc. R. Co.*, 30 Wis. 110; s. c., 11 Am. Rep. 550; *Ellis v. Portsmouth etc. R. Co.*, 2 Ired. (N. Car.) 138; *Read v. Nicholas*, 118 N. Y. 224.

In *Blanc v. Murray*, 36 La. An. 162; s. c., 51 Am. Rep. 7, the court enjoined, at the instance of the owner of a dwelling house, the construction within the fire limits of a city and in violation of its ordinance, of a wooden building to be filled with lumber and employed in manufacture.

In *Duncan v. Hayes*, 22 N. J. Eq. 25, however, the complaint sought to enjoin the erection of a planing and sawmill, on the ground that it would expose her own buildings to danger from fire, and greatly increase insurance rates. The injunction was denied, *ZABRISKIE, CH.*, saying: "I know of no precedent for an injunction against any business on account of an increased risk from fire to the adjoining buildings." To the same effect are *Dorsey v. Allen*, 85 N. Car. 358; s. c., 39 Am. Rep. 704, the case of a planing mill and cotton gin; *Green v. Lake*, 54 Miss. 540; s. c., 28 Am. Rep. 360, a flouring mill, and *Rhodes v. Dunbar*, 57 Pa.

**10. Blasting.**—Blasting rocks, to the danger of the neighborhood.<sup>1</sup>

**11. Spring Guns and Traps.**—Spring guns and traps placed by one upon his own premises, but to the danger of others, are a nuisance.<sup>2</sup>

**12. Common Scold.**—A common scold is a common-law nuisance. The practice of scolding must be habitual. At common law the offence was confined to women and was punishable by fine.<sup>3</sup> By

St. 274; s. c., 98 Am. Dec. 221, a planing mill.

1. *Hunter v. Farren*, 127 Mass. 481; s. c., 34 Am. Dec. 423; *Hay v. Cohoes Co.*, 2 N. Y. 159; s. c., 51 Am. Dec. 179; *Tremain v. Cohoes Co.*, 2 N. Y. 163; s. c., 51 Am. Dec. 284; *Reg. v. Mutter*, L. & C. 491; *Scott v. Bay*, 3 Md. 431.

The fact that defendants have complied with a city ordinance requiring certain precautions in all cases of blasting, does not prevent a court from continuing an injunction restraining the defendants from "so blasting . . . that any rock so blasted shall fall or be thrown upon the premises of the plaintiff, or said premises be in any way injured." *Rogers v. Hanfield*, 14 Daly 339.

2. *State v. Moore*, 31 Conn. 479; s. c., 83 Am. Dec. 159, was a criminal prosecution for maintaining loaded guns with springs attached to their triggers in defendant's blacksmith shop as a protection against burglars who had entered and tried to enter the shop. It was held that the facts did not authorize a conviction in that it did not appear that the shot could injure one upon the highway.

In *Ilott v. Wilkes*, 3 B. & Ald. 304, the plaintiff was a trespasser and was injured by a spring gun, but he had had ample notice that there were spring guns in that locality, though not of the precise spot, and the court held that because of such notice he could not recover. But the principle of the text was fully recognized, *BAYLEY, J.*, saying: "Although it may be lawful to put those instruments on a man's own ground, yet, as they are calculated to produce great bodily injury to innocent persons (for many trespassers are comparatively innocent), it is necessary to give as much notice to the public as you can, so as to put people on their guard against danger."

In *Deane v. Clayton*, 7 Taunt. 489; s. c., 2 Eng. C. L. 461, the plaintiff was hunting with his dog on A's land by

the latter's permission. Immediately adjoining was the land of the defendant, who, to protect his hares from dogs, had fastened sharp spikes into trees in the lane of the hare paths, at such height that dogs would be injured by running against them. The defendant had posted numerous notices on his premises giving warning of the existence of the spikes, but the plaintiff could not and did not see the notice. While the plaintiff was hunting, his dog started a hare on A's land, which ran in the direction of the defendant's land, hotly pursued by the dog. The plaintiff used every effort to call the dog back, but without success; he followed the hare into the defendant's close, and was killed by coming in contact with one of the spikes. In an action for the value of the dog it was held that the defendant was liable.

In *Bird v. Holbrook*, 4 Bing. 628, the plaintiff was trespassing on the defendant's premises, in pursuit of a stray fowl, and stepped on a wire which discharged a concealed spring gun set by the defendant, and was injured. The court held that an action for the damages would lie, notwithstanding the plaintiff was a trespasser. To the same effect is *Jay v. Whitfield*, 3 B. & A. 308. And see *Jordin v. Crump*, 8 M. & W. 787.

The English statute (24 & 25 Vict., ch. 100, § 31) makes it a misdemeanor to set spring guns or traps with the intent to harm trespassers or other persons, otherwise than in dwelling houses at night for their protection.

3. *Hawk. P. C.* 365, ch. 75, § 14; 4 *Black. Com.* 168; *Roscoe's Crim. Ev.* 745; *Rolle's Abr.* 84; *Reg. v. Foxley*, 6 Mod. 213; *Rex v. Cooper*, 2 Strange 1246; *Anson v. Stewart*, 1 L. R. 754; *Com. v. Harris*, 107 Mass. 108; *Com. v. Foley*, 99 Mass. 497; *Field's Case*, 6 City Hall Rec. (N. Y.) 90; *James v. Com.*, 12 S. & R. (Pa.) 220.

In *Com. v. Mohn*, 52 Pa. St. 243; s. c., 91 Am. Dec. 153, *WOODWARD, C. J.*, said: "As to the unreasonable-

statute it is sometimes made to extend to both sexes.<sup>1</sup>

**13. Collecting Crowds.**—Any business, use of property or act that assembles or tends to assemble disorderly crowds in public places is a nuisance *per se*.<sup>2</sup>

**14. Exciting Public Alarm.**—Anything that tends unnecessarily to create public alarm or disturb the feeling of public security is a public nuisance.<sup>3</sup>

ness of holding women liable to punishment for a too free use of their tongue, it is enough to say that the common law, which is the expressed wisdom of ages, adjudges that it is not unreasonable." Anger is not an element of the offence. *United States v. Royall*, 3 Cranch (C. C.) 620. On the contrary, anger and provocation may excuse it. *Greenwault's Case*, 4 City Hall Rec. (N. Y.) 174.

1. In *Massachusetts*, for example, where the statute speaks of "common railers and brawlers," and is applied to both sexes.

2. In *Rex v. Moore*, 3 B. & Ad. 184, the defendant devoted a lot near a highway to the use of a shooting alley. In this lot large numbers of people habitually assembled to shoot at pigeons and other marks. Many of these persons were disorderly, and with their firearms created much disturbance. It was held that an indictment would lie against the defendant for maintaining a nuisance.

So in *Bostock v. North Staffordshire R. Co.*, 5 De G. & S. 584, it was held that holding a regatta near plaintiff's house, calling together a crowd, was a nuisance *per se*.

In *Walker v. Brewster*, L. R., 5 Eq. 25, it was held that the assembling of noisy people to the annoyance of the neighborhood outside grounds in which entertainments with music and fireworks are being given for profit is a nuisance. Also that firing rockets and establishing a band of music which played twice a week for several hours continually near a public place was a nuisance. In this case the court said: "That the collection of crowds is a nuisance has been fully established." See also *Inchbald v. Robinson*, L. R., 4 Ch. App. 388; *Crump v. Lambert*, L. R., 3 Eq. 409.

In *Morristown v. Moyer*, 67 Pa. St. 355, it was held that loungers on the street were a public nuisance.

So in *Com. v. Miliman*, 13 S. & R. (Pa.) 403, it was held that a constable who obstructed a highway

by collecting a crowd to attend an execution sale was indictable as maintaining a nuisance. *Com. v. Passmore*, 1 S. & R. (Pa.) 217.

But in *State v. Hughes*, 72 N. Car. 25, the collecting of a crowd on the street to view a procession, or the reasonable celebration of a great public event was held not to be a nuisance *per se*, even though in violation of the orders of the mayor. In this case the court said: "In a popular government like ours the laws allow great latitude to public demonstrations, whether political, social or moral, and it requires but little reflection to foresee if such acts are to be construed to be indictable, that the doctrine of riots and common nuisances would be extended far beyond the limits hitherto circumscribing them, and would put an end to all public celebrations however innocent or commendable the purpose."

In *Rex v. Carlile*, 6 C. & P. 628, it was held that an exhibition in a shop window tending to collect a crowd on the street in front is a common nuisance.

So the exhibition of an effigy on the street is a nuisance, as it tends to collect a crowd. *Com. v. Haines*, 4 Clark (Pa.) 17.

In *Barker v. Com.*, 19 Pa. St. 412, it was held that a person addressing a crowd on the street in boisterous and indecent language is guilty of a public nuisance.

So in *Com. v. Spratt*, 14 Phila. (Pa.) 365, it was held that an outcry in the streets so that people collect in consequence, and the street is obstructed is a public nuisance.

In *Village of Des Plaines v. Poyer*, 123 Ill. 348, it was held that public picnics and dances are not *per se* common nuisances, and a village ordinance prohibiting them in general terms is unreasonable and void.

3. In *Com. v. Cassidy*, 6 Phila. (Pa.) 82, where a handbill was distributed which described a black woman, falsely declaring her to be a child stealer, it was held that such a

**III. INJUNCTION—1. Principles Governing—**(See also INJUNCTION).—The remedies for nuisances are threefold: preventive, compensatory and punitive. The first divides itself again into the remedy by abatement, without process of law, and by injunction. The compensatory remedy is an action at law for damages, the punitive remedy an indictment on behalf of the public.

The most efficient and flexible remedy is that of injunction. Under this form the court can prevent that from being done which, if done, would cause a nuisance; it can command the destruction of buildings or the cessation of works which violate a neighbor's rights;<sup>1</sup> where there is a disputed question of right between the parties, it can suspend the operations complained of until that question is finally decided; and its orders may be either absolute or conditional upon the fulfilment by either or both of the parties of such undertakings as appear just in the particular case.<sup>2</sup>

It is a matter of common learning and practice that an injunction is not, like damages, a remedy (as it is said) *ex debito justitiæ*. Whether it shall be granted or not in a given case is in the judicial discretion of the court, now guided by principles which have become pretty well settled. In order to obtain an injunction it must be shown that the injury complained of as present or impending is such as by reason of its gravity, or its permanent character, or both, cannot be adequately compensated in damages. The injury must be either irreparable or continuous. This remedy is therefore not appropriate for damage which is in its nature temporary and intermittent, or accidental and occasional, or for an interference with legal rights which is trifling in amount and effect.

Apprehension of future mischief from something in itself lawful and capable of being done without creating a nuisance is no ground for an injunction. "There must, if no actual damage is proved, be proof of imminent danger; and there must also be proof that the apprehended damage will, if it comes, be very substantial."<sup>3</sup> But where a nuisance is shown to exist, all the probable consequences are taken into account in determining whether the injury is serious within the meaning of the rule on which the court acts. But there must be substantial injury in view to begin with.<sup>4</sup>

bill was a public nuisance, in that it created alarm and tended to disturb the peace and order of the community.

1. The form of order does not go to prohibit carrying on of such and such operations absolutely, but "so as to cause a nuisance to the plaintiff," or like words. See *Lingwood v. Stowmarket Co.*, 1 Eq. 77, 336, and precedents in Seton, pt. 2, ch. 5, § 5.

2. Thus, where the complaint was of

special damage or danger from something alleged to be a public nuisance, an interlocutory injunction has been granted on the terms of the plaintiff bringing an indictment. *Hepburn v. Lordan*, 2 H. & M. 345.

3. *Fletcher v. Bealey*, 28 Ch. Div. 688.

4. *Salvin v. North Brancepeth Coal Co.*, 9 L. R., Ch. 705; *Pollock on Torts*

**2. Laches and Acquiescence**—(See also LACHES).—The right to invoke the interposition of a court of equity may be barred by delay and acquiescence.<sup>1</sup>

1. *Marker v. Marker*, 9 How. (U. S.) 1; *Haines v. Taylor*, 2 Ph. 209; *Oldaker v. Hunt*, 19 Beav. 485; *Robertson v. Stewart*, 9 G. & M. 189; *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515; *Bankhardt v. Houghton*, 27 Beav. 425; *Tipping v. St. Helen Smelting Co.*, 1 L. R., Ch. 66; *Canal Co. v. King*, 16 Beav. 643; *Jones v. Canal Co.*, 2 Molloy 319; *Williams v. Earl of Jersey*, 1 Cr. & Ph. 92; *Hilton v. Earl of Granville*, Cr. & Ph. 284; *Atty. Gen. v. Board of Health*, 2 Jur., N. S. 180; *Pulling v. London etc. R. Co.*, 33 L. J., Ch. 505; *Ramden v. Dyson*, 1 L. R., H. L. 129; *Goldsmid v. Tunbridge Wells Co.*, 1 L. R., Ch. 349; *Western v. McDermott*, 2 L. R., Ch. 72; *Laudmexborough v. Bower*, 2 L. T. 205; *Carlisle v. Cooper*, 21 N. J. Eq. 599; *Morris etc. R. Co. v. Prudden*, 20 N. J. Eq. 530; *Meigs v. Lester*, 23 N. J. 199; *Goodwin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 169; *Helms v. McFadden*, 18 Wis. 191; *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 647; *Atty. Gen. v. New York etc. R. Co.*, 24 N. J. Eq. 49; *Simpson v. Justice*, 8 Ired. Eq. (N. Car.) 115; *Grey v. Ohio etc. R. Co.*, 1 Grant's Cas. (Pa.) 412; *Heiskell v. Gross*, 7 Phila. (Pa.) 317; *Sprague v. Steere*, 1 R. I. 247; *Swain v. Seamens*, 9 Wall. (U. S.) 254; *Irvine v. Irvine*, 9 Wall. (U. S.) 618.

Where a trifling trespass or interference with an ancient right has been submitted to without protest for six years, equity will not exercise its jurisdiction, but will leave the plaintiffs to their remedies at law. *Gaunt v. Fynney*, 8 L. R., Ch. 8; 42 L. J., Ch. 122.

The owners of glassworks which were erected in 1845, erected in 1847, and subsequent years down to 1863, seven new furnaces, by reason of which the quantity of smoke and vapor emitted from the works was greatly increased. Plaintiff owned property adjoining the works, which he and his predecessors in title had enjoyed long before the erection of the works, and he had at considerable expense fitted up a portion of the property for building purposes, but on account of the offensive smoke, etc., from the glassworks he had been prevented from carrying out this plan. In 1870 he filed a bill to restrain the emission of smoke and

vapor from the new kilns. It was held that he was not barred by delay, and that he was entitled to an injunction as to the whole of the new works. *Savile v. Kilner*, 26 L. T., N. S. 277.

Where a person lies by and permits another to erect works at great expense, and to use and operate them for a number of years without raising any objection, he has no standing in a court of equity to restrain the use of the works in the same manner that they have always been used. Having acquiesced so long, he must continue to acquiesce or look to a court of law for his remedy. *Southard v. Morris Canal Co.*, 1 N. J. Eq. 518.

So if he has given his consent, either expressly or impliedly, to the erection of expensive works, he cannot afterwards enjoin their operation, though they prove more annoying and injurious than he anticipated. Nor can he restrain the erection of further works necessary to the use of, and connected with, the original. But he cannot be compelled to submit to a radical change in the manner of operating the works. *Hulme v. Shreve*, 4 N. J. Eq. 116.

Where a party does not take an injunction in the first instance, but permits the others to go on erecting the building and fixtures from which a nuisance is anticipated, he can obtain a perpetual injunction against the continuance of the nuisance only by showing that in the meantime the fact of the existence of the nuisance has been established by an action at law, or, at all events, he must support his application by strong and unanswerable proof of nuisance. *Simpson v. Justice*, 8 Ired. Eq. (N. Car.) 115.

In the case of a private nuisance, the fact that the complainant has slept upon his rights for seven years, during all of which time the nuisance openly existed, raises a strong, if not conclusive, presumption that the injury complained of is not of such a pressing and urgent nature as to entitle him to have it restrained by a special injunction. *Heiskell v. Gross*, 7 Phila. (Pa.) 317.

Where three years' delay in applying for an injunction against the obstruction of a public road remains unaccounted for, and the complainant appears to be inconvenienced by the ob-

Mere delay without acquiescence will not necessarily constitute a bar to relief.<sup>1</sup>

Silence, while the perpetrator of the nuisance is expending money to perpetuate it, may preclude relief on the principle of estoppel.<sup>2</sup>

**IV. CRIMINAL PROCEEDINGS—1. Where Maintainable.**—In general, it may be said that a nuisance is indictable where the injury is general, and where public rights are affected, even though the nuisance may produce at the same time a special and actionable injury to individuals. The subjoined extract from Addison on Torts will serve to illustrate the common-law definition of indictable nuisances:

“The following nuisances have been held indictable: The overcrowding of houses with poor people in time of infection of plague, and thereby endangering the health of the neighborhood; the carrying of people infected with contagious dis-

struction merely as one of the public, the injunction will be denied. *Richeson v. Richeson*, 8 Ill. App. 204.

Where a factory alleged to emit cinders from its smokestack had been operated in the same manner for seven years without complaint, a very clear and positive showing of nuisance is necessary to warrant an injunction. *Louisville Coffin Co. v. Warren*, 78 Ky. 400.

A mining company constructed and operated its first washer more than three years before the complainant sued to enjoin its operation, on the ground that it polluted a watercourse on which he was a riparian owner. Prior thereto, he having made no objection, defendant from time to time enlarged its business by constructing and operating additional washers on the same stream. *Held*, that the complainant had not exercised reasonable diligence and must be left to his remedy at law. *Clifton Iron Co. v. Dye*, 87 Ala. 468.

The acquiescence of plaintiff's grantor in the acts of defendant is no defence. *Learned v. Castle*, 78 Cal. 454.

In *Snow v. Williams*, 16 Hun (N. Y.) 468, it was held that the owner of a farm through which a stream flowed was not precluded from maintaining an action to enjoin the operation of a cheese factory on the stream above in such manner as to pollute the water with whey, by the fact that at the time the factory was built he was acquainted with the custom of such factories to thus dispose of surplus whey, and that he had patronized the factory for two years before the defendant purchased it.

Plaintiff's mere failure to protest against the construction of a mill and the use of a mill pond, in the absence of evidence that the defendant was induced by his silence to do anything he would not otherwise have done, and a reasonable delay in suing in order to be sure that the pond was a nuisance, will not estop the plaintiff from maintaining an action to abate it. *Leonard v. Spencer*, 108 N. Y. 338.

1. *Rochdale Canal Co. v. King*, 6 Beav. 643; *Coles v. Sims*, 6 De G. M. & G. 1; *Ramsden v. Dyson*, L. R., 1 H. L. 129; *Rawlins v. Wickham*, 3 De G. & J. 304; *Northam etc. Co. v. Railroad Co.*, 1 Railway Cases 653; *Barker v. Railroad Co.*, 5 Railway Cases 401; *Greenhalgh v. Manchester etc. R. Co.*, 3 Myl. & C. 784; *Stokoe v. Singers*, 8 E. & B. 31; *Crossley v. Lightowler*, L. R., 2 Ch. App. 478; *Corning v. Troy Iron etc. Co.*, 34 Barb. (N. Y.) 485.

2. *Great Western R. Co. v. Oxford etc. R. Co.*, 3 D. M. & G. 341; *Wood v. Sutcliffe*, 2 Sim., N. S. 163; *Batchelder v. Sanborn*, 24 N. H. 474; *Lewis v. San Antonio*, 7 Tex. 288; *Dickson v. Green*, 24 Miss. 612; *Calhoun v. Richardson*, 30 Conn. 210; *Mitchell v. Leavitt*, 30 Conn. 587; *Johnson v. Wyatt*, 2 De G. J. & S. 18; *Davies v. Marshall*, 10 C. B., N. S. 711; *Rawlings v. Wickham*, 3 De G. & J. 304. And see *Archbold v. Scolly*, 9 H. L. 388; *Gale v. Abbott*, 8 Jur., N. S. 987; *Gordon v. Cheltenham R. Co.*, 5 Beav. 233.

3. 2 Roll. Abr. 139, pl. 3.



orders along public thoroughfares in such a way as to endanger the health of the passengers;<sup>1</sup> the exposure for sale in a public place of a horse affected with glanders;<sup>2</sup> the keeping of large quantities of gunpowder in dangerous proximity to populous neighborhoods;<sup>3</sup> the carrying on of noxious and offensive manufactures in public places or adjoining public thoroughfares, so as seriously to incommode and annoy large numbers of persons;<sup>4</sup> holding out inducements to people to collect together in large crowds, to the obstruction of public thoroughfares, the treading down the grass of the neighboring meadows, the destruction of fences, or the creation of alarm and disturbance in the surrounding neighborhood;<sup>5</sup> the making of a great noise in the night with a speaking trumpet, to the disturbance of divers householders;<sup>6</sup> sawing of logs of timber in a public street, an incumbering a road or footpath with barrels of beer;<sup>7</sup> the opening of new coal holes, and unloading coals in a public thoroughfare, in places where no coal-hole previously existed, and where the highway was not originally dedicated subject to the use of it for domestic coaling;<sup>8</sup> making excavations and openings in the soil of a highway, or in the pavement of a public street, for water, gas, sewerage, or other purposes, without parliamentary authority;<sup>9</sup> the use on a highway of a traction steam-engine, which, by its noise and appearance, frightens horses and makes the highway dangerous to persons riding or driving;<sup>10</sup> mixing of large quantities of alum and deleterious and prohibited ingredients in bread, intended for the use and consumption of the public.<sup>11</sup>

**2. Indictment—(a) Description.**—The nuisance should be described with certainty, according to the circumstances, and with the detail and fulness usual in indictments. Enough must be alleged to identify the act and to show guilt *prima facie*. Enough must appear to enable the court to see that an indictable nuisance is described if the thing becomes a nuisance by force of special circumstances, these must be set forth.<sup>12</sup>

1. *Rex v. Vantandillo*, 4 M. & S. 73.

2. *Reg. v. Henson*, 1 Dears. C. C. 24.

3. *Rex v. Taylor*, 2 Str. 1167; *Biggs v. Mitchell*, 31 L. J., M. C. 163.

4. *Rex v. White*, 1 Burr. 335; *Rex v. Pappineau*, 2 Str. 686; *Rex v. Neil*, 2 C. & P. 485.

5. *Rex v. Moore*, 3 B. & Ad. 184.

6. *Rex v. Higginson*, 2 Burr. 1233.

7. *Rex v. Jones*, 3 Campb. 229.

8. *Cockburn, C. J.*, 29 L. J., M. C. 123.

9. *Reg. v. Longton Gas Co.*, 29 L. J., M. C. 119.

10. *Watkins v. Reddin*, *ante*.

11. *Rex v. Dixon*, 3 M. & S. 11.

12. 2 Archb. Crim. Pr. (Waterman's

notes) 980, *et seq.*; *State v. Matthews*, 42 Vt. 542; *State v. Hanley*, 42 Vt. 290; *Rex v. Haddock*, Andr. 137; *Rex v. Watts*, 2 C. & P. 486; *Com. v. Twitchell*, 4 Cush. (Mass.) 74; *Rex v. White*, 1 Burr. 333; *Messersmidt v. People*, 46 Mich. 437; *State v. Kaster*, 35 Iowa 221; *State v. Close*, 35 Iowa 570; *State v. Reno*, 41 Kan. 674; *State v. Purse*, 4 McCord (S. Car.) 472; *Rex v. Stead*, 8 T. R. 142. *Stephen's Case*, 3 Leigh (Va.) 759; *State v. Close*, 35 Iowa 570; *Munson v. People*, 5 Park. (N. Y.) Cr. 16; *State v. Payson*, 37 Me. 361; *Rex v. Pedly*, 1 A. & E. 822; *State v. Buckman*, 8 N. H. 203; s. c., 29 Am. Dec. 646; *People v. Townsend*, 3 Hill

(N. Y.) 479; *People v. Monteverde*, 43 Hun (N. Y.) 447; *Com. v. Harris*, 101 Mass. 29; *Com. v. Smith*, 6 Cush. (Mass.) 80; *Com. v. Oaks*, 113 Mass. 8; *State v. Schlurman*, 52 Mo. 164.

If the statute makes it an offence to put carcasses into rivers, fields, etc., "to the injury of the health or to the annoyance of the citizens," a complaint not charging such injury or annoyance is insufficient. *State v. Wahl*, 35 Kan. 608.

A complaint which charges "the disturbance of divers citizens" by noises in the public streets will not support a conviction. There should have been an allegation that the noises were to the common nuisance of all the citizens of the commonwealth, etc. *Com. v. Smith*, 6 Cush. (Mass.) 80.

As, under the New York Penal Code, § 365, one cannot be guilty of maintaining a public nuisance without being guilty of an unlawful act or omission, an indictment charging merely that the proprietor of certain premises unlawfully permitted the playing of base ball there on Sunday, and allowed bad language and great noise, confusion, and uproar, is demurrable as failing to charge unlawful action or participation on his part, or more than a mere negative permission. *People v. Monteverde*, 43 Hun (N. Y.) 447.

An indictment for maintaining a nuisance, which charges that in a certain county, continually from a named day till the finding of the indictment, defendant wilfully and unlawfully caused and suffered carcasses, filth, and offal to be collected near the dwelling houses of named persons, to their prejudice, and to the common nuisance of all the people lawfully in that locality, sufficiently describes the character of the nuisance and its locality, under Crim. Code Ill., § 221. *Seacord v. People*, 22 Ill. App. 279; affirmed, 121 Ill. 623.

**Bill of Particulars.**—If the indictment be so general that it fails to give the defendant sufficient information to enable him to procure his defence, the court will order the public prosecutor to furnish a bill of particulars of the several acts of nuisance intended to be proved. *Rex v. Curwood*, 3 Ad. & El. 815; *Rex v. Marquis of Downshire*, 4 Ad. & El. 698.

**Surplusage.**—In an indictment for keeping a nuisance in a certain building, it is surplusage to charge that the building was under defendant's control. *State v. Schilling*, 14 Iowa 455.

**Intent.**—Under a statute making corporations criminally liable for obstructing highways, allegations that there was a highway; that defendant obstructed it in a specified manner, and that travel was thereby obstructed and the public greatly inconvenienced, are sufficient, though there is no charge of criminal intent. *State v. Baltimore etc. R. Co.*, 120 Ind. 298.

And a complaint for keeping a house of ill fame need not allege an unlawful or guilty intent, where the act charged is expressly forbidden by statute. *Com. v. Shea*, 150 Mass. 314.

And an indictment for quarrelling by cursing and swearing, to the disturbance of the public peace, may be good without an allegation of intent. *State v. Archibald*, 59 Vt. 548; s. c., 59 Am. Rep. 755.

So where the statute makes it an offence "to obstruct or injure any road," the words "knowingly and wilfully" are surplusage in the indictment, and may be disregarded. *State v. Chesapeake etc. R. Co.*, 24 W. Va. 809.

To charge one with furnishing unwholesome and poisonous water to the public is bad unless it is also charged that he did so knowingly or intentionally. *Stein v. State*, 37 Ala. 123; s. c., Ala. Sel. Cas. 29.

**Nuisances to Highways.**—An indictment for obstructing a watercourse so as to overflow a highway need not aver the length and breadth of the overflow. *Respublica v. Newell*, 3 Yeates (Pa.) 417; s. c., 2 Am. Dec. 381.

An indictment for stopping "the King's highway in Kensington" is good without setting forth any boundaries or abutments in the way leading from or to specified towns; "for a highway shall be intended to go throughout the kingdom." Anonymous, 6 Salk. 183.

An indictment for not repairing a highway must set forth with certainty how the defendant became charged with the duty of repairing it. *State v. King*, 3 Ired. (N. Car.) 411; *Simpson v. State*, 10 Yerg. (Tenn.) 525.

An indictment for suffering a highway to be muddy, and so narrow that the public could not pass, etc., was held bad for want of saying specifically that the way was out of repair. *Reg. v. Inhabitants of Stratford*, 2 Ld. Raym. 1169.

To charge that the defendant has a toll gate on a public road adjoining a bridge, and receives tolls from passengers crossing the said bridge, and that

"he is bound, and of right ought, to keep said bridge in good repair," but omitting to allege the fact of ownership, from which the duty to repair would arise, is defective. *State v. King*, 3 Ired. (N. Car.) 411.

In *Com. v. Hall*, 15 Mass. 240, judgment was arrested because the indictment for obstructing the highway averred that the obstruction consisted of "a number of wooden sheds and buildings, 100 feet in length and 16 feet in breadth," but omitted to state what the number was.

The manner of obstructing a highway is sufficiently charged by an averment that it was by "erecting and maintaining a fence and stable thereon." *Boyer v. State*, 16 Ind. 451.

Merely charging the obstruction "of a certain road in the unincorporated town of Glen Rose," charges no offence under a statute against wilfully obstructing any public road or highway. *McClanahan v. State*, 21 Tex. App. 429.

Under the Florida statute, an indictment must charge not merely that the obstruction of a highway was "unnecessary and unreasonable," but that it was wilful. *Savannah etc. R. Co. v. State*, 23 Fla. 579.

A charge that the road was and is "a common highway in Putnam county, made and laid out for the people of this State to go, return and pass at their free pleasure and will on foot, on horseback and in vehicles," is equivalent to a charge that it was and is an "established highway" under a statute making it an offence to obstruct any public road or established highway. *Palatka etc. R. Co. v. State*, 23 Fla. 546.

An indictment for obstructing a highway which gave no more particular description of its location than the name of the township, county and State, was held fatally defective. *State v. Stewart*, 66 Ind. 555.

So of an indictment for obstructing "a certain common road and public highway," without specifying its particular location or terminal points. *State v. Crumpler*, 88 N. Car. 647.

It is not sufficient to charge the obstruction of a navigable river to be a wharf owned by the defendant "known as the Week's wharf," and that the nuisance consists of "a certain part" of such wharf, without specifying what part. Such a description is too vague, uncertain and indeterminate. *State v.*

*Sturdivant*, 21 Me. 9. See also *State v. Phipps*, 4 Ind. 515.

While a public nuisance is well charged by alleging that defendant, a turnpike company, has failed to construct its road as required by its charter, and has kept and maintained the same in a soft, miry and rough condition, to the great damage and common nuisance of all the citizens of the State, yet the omission of any allegation of a duty on the part of the company to keep its road in a certain state of repair, and that in consequence of a neglect to perform that duty it had fallen out of repair, renders the indictment demurrable. *State v. Godwinsville etc. Road Co.*, 49 N. J. L. 266; s. c., 60 Am. Rep. 611.

To charge merely as a legal conclusion that a railroad track in a street is an obstruction, is defective; the facts which render it an obstruction should be averred. *Wabash etc. R. Co. v. People*, 12 Ill. App. 448.

In an indictment for obstructing a highway, it may be laid as a common highway for carts, carriages, etc., although it has always been arched over; provided that it is capable of being used by all ordinary carriages, and notwithstanding the archway is not high enough to allow road wagons and other vehicles of unusual dimensions to pass under it. *Rex v. Lynn*, 1 C. & P. 527; R. & M. 150.

In an information against a common carrier for going upon a highway with an unreasonable weight, which is a nuisance at common law, a charge that the defendant went thereon with a load of four thousand pounds, and "with an unusual number of horses," without setting forth the number, was held good, because it was not the horses, but the excessive weight he carried that made the nuisance. *Rex v. Egerly*, 3 Salk. 183. It was also held in that case that an averment that the defendant spoiled the highway "leading from Oxford to London, viz: at Lobb Lane," was good, though there was no statement of how much of the way was spoiled; that it would be intended that all Lobb Lane was spoiled.

**Offensive Trade.**—An indictment alleged that a certain shop was erected and maintained for the purposes of a certain trade; that defendants did therein carry on said trade; and, in so doing, collected and kept certain offensive substances; that, "in manner aforesaid," they collected and kept certain other offen-

sive substances; and that "by reason of the premises," the nuisance resulted. *Held*, that the expressions quoted sufficiently charged that the offensive substances last named were collected in the exercise of the trade, and that the results followed from both that exercise and such collections. *State v. Hart*, 34 Me. 36.

To charge merely that defendant "kept a large quantity of hides, tallow and other substances, which emitted a disagreeable odor," is not sufficient. *Lippman v. South Bend*, 84 Ind. 276.

To charge merely that the defendant "suffered offal to be collected and remain" on a specified street, "causing a common nuisance," etc., is fatally uncertain. *Cornell v. State*, 7 Baxt. (Tenn.) 520.

The words "roads" and "streets," in an indictment charging the carrying on of an offensive trade "near unto divers roads and streets," etc., are equivalent to public roads and streets. *Horner v. State*, 49 Md. 277. See *Archbold, Cr. Pl. & Ev.* 633; *Com. v. Rumford Chemical Works*, 16 Gray (Mass.) 231; *State v. Wilson*, 43 N. H. 415; s. c., 82 Am. Dec. 163; *Rex v. Mutters*, 10 Cox (C. C.) 6; *Com. v. Brown*, 13 Met. (Mass.) 365; *Taylor v. State*, 35 Wis. 298.

**Contagious Disease.**—An indictment for bringing a horse infected with the glanders into a public place, to the danger of infecting the queen's subjects, is good after verdict without an averment that defendant knew that the disease was communicable to human beings. *Reg. v. Henson, Dears. C. C.* 24.

**Copulation of Horses.**—It is sufficient to charge that defendant let his stallion to mares upon the public street of a town and in view of its inhabitants without charging that he had failed to provide a proper enclosure. *Crane v. State*, 3 Ind. 193.

**Bawdy and Disorderly Houses.**—Where a statute declares to be a nuisance places where certain classes of persons "are in the habit of resorting," it is sufficient to charge the keeping of a place "used" for the habitual resort of such persons. *State v. Brady* (R. I. 1888), 12 Atl. Rep. 238.

An indictment need not set forth the names of the "intemperate, idle, dissolute, noisy," etc., persons alleged to frequent the place. *State v. Doyle*, 15 R. I. 527.

The nuisance of keeping a disorderly house is well charged by alleging substantially that defendants, at a time

stated, within the county, kept a disorderly house, where they unlawfully kept and maintained for money, men and women of evil name and disposition, and unlawfully permitted such persons, at unlawful times in the day and night, to be and remain in the said house, drinking, swearing, quarreling, gambling and whoring, and otherwise misbehaving themselves. *Thatcher v. State*, 48 Ark. 60. See also *Loraine v. State*, 22 Tex. App. 640, where it was held sufficient to charge that defendant, on a day named, within the county, "did keep a disorderly house, said house being then and there kept for the purpose of public prostitution."

An averment that the defendant kept a "common, ill-governed and disorderly tenement," charges no offence known to the common law. The word tenement cannot be construed as equivalent to house. It has a much broader signification. *Com. v. Wise*, 110 Mass. 181.

A charge that defendant kept a disorderly house "by allowing and permitting great numbers of drunken negroes to congregate and use indecent language, and entertaining them, to the great annoyance," etc., is insufficient in not stating that he permitted such persons to congregate at his house, and that he entertained them there. *Stephans v. State*, 21 Tex. 206.

The offence of keeping a house of ill-fame must be described as committed in a particular town, and the prosecutor is confined in his proof to that town; he cannot, as in other cases, prove an offence anywhere within the county; but a more particular description of the house is not necessary. *State v. Nixon*, 18 Vt. 70; s. c., 46 Am. Dec. 135.

To charge the defendant with keeping in a public place "a certain common, ill-governed and disorderly room, in which, for lucre, the defendant procured and suffered disorderly persons to meet by night and day, and remain there, "drinking, tippling, cursing, swearing, quarrelling, making great noises, rolling bowls in and at a game commonly called tenpins," is good. *Bloomhuff v. State*, 8 Blackf. (Ind.) 205.

An indictment for keeping a disorderly house need not allege the manner of keeping it, nor the character of the persons frequenting it. *State v. Dame*, 60 N. H. 479; s. c., 49 Am. Rep. 331.

For additional instances of indictments for keeping disorderly houses,

that have been held good, see *Rex v. Higginson*, 2 Burr. 1233; *Com. v. Stewart*, 1 S. & R. (Pa.) 342; *Com. v. Pray*, 13 Pick. (Mass.) 359; *State v. Patterson*, 7 Ired. L. (N. Car.) 70; s. c., 45 Am. Dec. 506; *State v. Bailey*, 21 N. H. 343.

An information for indecent and offensive conversation should state the substance of the conversation. *State v. Bach*, 25 Mo. App. 554.

A charge that the defendant "swore several oaths in the courtyard, to the great disturbance and common nuisance of the citizens necessarily attending said court," was held good. *State v. Kirby*, 1 Murph. (N. Car.) 254.

So of a charge that the defendant, being an evil disposed person, "did, in the public street of Jefferson, profanely curse and swear, and take the name of God in vain, to the evil example, etc., and to the common nuisance of the good citizens of this State," etc. *State v. Ellar*, 1 Dev. (N. Car.) 267.

So of a charge that the defendant, in a public place and in the presence and hearing of divers good citizens of this State, then and there being, unlawfully did utter, publish, speak and say the following gross, scandalous, profane and blasphemous language [setting it out], to the great scandal and common nuisance of all good citizens so then and there being as aforesaid, to the manifest corruption of public morals, to the evil example of all like offenders, and against the peace and dignity of the State." *State v. Graham*, 3 Sneed (Tenn.) 134.

Where it was charged that the defendants assembled at a public place, and profanely and with a loud voice cursed, swore and quarrelled in the hearing of divers persons then and there assembled, whereby a certain singing school was broken up and disturbed, to the common nuisance, etc., the indictment was held bad, because it did not show that the "singing school" alleged to have been broken up was composed of members of the community other than the defendants themselves; and the averment *ad commune*, etc., did not aid it in this respect. *State v. Baldwin*, 1 Dev. & B. (N. Car.) 195.

It has been held that an indictment cannot be maintained against a person for being a common bawd, and procuring men and women to meet together to commit fornication; the indictment should charge her with keeping a bawdy house. Such bare solicitation is not

indictable, but cognizable only in the ecclesiastical courts. 1 Hawk. P. C. C. 74; *Jones Just.*, tit. Lewdness.

**Common Scold.**—An indictment for the nuisance of being a common scold must charge the offence in those words; it is not sufficient to charge that the defendant is a "common slanderer," or a "common brawler," or "a source of discord among her quiet and honest neighbors." *Margaret Cooper's Case*, 2 Strange 1246; *United States v. Royall*, 3 Cranch (C. C.) 620.

In *Reg. v. Foxby*, 6 Mod. 11, judgment was arrested because it was charged that the defendant was "*communis calumniatrix*," which is not the Latin word for scold, but *rixatrix*."

**Indecent Exposure.**—Charging an indecent and scandalous exposure of the defendant's private parts to public view on a public highway, is sufficient without charging the act to have been committed in the presence of citizens. *State v. Roper*, 1 Dev. & B. (N. Car.) 208. See to nearly the same effect *Rex v. Crunden*, 2 Camp. 89.

An averment in an indictment for committing a nuisance "in the sight and view of B," does not mean that B actually saw it, but simply that he might have seen it if he had happened to look. *Reg. v. Webb*, 1 Den. C. C. 338; 18 L. J., N. C. 39; *S. P.*, *Reg. v. Watson*, 2 Cox C. C. 376.

To charge the defendant with "making an indecent exposure of his person, by making an uncovered exhibition of his privates," is a sufficient allegation of the commission of a public indecency. *Ardery v. State*, 56 Ind. 328.

**Dangerous Buildings.**—Under a statute relating to buildings that are unsafe, "so as to endanger life," and under another relating to such as are "specially dangerous in case of fire," it is insufficient to charge merely that a building was "dangerous, having been heretofore damaged by fire." *State v. Municipal Court* (Minn. 1887), 35 N. W. Rep. 576.

**Dangerous Substances.**—An indictment charging that defendant "unlawfully, knowingly and wilfully did deposit in a warehouse belonging to him, near to divers streets and highways, and to divers dwelling houses of her majesty's subjects, divers large and excessive quantities of a dangerous ignitable and explosive fluid, called wood naphtha, and did keep in the warehouse and near to the streets the fluid in such large, excessive and dangerous

(b) *Duplicity*.—While duplicity is to be avoided, an indictment is not open to the charge of duplicity for alleging in one count the various acts constituting one nuisance.

(c) *Time*.—It is not necessary that the exact date of committing the offence should be given; it is sufficient if it is alleged as of "about" a certain date, before the finding and within the statutory period of limitation.<sup>1</sup>

(d) *Location*.—The venue of the nuisance must of course be laid in the county where the indictment is found; but whether further particularity of location is necessary depends on whether an abatement of the nuisance is sought,<sup>2</sup> unless in cases where

quantities, whereby the queen's subjects passing along were in great danger of their lives and property, and were kept in great alarm and terror, *ad commune nocumentum*," sufficiently charges a public nuisance. *Reg. v. Lister, Dears. & B. C. C.* 209; 3 Jur., N. S. 570; 26 L. J., M. C. 196.

A count charging that defendant kept swine in a pen near the highway, and that he fed them with offal does not allege two separate offences. *State v. Payson*, 37 Me. 361.

The offence of creating a nuisance is distinct from the offence of continuing it. The two cannot be joined in the same count. *Burke v. People*, 23 Ill. App. 36; *Hoadley v. People*, 23 Ill. App. 39.

An indictment charging the defendant, first, with maintaining on certain lots a stone building overhanging a public street and liable and threatening to fall into it, etc., and second, with permitting to remain on said lots large quantities of filth, emitting offensive stenches dangerous to public health, is demurrable as charging two separate offences. *Chute v. State*, 19 Minn. 271.

An indictment under the Massachusetts statute for maintaining a building as a common nuisance is not rendered bad for duplicity by the words, "used as a house of ill-fame." *Com. v. Bal-lou*, 124 Mass. 26.

It is not duplicity to charge defendant in the same count with being engaged in the "business and employment of both registering bets and selling pools;" those acts being but different parts of the same transaction. *Com. v. Ferny*, 146 Mass. 203. And see also *State v. Matthews*, 42 Vt. 542; *Com. v. Twitchell*, 4 Cush. (Mass.) 74; *State v. Hanlev*, 47 Vt. 290; *Com. v. Mills*, 6 Bush (Ky.) 296; *Rex v. Pap-pineau*, 1 Stra. 686.

1. *State v. Schilling*, 14 Iowa 455.

Allegations that defendant on a day named, "and on divers other days and times between that day and the day of making this complaint, at said Boston, and within the judicial district of said court, did keep a certain house of ill-fame there situate," sufficiently allege the time and place of committing the offence. *Com. v. Shea*, 150 Mass. 314.

2. The particular location within the county need not be alleged, unless there is a request for its abatement, nor need the names be given of the persons near whose dwellings the nuisance is maintained. *Droneberger v. State*, 112 Ind. 105.

An allegation of the particular tract of land upon which the nuisance is located is probably unnecessary unless abatement is sought; but if made, it must be proved as made. *Wertz v. State*, 42 Ind. 161; *Dennis v. State*, 91 Ind. 291.

Where the nuisance charged constitutes an offence wherever committed, it is sufficiently located by stating the city in which it is maintained. *Jenks v. State*, 17 Wis. 665.

The locality is sufficiently designated by laying it in a certain county in the near neighborhood of certain streets. *State v. Sneed*, 16 Lea (Tenn.) 450.

Indictment for damming up and stagnating the waters of a creek must charge that the obstruction produced the nuisance "in or near a public highway," or some other place in which the public have a special interest. *Com. v. Webb*, 6 Rand. (Va.) 726.

A charge that defendant did maintain "a certain mill-dam in, about and across a certain stream of water in said county, called Elkhart river," does not sufficiently locate the dam. *Wood v. State*, 5 Ind. 433.

An indictment charged that defend-

the offence is local to some particular town or neighborhood.<sup>1</sup>

(e) *Continuando*.—If an abatement is sought, and not punishment only, an averment of the continuance of the nuisance is indispensable.<sup>2</sup>

ant, on a day named and on divers other days between that day and the finding, "did erect, continue and use a certain building and place; that the said building and place is commonly known as a brewery, and is situated in Franklin county, Iowa." *Held*, a sufficient allegation that the building was situated in that county at the time of the offence. *State v. Jacobs*, 75 Iowa 247.

It is sufficient to describe the highway obstructed as the "Fayetteville and War Eagle Road," that being the usual designation of the public road running from Fayetteville to the War Eagle Creek, and the one for whose obstruction the indictment is brought. *Patton v. State*, 50 Ark. 53.

It is not necessary to describe the termini and width of a highway in indictments for erecting nuisances thereon; nor otherwise to describe its location than by alleging it to be in some known place within the county, so that if it should be necessary for the sheriff to abate the nuisance he may have no difficulty in finding it. *Rex v. Hammond*, 1 Strange 44; *Rex v. Hammer-smith*, 1 Strange 357; *Rex v. Pappineau*, 2 Strange 686; *Rex v. White*, 1 Burr. 333; *State v. Sturdivant*, 21 Me. 9; *Com. v. Hall*, 15 Mass. 240; *Com. v. Newbury*, 2 Pick. (Mass.) 51.

An indictment for obstructing a highway need not allege from or to what town in the county the highway leads. It is sufficient to allege that the nuisance was erected at S. in the county where the highway is alleged to be. *Com. v. Hall*, 15 Mass. 240.

An indictment for keeping a bawdy house within the county is not bad for omitting to charge more specifically where it was kept. *Handy v. State*, 63 Miss. 207; s. c., 56 Am. Rep. 803.

A charge that defendant "did cause and suffer the carcasses of divers dead animals and large quantities of offal, filth and noisome substances, to be collected, deposited and remain near the dwelling houses of A, B, C, D and others," "to the prejudice of said A, B, C, D, and others," sufficiently describes both the locality and the offence under a statute against "causing

or suffering the carcass of any animal, etc., to be collected, deposited or remain" in any place to the prejudice of others." *Seacord v. People*, 121 Ill. 623. See also *Chute v. State*, 19 Minn. 271; *Rex v. Record*, 2 Show. 216; *State v. Schilling*, 14 Iowa 455; *Wood v. State*, 5 Ind. 433; *State v. Stewart*, 66 Ind. 555; *Stephen's Case*, 2 Leigh (Va.) 759; *Cornell v. State*, 7 Baxt. (Tenn.) 520; *People v. Townsend*, 3 Hill (N. Y.) 479; *State v. Freeport*, 43 Me. 108; *State v. Dibble*, 4 Jones L. (N. Car.) 107; *State v. Baber*, 74 Mo. 292; *Jenks v. State*, 17 Wis. 665; *Com. v. Shea*, 150 Mass. 314; *Com. v. Donovan*, 16 Gray (Mass.) 18; *Com. v. Rumsford Chemical Works*, 16 Gray (Mass.) 231.

1. See, on this head, *Com. v. Logan*, 12 Gray (Mass.) 136, 138; *Com. v. Heffron*, 102 Mass. 148, 150; *Com. v. Bacon*, 108 Mass. 26, reviewed in 2 Bishop Cr. Proc. (3rd ed.), § 867, note. Mr. Bishop, however, deems that the rule requiring further particularity of description where an abatement is not sought is not founded on principle, but that it arose from the requirement of such proof to avoid a variance.

2. *Munson v. People*, 5 Park. Cr. (N. Y.) 16; *Taylor v. People*, 6 Park. Cr. (N. Y.) 347.

A continuous nuisance is well charged by averring that defendant on a day named erected, and from thence hitherto continually maintained, etc. *Baugh v. State*, 14 Ind. 29.

Abatement is warranted under a charge that defendant on a day named erected gates on a highway, "and did, on divers other days between that day and the time of taking this inquisition, continue and allow to remain the said gates, by reason whereof the citizens of this State, during the time aforesaid," were prevented, etc. *Wroe v. State*, 8 Md. 416.

An indictment for allowing defendant's plank road to get out of repair must allege that it is continued down to the date of the finding. *People v. Branchport etc. Road Co.*, 5 Park. Cr. (N. Y.) 604. And see also *Munson v. People*, 5 Park. Cr. ((N. Y.) 16; *Taylor v. People*, 6 Park. Cr. (N. Y.) 347;

(f) *Conclusion*.—In the case of a common-law nuisance, in addition to the conclusion "against the peace, etc.," it is usual to conclude with the words, "to the great damage and common nuisance of all the people there lawfully being and abiding," or with similar words.<sup>1</sup> Under the ancient precedents, doubtless this was necessary.<sup>2</sup> At present the authorities are divided as to its necessity.<sup>3</sup> Elsewhere than in a State, where this conclusion has been adjudged to be unnecessary, it is perhaps safer to adhere to the ancient form. If the nuisance is a statutory nuisance the conclusion "against the form of the statute" is essential.<sup>4</sup>

Ashbrook v. Com., 1 Bush (Ky.) 139; s. c., 83 Am. Dec. 740; Baugh v. State, 14 Ind. 29; State v. Hull, 21 Me. 84.

1. 2 Bishop Cr. Proc. (3rd ed.), § 862.

2. Archb. Cr. Pl. and Ev. (19th ed.) 956; 3 Chitty Cr. Law 607a. And see 2 Archb. Crim. Pr. (Waterman's notes) 981; Bac. Abr., tit. Nuisance; Vin. Abr., tit. Indictment (2); Nuisance 13; 2 Roll. Abr. 83; 7 Hawk. P. C., ch. 75, §§ 3-5; Rex v. Haward, Cro. Eliz. 148; Anonymous, 1 Vent. 26; Prat v. Stearn, Cro. Jac. 382.

3. See Com. v. Faris, 5 Rand. (Va.) 691; State v. Wilson, 93 N. Car. 608; State v. Houck, 73 Ind. 37; State v. Schilling, 14 Iowa 455; Com. v. Smith, 6 Cush. (Mass.) 80; Com. v. Haynes, 2 Gray (Mass.) 72; Com. v. Boon, 2 Gray (Mass.) 74; Com. v. Harris, 101 Mass. 29; Com. v. Oaks, 113 Mass. 8; 2 Bishop. Cr. Proc. (3rd ed.), § 862 and seq.

In State v. Baldwin, 1 Dev. & B. (N. Car.) 195, GASTON, J., said: "If the facts charged must, from their very nature, have created a nuisance to the citizens in general, the words *ad commune nocumentum*, though always proper and safest to be inserted, may be omitted, for they neither describe the crime nor the facts which constitute it. Such facts necessarily show the crime. If the facts charged show an offence inconvenient and troublesome, that may have extended its annoyance to the community, or may have reached only certain individuals of that community, the averment of *ad commune nocumentum* becomes indispensable. It then involves an actual enquiry as a matter of fact for the jury, into the extent of the annoyance. But an allegation in an indictment that certain facts charged were to the common nuisance of all the good citizens of the State, "will not make it a good indictment for a common nuisance unless these facts be of such a

nature as may justify that conclusion as one of law as well as of fact."

A nuisance is sufficiently averred to be public by charging that defendant collected together certain filth and allowed it to remain near certain dwelling-houses and a highway "to the great damage and common nuisance of the inhabitants of said houses and of all persons then and there passing upon and along the said" highway. Com. v. Sweeney, 131 Mass. 579.

An indictment for the common-law nuisance of keeping a house of ill fame must conclude "to the common nuisance," etc. State v. Stevens, 40 Me. 559.

An indictment for indecent exposure, which does not conclude, "to the common nuisance," etc., is aided by statute 14 and 15 Vict., ch. 100; Reg. v. Holmes, Dears. C. C. 207; 3 C. & K. 360; 22 L. J., N. C. 122.

It has been held that such a conclusion is not required in an indictment for a nuisance in or near a river which plainly appears to be a public navigable river, or to a way plainly appearing to be a highway. 7 Hawk. P. C., ch. 75, § 5; Rex v. Pappineau, 1 Strange 686.

In an indictment for damming up and stagnating the waters of a creek, whereby the air is corrupted and infected, and sends forth noisome and unwholesome smells, it is not sufficient to lay it "to the common nuisance of all the good citizens of this commonwealth, not only there residing and inhabiting, but also going, returning, passing and repassing by the neighborhood of the said pond;" nor "to the common nuisance of all the citizens of the commonwealth." Neither of these will supply the place of an averment that the obstruction caused a stagnation of the water in or near a public highway or some other place in which the public have a special interest. Com. v. Webb, 6 Rand. (Va.) 726.

4. Where a statute declares an act



**3. Evidence.**—Generally proof of the existence of the nuisance for a single day or even part of a day will be sufficient where an abatement is not sought.<sup>1</sup>

The rules of evidence common to trials of indictments generally are applicable.<sup>2</sup>

**4. Punishment.**—As, at common law and under the State statutes, the offence of maintaining an indictable nuisance is a misdemeanor only and not a felony, a conviction may be followed by fine and imprisonment.<sup>3</sup> If before the conviction the defendant has himself abated the nuisance, this may tend to reduce the punishment.<sup>4</sup>

**5. Abatement.**<sup>5</sup>—An abatement may be required as part of the sentence, where the necessary continuance has been alleged and proved.<sup>6</sup>

an offence if done "to the injury of the health or to the annoyance of the citizens," etc., a failure to charge such injury or annoyance is fatal. *State v. Wahl*, 35 Kan. 608.

1. *Com. v. Higgins*, 16 Gray (Mass.) 19; *Com. v. Gallagher*, 1 Allen (Mass.) 592, where a conviction was held to be supported by proof of the maintenance of the nuisance for two hours.

Where the indictment charges that the acts complained of "became, were, and still are," a public nuisance, evidence of the existence of the nuisance at any time within two years prior to the date laid in the indictment is admissible. *State v. Holman*, 104 N. Car. 861.

2. See, on questions of evidence, *Com. v. Brown*, 13 Met. (Mass.) 365; *Com. v. Mann*, 4 Gray (Mass.) 213; *State v. Mace*, 6 R. I. 85; *People v. Mallory*, 4 Thomp. & C. (N. Y.) 567; *Com. v. Twombly*, 119 Mass. 104; *Crippen v. People*, 8 Mich. 117; *Knox v. Mayor etc. of N. Y.*, 55 Barb. (N. Y.) 404; 38 How. Pr. (N. Y.) 67; *Com. v. Kelley*, 116 Mass. 341; *Palfus v. State*, 36 Ga. 280; *State v. Rankin*, 3 S. Car. 438; s. c., 16 Am. Rep. 737; *State v. Willis*, Busb. L. (N. Car.) 223; *State v. Commrs. of Cross Roads*, 3 Hill L. (S. Car.) 149; *Garrison v. State*, 14 Ind. 287.

3. *State v. Bell*, 5 Port. (Ala.) 365; *Rex v. White*, 5 Burr. 333. And see *State v. Munzenmaier*, 24 Iowa 87; *State v. Jordan*, 39 Iowa 387; *State v. Anwerda*, 40 Iowa 151.

Upon a conviction on an indictment at common law, for allowing a highway to become a nuisance, the defendant is liable only to the common law

punishment, no other punishment for not repairing highways being provided by statute. *Syracuse etc. Plank Road Co. v. People*, 66 Barb. (N. Y.) 25.

One indicted for a nuisance may be punished by fine, etc., though there be no judgment that the nuisance be abated. *State v. Noyes*, 30 N. H. 279.

4. The court may continue the case for sentence, in its discretion, to give an opportunity for a voluntary abatement. 2 Bishop Cr. Proc. (3rd ed.), § 870; *Rex v. —*, 2 Show. 60.

5. On the subject of abatement, generally, and as incident to civil actions, see that subtitle in this article; also ABATEMENT, 1 Am. & Eng. Encyc. of Law 6.

6. See *Reg. v. Chichester*, 2 Den. Crim. C. 458; 17 Q. B. 504; *Rex v. Wilcox*, 2 Salk. 458; *Rex v. Yorkshire*, 7 T. R. 467; *Rex v. Incledon*, 13 East 164; *Rex v. Commerell*, 4 M. & S. 203; *Rex v. Stead*, 8 T. R. 142; *Reg. v. Bateman*, 8 El. & Bl. 584; 4 Jur. N. S. 301; *Rex v. Pappineau*, 1 Stra. 686; *Jacob Hall's Case*, Vent. 169; 2 Roll. Abr. 84; *Hawk P. C. C.*, ch. 75; *Taggart v. Com.* 21 Pa. St. 527; *Delaware etc. Canal Co. v. Com.*, 60 Pa. St. 367; *Smith v. State*, 22 Ohio St. 539; *Matthews v. State*, 25 Ohio St. 536; *State v. Moffett*, 1 Greene (Iowa) 247; *Wroe v. State*, 8 Md. 416; *Morrison v. Marquardt*, 24 Iowa 35; s. c., 92 Am. Dec. 444; *Smart v. Com.*, 27 Gratt. (Va.) 950; *State v. Noyes*, 30 N. H. 279; *Welch v. Stowell*, 2 Doug. (Mich.) 332; *Crippen v. People*, 8 Mich. 117; *Maxwell v. Boyne*, 36 Ind. 120; *Wertz v. State*, 42 Ind. 161; *McLaughlin v. State*, 45 Ind. 338; *Droneberger v. State*, 112 Ind. 105; *Barclay*

**V. PRIVATE ACTION—1. Right of Action.**—A private action for a public nuisance is maintainable by one who suffers therefrom some particular loss or damage beyond that suffered by him in common with all others affected by the nuisance. Interference with a common right does not of itself afford a cause of action by an individual. Special or particular damage consequent on the interference does. An illustration in an ancient case is as follows: Where one makes a ditch across a highway and I am travelling in the night and with my horse fall into the ditch and so have great damage and inconvenience, I may have an action against him who made the ditch; though for the mere obstruction caused by the ditch there is no right of action, this being an inconvenience common to all.<sup>1</sup> There is no difficulty in this general statement of the rule and the exception. It is supported by all the cases. The difficulty is in the application to the facts of the cases wherein the rule has been invoked.<sup>2</sup>

*v. Com.*, 25 Pa. St. 503; s. c., 64 Am. Dec. 715; *Campbell v. State*, 16 Ala. 144.

"It seems to be the better opinion that the court of king's bench may, by a mandatory writ, prohibit a nuisance, and order that the same shall be abated; and that if the party disobeys the writ, he subjects himself to an attachment. But upon such attachment for proceeding after the writ of prohibition, there ought to be a declaration setting forth the nature of the offence, and that the same is a nuisance, and that, notwithstanding the writ of prohibition, the defendant proceeded in or continued it; to which if the defendant can in pleading set forth a sufficient justification his proceeding *post prohibitionem regiam* will be good in law, and himself discharged of all contempt." 7 Bacon Abr. 234.

Although an order for the abatement of a nuisance does not necessarily follow a conviction in a criminal case, or a verdict and judgment for the plaintiff in an action for damages, yet it is not a matter entirely within the discretion of the court. It is the court's duty to make such an order whenever the interests and comfort of the community or of individuals require the nuisance to be abated in whole or in part. *Maxwell v. Boyne*, 36 Ind. 120.

The defendant may be ordered to abate the nuisance at his own cost, and to stand committed until the sentence be complied with. *Taggart v. Com.*, 21 Pa. St. 527; *State v. Haines*, 30 Me. 65.

But it is error to command the sheriff to see that the order of abatement is

executed, as this is in effect commanding him personally to make the abatement. *Campbell v. State*, 16 Ala. 144.

Neither the common law nor statute authorizes the courts, on conviction for maintaining a nuisance by the unlawful use of a building, to order the building destroyed. It is only the unlawful use that can be abated. *Earp v. Lee*, 71 Ill. 193. See also *Brightman v. Bristol*, 65 Me. 426; s. c., 20 Am. Rep. 711; *Shepard v. People*, 40 Mich. 487; *Czarniecki's Appeal* (Pa. 1887), 11 Atl. Rep. 660.

The fact that the nuisance is situated on the land of a stranger is no reason for not abating it. *Delaware etc. Canal Co. v. Com.*, 60 Pa. St. 367.

1. *Fitzherbert*, J. Year Book, 27 Hen. VIII, 27, pl. 10.

2. In *Co. Lit.* 56a it is said that to maintain the action the plaintiff must prove that the damage he has sustained is not "common to others." Again in *Williams' Case*, 5 Coke 73, it is said: "But if any particular person afterwards by the nuisance done has more particular damage than any other, there, for that particular injury, he shall have a particular action on the case." In *Paine v. Patrick*, 3 Mod. 289, *HOLT*, C. J., said: "If a highway be so stopped that a man is delayed a little while on his journey, by reason whereof is damnified, or some important affair neglected, that is not such a special action for which an action on the case will lie; but that the damage ought to be direct and not consequential, as the loss of his horse or some corporal hurt in falling into a trench on the highway."

In *Hart v. Bassett*, T. Jones 156, a private action for obstructing a highway was allowed, because the plaintiff was compelled to employ servants and cattle to carry his goods by another and more difficult way on account of the obstruction.

In *Iveson v. Moore*, 1 Ld. Raym. 486; Salk. 15; 12 Mod. 262, the plaintiff declared that he had a colliery near a highway by which he used to carry his coals, and that the defendants stopped the way, and so the plaintiff lost the opportunity of selling his coals, which were greatly deteriorated. It was held that the declaration disclosed special damage, and that the action lay.

In *Hubert v. Groves*, 1 Esp. 148 (1794), the plaintiff declared that the defendant's obstruction of the highway prevented plaintiff from carrying on his business as a coal merchant in so advantageous a manner as he had a right to do, but that he was obliged to carry the coals by a circuitous route, and it was held that this was not such a special damage as to enable the plaintiff to maintain the action. This case cannot be reconciled with the two preceding cases; but its authority has since been greatly shaken, as in *Rose v. Miles*, 4 M. & S. 101, a case arising a few years afterwards, where it was held that an action lay where the defendant obstructed a public navigable creek by mooring his barge across the same and prevented the plaintiff from navigating his loaded barges, *per quod* he was obliged to carry his goods overland at great expense; and in *Greasly v. Codling*, 2 Bing. 263, where the plaintiff was in the habit of passing up and down a highway with coals and was detained four hours and could not carry as many loads in a day by the circuitous route which he was obliged to go in consequence of the defendant's obstruction of the highway, the action was maintained.

In *Maynell v. Saltmarsh*, 1 Keb. 847, the plaintiff brought his action against the defendant for erecting posts in a highway through which the plaintiff passed to and from his close, and alleged that his corn was corrupted and spoiled in consequence of the obstruction; and it was held that that was a sufficient special damage to support the plaintiff's action.

In *Chichester v. Lethbridge*, Willes 71, the plaintiff's action for the obstruction of a highway was allowed because he had on several occasions attempted

to remove the obstruction to enable him to pass, but had been prevented by the defendant, and this was deemed to distinguish his case from that of the public in general.

In *Wilkes v. Hungerford Market Co.* (1835), 2 Bing. N. C. 281, the plaintiff, a bookseller, having a shop by the side of a public thoroughfare, suffered in his business in consequence of passengers having been diverted from the thoroughfare by an unauthorized obstruction across it for an unreasonable time. The allegation of the plaintiff was, that by means of the obstruction he was prevented from carrying on his trade and business in so large, ample, and beneficial a manner as he otherwise might and would have done, and that he had lost and been deprived during the time that the obstruction existed of divers great gains and profits which might and otherwise would have arisen and accrued to him from carrying on the trade and business of a bookseller in his messuage and premises. The plaintiff proved the allegations in his writ and obtained a verdict. On the hearing of a motion for a nonsuit it was contended that the act of the defendants constituted a public nuisance, for which an indictment but not a civil action might lie. The whole court decided otherwise. The cases from the Year Books down were examined, and the case of *Hubert v. Groves* disapproved. In *Stetson v. Faxon*, 19 Pick. (Mass.) 147; 8 C., 31 Am. Dec. 123. *Wilkes v. Hungerford Market Co.*, was adopted in a full, careful judgment; but in *Beckett v. Midland R. Co.*, L. R., 3 C. P. 100, that case is treated as overruled by the remarks of Lord Chelmsford and Lord Cranworth in *Ricket v. Metropolitan R. Co.* (1867), L. R., 2 H. L. 188, 199.

In *Stetson v. Faxon*, the plaintiff averred his title to warehouses and real estate, and that by means of the obstructions made by the defendant upon the highway, his warehouses had been greatly obscured and injured, and access thereto prevented from and along the part of the highway so obstructed; that thereby the free communication which the plaintiff and other persons frequently resorting to his warehouses formerly enjoyed, had been greatly diminished and hindered; that he had suffered great damage from the nuisance, by reason of his warehouses and lands having been deserted by his ten-

ants, and left vacant and unoccupied by the frequent changes and removals of his tenants and occupiers, and that he had been obliged to reduce his rents, etc. The court said: "Now upon the authority of the adjudged cases before referred to, we are all of opinion that these are sufficient special injuries, peculiar to the plaintiff, and not common to all the citizens, for which the plaintiff may maintain his action, notwithstanding the defendant may be liable to answer upon an indictment for the public nuisance."

In *Hughes v. Heiser*, 1 Binn. (Pa.) 463; s. c., 2 Am. Dec. 459; and *Powers v. Irish*, 23 Mich. 429, it was held that there was a cause of action where the plaintiff in passing over a navigable stream with rafts of lumber was detained by the defendant's dam, and so lost the sale of the lumber at such prices as but for the detention he would have obtained.

In *Rose v. Groves*, 5 M. & G. 613, loss of trade by reason of an obstruction in a river was held to give a right of action.

In *Frink v. Lawrence*, 20 Conn. 117; s. c., 50 Am. Dec. 274, the owner of a wharf on a navigable river was held to have a right of action, where his approach was cut off. In *Lansing v. Smith*, 8 Cow. (N. Y.) 151, it was held otherwise in the first instance, but the court of errors 14 Wend. (N. Y.) 10 repudiated the doctrine announced by the supreme court. In *Cook v. Bath*, L. R., 6 Eq. Cas. 177, an injunction was granted against the placing of buildings on a highway in such a manner as to cut off the access to the plaintiff's premises.

In *Blanc v. Klumpke*, 29 Cal. 156, it was held that deprivation of access to the plaintiff's premises by reason of an obstruction in a highway was sufficient to sustain his action. And so in *Brakken v. Minneapolis etc. R. Co.*, 29 Minn. 41; *Ofstie v. Kelly*, 33 Minn. 440; *Schulte v. North Pac. Transp. Co.*, 50 Cal. 592; *Jaques v. National Exhibit Co.*, 15 Abb. N. Cas. (N. Y.) 250.

But simply cutting off one's facilities for making a new entrance to his lot from a public street was held not sufficient in *McLachlin v. Charlotte etc. R. Co.*, 5 Rich. L. (S. Car.) 583; *Shaubut v. St. Paul etc. R. Co.*, 21 Minn. 502.

In *Walker v. Shepardson*, 2 Wis. 384; s. c., 60 Am. Dec. 423, the action-

able nuisance greatly impaired the value and lawful use by the complainant of his wharf. In *Barnes v. Racine*, 4 Wis. 454, it interfered with the convenient use of the plaintiff's lots, wharves, ship yards and mills, and impaired their value. In *Williams v. Smith*, 22 Wis. 594, it cut off (or would have done so) the only way of access to the premises of the plaintiffs. In *Enos v. Hamilton*, 27 Wis. 256, it shut off access to plaintiff's mill, and deprived him of the use thereof, and prevented him from seasonably stocking it for future work. In *Wisconsin River Imp. Co. v. Lyons*, 30 Wis. 61, it caused a loss to the plaintiff of \$600 in tolls. In *Greene v. Nunne-macher*, 36 Wis. 50, it drove customers from the plaintiff's saloon and tavern, diminished his profits, and injured the health of himself and family. And in *Gates v. Northern Pac. R. Co.*, 64 Wis. 64, it stopped or delayed the boats and rafts of the plaintiff in their actual passage down a navigable river, to his great damage.

Being prevented from fulfilling a transportation contract, because of an obstruction of a navigable river by a boom, was deemed sufficient special damage in *Dudley v. Kennedy*, 63 Me. 465.

So the stopping of plaintiff's boat by a bridge wrongfully built in the river. *Little Rock etc. R. Co. v. Brooks*, 39 Ark. 403.

Where an owner of a lot erected a stoop and fence in front of it, so as materially to encroach upon the public sidewalk, it was held that the owner of a lot on the same street, 100 feet distant from the encroachment, could maintain an action to have it abated as a nuisance. *Crooke v. Anderson*, 23 Hun (N. Y.) 266.

But in *Shaubut v. St. Paul etc. R. Co.*, 21 Minn. 502, it was held that the owner and occupant of property abutting on a street could not maintain an action on account of an obstruction by a railroad company of a portion of the street upon which his property did not abut; that the plaintiff's injury differed from that of the public in degree only, and not in kind. This case was followed in *Barnum v. Minnesota Transfer R. Co.*, 33 Minn. 365.

In *South Carolina* the leading case is *Carey v. Brooks*, 1 Hill L. (S. Car.) 365, where it was held that an allegation that the plaintiff had incurred expense in clearing out the channel of a navigable stream and had suffered loss

in transporting his lumber to market under a contract to deliver it within a specified time did not present a case of special damage. This case was approved in *South Carolina Steamboat Co. v. South Carolina R. Co.*, 30 S. Car. 539, where it was held that a complaint alleging that plaintiff was a carrier of passengers on a navigable river; that defendant, a railway company, had erected a bridge, obstructing navigation; that by reason of said obstruction plaintiff had been prevented from freely navigating said stream in the ordinary course of business; that it had been compelled to remove a portion of one of its boats in order to pass such bridge, and rebuild it above, and had sustained loss in its business, did not allege such special injury to plaintiff as to constitute a cause of action.

The foregoing cases relate to obstructions in highways and navigable waters, but the principle on which their decisions rest is applicable to public nuisances generally; as, for example, in *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95; s. c., 90 Am. Dec. 181, it was held that an action may be maintained to recover damages for a nuisance to a dwelling-house, caused by carrying on works and operating machinery in the vicinity, which fill the air with smoke and cinders, and render it offensive or injurious to health, and shake the building so as to injure it and render its occupation uncomfortable, although all persons owning estates in the vicinity have sustained similar injuries from the same cause. Again the principle was applied in support of the right of action to the case of negligently keeping gunpowder on a public street to the especial danger of the individual complaining. *People v. Sands*, 1 Johns. (N. Y.) 78; s. c., 3 Am. Dec. 296. Carrying on a noxious trade. *Story v. Hammond*, 4 Ohio 376; *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Catlin v. Valentine*, 9 Paige (N. Y.) 575; s. c., 38 Am. Dec. 567; *Brady v. Weeks*, 3 Barb. (N. Y.) 157; *Rex v. Neil*, 2 C. & P. 485; *Mills v. Hall*, 9 Wend. (N. Y.) 315; s. c., 24 Am. Dec. 160; *Ottawa Gas Light Co. v. Thompson*, 39 Ill. 508; *Grabill v. Illinois Cent. R. Co.*, 50 Ill. 241; *Rex v. Dewsnap*, 16 East 194. To a bawdy house, the maintenance of which lessens the value of neighboring property. *Hamilton v. Whitridge*, 11 Md. 128; s. c., 69 Am. Dec. 184. To a steam-engine creating smoke to the injury of a neighboring

shop-keeper. *Sampson v. Smith*, 8 Sim. 272. To a dam, which by setting back water renders the atmosphere of the neighborhood unwholesome and creates sickness in the family of the complainant. *Mills v. Hall*, 9 Wend. (N. Y.) 315; s. c., 24 Am. Dec. 160. To stenches from a tannery, rendering the enjoyment of the complainant's dwelling uncomfortable and preventing the renting of a neighboring building owned by him. *Francis v. Schoellkopf*, 53 N. Y. 152. To a slaughter-house. *Catlin v. Valentine*, 9 Paige (N. Y.) 575; s. c., 38 Am. Dec. 567; *Brady v. Weeks*, 3 Barb. (N. Y.) 157; *Dubois v. Budlong*, 10 Bosw. (N. Y.) 700; *Fay v. Whitman*, 100 Mass. 76. To a rendering establishment. *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Meigs v. Lister*, 23 N. J. Eq. 199. To a planing mill. *Duncan v. Hayes*, 22 N. J. Eq. 25; *Cartwright v. Gray*, 12 Grant's Ch. Cas. (Ont.) 399; *Rhodes v. Dunbar*, 57 Pa. St. 274; s. c., 98 Am. Dec. 221; *Ross v. Butler*, 19 N. J. Eq. 294; s. c., 97 Am. Dec. 654; *Thebaut v. Canova*, 11 Fla. 143. A rolling mill. *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95; s. c., 90 Am. Dec. 181. Or other noisy trade. *Dennis v. Eckhardt*, 3 Grant's Cas. (Pa.) 390; *Scott v. Firth*, 10 L. T., N. S. 241; *Eaden v. Firth*, 1 H. & M. 573; *First Baptist Church v. Schenectady R. Co.*, 5 Barb. (N. Y.) 79. To gas works. *People v. New York Gas Light Co.*, 64 Barb. (N. Y.) 55; *Ottawa Gas Light Co. v. Thompson*, 39 Ill. 508; *Broadbent v. Imperial Gas Co.*, 7 H. L. Cas. 600; *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201. To the pollution of rivers. *Carhart v. Auburn Gas Light Co.*, 22 Barb. (N. Y.) 297; *Rex v. Medley*, 6 C. & P. 202. To the keeping of explosives and highly combustible substances. *Ryan v. Copes*, 11 Rich. L. (S. Car.) 217; s. c., 73 Am. Dec. 106; *Fillo v. Jones*, 2 Abb. Ct. App. Dec. (N. Y.) 121; *Wier's Appeal*, 74 Pa. St. 230; *Myers v. Malcolm*, 6 Hill (N. Y.) 292; s. c., 41 Am. Dec. 744; *Crowder v. Tinkler*, 19 Ves. 623; *Hepburn v. Lordan*, 13 L. T., N. S. 59. To a ditch creating a stench and sickness. To showcases on a sidewalk to the obstruction of the windows of a neighboring shopkeeper. *People v. New York*, 18 Abb. N. Cas. (N. Y.) 123 to an advertising attraction in a shop window drawing such crowds as to obstruct access to the complainant's premises. *Elias v. Sutherland*, 18 Abb.

Though the consequence is of a sort likely to ensue in many individual cases, it must be a distinct and specific one in the particular case. Where this test fails there can be no particular damage in a legal sense.<sup>1</sup>

If horses and wagons are kept standing for an unreasonable time in the highway opposite a man's house, so that the access of customers is obstructed, the house is darkened, and the people in it are annoyed by bad smells, this damage is sufficiently "particular, direct, and substantial" to entitle the occupier to maintain an action.<sup>2</sup>

The plaintiff must show actual damage sustained and not damage resting in contemplation merely. It is not enough, for example, that the obstruction to a highway or river would have resulted in damage to him had he attempted to use it so long as he did not make the attempt, or that, could he have used it, he would have saved money; though, in one sense, here is damage, it is not such damage as gives a right of action.<sup>3</sup>

For mere delay in a journey, or from being compelled to take a circuitous route, by reason of an obstruction in a river or a

N. Cas. (N. Y.) 126. To a frame building erected in violation of a city ordinance, and subjecting the complainant's premises to risk from fire. *Horstman v. Young*, 13 Phila. (Pa.) 19; *Blane v. Murray*, 36 La. An. 162; s. c., 51 Am. Rep. 7. To horses kept standing in a street so as to make a dwelling-house opposite uncomfortable from the smells. *Lippincott v. Lasher*, 44 N. J. Eq. 120. To an injury to the plaintiff's house from jar and vibration caused by the running of trains unlawfully in a public street. *Wilcken v. West Brooklyn R. Co.*, 1 N. Y. Supp. 791.

1. In *Stetson v. Faxon*, *supra*, the court said: "We know that extreme cases may be put, which makes it difficult to draw the line between substantial and imaginary damages," and supposed the case of a ditch across a street, and the absurdity of the proposition that every shopholder in the street could maintain an action for special damages to his estate, and added, "but it would not follow that because some owners of shops who lived a mile from the obstruction might not have special damages, those who lived near it might not . . . But suppose that twenty men in the course of one night should fall into that ditch and receive injury, could it be maintained that each of them might not severally recover special damages according to the extent of the actual injury received by each?"

2. *Benjamin v. Storr* (1874), L. R., 9 C. P. 400.

3. In *Rose v. Miles*, *cited* in previous note, LORD ELLENBOROUGH said: "The plaintiff had actually commenced his course down the river, and was actually using it when he was obstructed, and his damages did not rest in contemplation." This also was the case in *Hart v. Bassett*, where the plaintiff was obstructed while actually travelling over the road, and in *Hughes v. Heiser*, where he met the obstruction while going down the river with his raft. See also *Baxter v. Winoski Turnpike Co.*, 22 Vt. 114; s. c., 52 Am. Dec. 84; *Hatch v. Vermont etc. R. Co.*, 28 Vt. 142.

In *Pierce v. Dart*, 4 Cow. (N. Y.) 609, the plaintiff had removed several times, while passing with his team, the fence which constituted the obstruction complained of, and it was held that the expense of such removal, though trifling in amount, and the delay and labor incident thereto, supported the action.

But in *Winterbottom v. Lord Derby* (1867), L. R., 2 Ex. 316, 322, it was said that, if the same man is at divers times delayed by the same obstruction, and incurs expense in removing it, this is not of itself sufficient particular damage; the damage, though real, is "common to all who might wish, by removing the obstruction, to raise the question of the right of the public to use the way."

road, it would seem from the weight of authority that a cause of action does not arise.<sup>1</sup>

To support an action the damage must differ in kind as well as in degree from that suffered in common. That the plaintiff suffers more inconvenience than others from his proximity to the nuisance is not enough.<sup>2</sup>

1. Wood on Nuisances (2nd ed.), § 653.

In *Clark v. Chicago etc. R. Co.*, 70 Wis. 593, it was held that where by reason of a bridge obstructing a navigable stream the plaintiff, engaged in carrying passengers and freight by steamboat, was compelled to take a more circuitous route, increasing the distance about four miles, and making the carriage of freight more expensive, the plaintiff had failed to show any damage special to himself, and not suffered by all persons navigating the river.

In *Houch v. Wachter*, 34 Md. 265; s. c., 6 Am. Rep. 332, it was held that the fact that the obstruction complained of in the highway compelled the plaintiff to return to his home by a very circuitous route, was not enough to support his action. In *Brown v. Watson*, 47 Me. 161; s. c., 74 Am. Dec. 482, it was held otherwise; and so in *Pittsburgh v. Scott*, 1 Pa. St. 309. See *Farrelly v. Cincinnati*, 2 Disney (Ohio) 516, where the subject is discussed.

2. *Simpson v. Savage*, 8 Minn. 272; *Howard v. Lee*, 3 Sandf. (N. Y.) 281; *Demarest v. Hardham*, 34 N. J. Eq. 469; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396; *Whitsett v. Union Depot etc. Co.*, 10 Colo. 243; *Gold v. Philadelphia*, 115 Pa. St. 184; *Mechling v. Kittanning Bridge Co.*, 1 Grant's Cas. (Pa.) 416; *Quincy Canal v. Newcomb*, 7 Metc. (Mass.) 283; *Grant v. Schmidt*, 22 Minn. 1; *Palmer v. Waddell*, 22 Kan. 352; *Atchison etc. R. Co. v. Nave*, 38 Kan. 744; *Corley v. Lancaster*, 81 Ky. 171; *Seifried v. Hayes*, 81 Ky. 377; s. c., 50 Am. Rep. 167.

In *Blood v. Nashua etc. R. Co.*, 2 Gray (Mass.) 137; s. c., 61 Am. Dec. 444, an obstruction in a navigable stream which caused the water to flow back upon the plaintiff's mills was held to give him a cause of action. In *Brightman v. Fairhaven*, 7 Gray (Mass.) 271, it was held that the depreciation in value of plaintiff's land because of such obstruction was not such damage as gave a private right of

action. So in *Willard v. Cambridge*, 3 Allen (Mass.) 574; *Fall River Iron Co. v. Old Colony etc. R. Co.*, 5 Allen (Mass.) 221; and again in *Harvard College v. Stearns*, 15 Gray (Mass.) 1.

In *Brayton v. Fall River*, 113 Mass. 218, the Massachusetts authorities were reviewed, and the court said that the tendency in that State was to restrict the right to bring a private suit within narrower limits than in some of the English cases, and held that an action lay in favor of a wharf owner who was prevented by the obstruction from having vessels lie at the wharf as formerly.

The following cases are referred to as illustrating and supporting the doctrines enunciated in the text and elucidated by the cases cited in the foregoing notes. To review them in detail would require more space than it would be justifiable to consume. It is believed that the cases reviewed sufficiently show the growth and the present condition of the law of the subject:

*Alabama*—*Hall v. Ragsdale*, 4 S. & P. (Ala.) 252; *Rosser v. Randolph*, 7 Port. (Ala.) 238; s. c., 31 Am. Dec. 712; *Crommelin v. Cox*, 30 Ala. 318; s. c., 68 Am. Dec. 120.

*California*—*Gunter v. Geary*, 1 Cal. 467; *Farrott v. Floyd*, 54 Cal. 534; *Jarvis v. Santa Clara Valley R. Co.*, 52 Cal. 438; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396; *Payne v. McKinley*, 54 Cal. 532; *Aram v. Schallenberger*, 41 Cal. 449; *Yolo Co. v. Sacramento*, 36 Cal. 193; *Bigley v. Nunan*, 53 Cal. 403.

*Connecticut*—*Clark v. Saybrook*, 21 Conn. 319; *Allen v. Lyon*, 2 Root (Conn.) 213; *Burrows v. Pixley*, 1 Root (Conn.) 362; s. c., 1 Am. Dec. 56; *O'Brien v. Norwich etc. R. Co.*, 17 Conn. 372; *Seely v. Bishop*, 19 Conn. 128; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; s. c., 36 Am. Dec. 502.

*Florida*—*Geigor v. Filor*, 8 Fla. 325; *Alden v. Pinney*, 12 Fla. 348.

*Georgia*—*Savannah R. Co. v. Shields*, 33 Ga. 601; *South Carolina R. Co. v. Moore*, 28 Ga. 398; s. c., 73 Am. Dec. 778; *Georgia Chemical etc. Co. v. Colquitt*, 72 Ga. 172.

*Illinois*—Railroad Co. v. St. Louis, 5 Chicago Leg. News 49; Chicago v. Union Building Assoc., 102 Ill. 379.

*Iowa*—Innis v. Cedar Rapids etc. R. Co., 76 Iowa 165.

*Kansas*—Billard v. Erhart, 35 Kan. 611; Venard v. Cross, 8 Kan. 248; School District v. Neil, 35 Kan. 617.

*Kentucky*—Gateswood v. Blincoe, 2 Dana (Ky.) 158; Lexington etc. R. Co. v. Applegate, 8 Dana (Ky.) 289; s. c., 33 Am. Dec. 497; Seifried v. Hays, 81 Ky. 377; s. c., 50 Am. Rep. 167.

*Louisiana*—Bruning v. New Orleans etc. Co., 12 La. An. 541.

*Maine*—Holmes v. Corthell, 80 Me. 31; Dudley v. Kennedy, 63 Me. 465; Cole v. Sprowl, 35 Me. 161; s. c., 56 Am. Dec. 606; Low v. Knowlton, 26 Me. 128; s. c., 45 Am. Dec. 100; Veazie v. Dwinel, 50 Me. 490; Gerrish v. Brown, 51 Me. 256; s. c., 81 Am. Dec. 569; Knox v. Chaloner, 42 Me. 150; Norcross v. Thoms, 51 Me. 503; s. c., 81 Am. Dec. 508.

*Maryland*—Harrison v. Sterrett, 4 Har. & M. (Md.) 540; Mayor v. Marriott, 9 Md. 160; Norwood v. Norwood, 4 Har. & J. (Md.) 112; Adams v. Michael, 38 Md. 123; s. c., 17 Am. Rep. 516.

*Massachusetts*—Barden v. Crocker, 10 Pick. (Mass.) 388; Charles River Bridge Co. v. Warren Bridge, 6 Pick. (Mass.) 376; Boston Rolling Mills v. Cambridge, 117 Mass. 396; Smith v. Smith, 2 Pick. (Mass.) 621; s. c., 13 Am. Dec. 464.

*Minnesota*—Shaubut v. St. Paul etc. R. Co., 21 Minn. 502; Ofstie v. Kelly, 33 Minn. 440; Barnum v. Minnesota Transfer Co., 33 Minn. 365.

*Missouri*—Cummings v. St. Louis, 90 Mo. 259; Drubach v. Hannibal, 89 Mo. 483; Glaessner v. Anheuser Bursch etc. Assoc., s. c., 89 Mo. 483; Smith v. McConathy, 11 Mo. 517; Welton v. Martin, 7 Mo. 307.

*Nevada*—Fogg v. Nevada etc. R. Co., 20 Nev. 429.

*New Hampshire*—Runnels v. Bullen, 2 N. H. 532.

*New Jersey*—Board of Health v. New York etc. Co. (N. J. 1890), 19 Atl. Rep. 1098; McDonald v. Newark, 42 N. J. Eq. 136; Zabriskie v. Jersey City etc. Co., 13 N. J. Eq. 314; Hinchman v. Patterson etc. R. Co., 17 N. J. Eq. 75; Babcock v. New Jersey Stockyard Co., 20 N. J. Eq. 206; Allen v. Board of Freeholders, 13 N. J. Eq. 68; Norris etc. R. Co. v. Prudden, 20 N. J. Eq. 530; Runyon v. Bordine, 14 N. J.

L. 472; Newark Aqueduct Board v. Passaic, 45 N. J. Eq. 393; Bechtel v. Carslake, 11 N. J. Eq. 500.

*New York*—Penniman v. New York Balance Co., 13 How. Pr. (N. Y.) 40; Corning v. Lowerrre, 6 Johns. Ch. (N. Y.) 439; Milhan v. Sharp, 27 N. Y. 614; s. c., 28 Barb. (N. Y.) 228; s. c., 84 Am. Dec. 314; Smith v. Lockwood, 13 Barb. (N. Y.) 209; Manhattan Gaslight Co. v. Barker, 36 How. Pr. (N. Y.) 233; Dougherty v. Bunting, 1 Sandf. (N. Y.) 1; Wetmore v. Story, 22 Barb. (N. Y.) 414; Croton Turnpike Co. v. Ryder, 1 Johns. Ch. (N. Y.) 611; Doolittle v. Broome Co., 18 N. Y. 160; Davis v. Mayor etc. of New York, 14 N. Y. 526; s. c., 67 Am. Dec. 186; Gilbert v. Mickle, 4 Sandf. Ch. (N. Y.) 357.

*N. Carolina*—Gordon v. Baxter, 74 N. Car. 470.

*Ohio*—Columbus Gas Light Co. v. Freeland, 12 Ohio St. 392.

*Oregon*—Parrish v. Stephens, 1 Oreg. 73; Roseburg v. Abraham, 8 Oreg. 509.

*Pennsylvania*—Sparhawk v. Union etc. R. Co., 54 Pa. St. 401; Smith v. Cummings, 2 Pars. Eq. (Pa.) 92; Mechling v. Kittanning Bridge Co., 1 Grant's Cas. (Pa.) 416; Price v. Grantz, 118 Pa. St. 402; Pittaburgh v. Scott, 1 Pa. St. 309; Philadelphia v. Collins, 68 Pa. St. 106; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Biddle v. Ash, 2 Ashm. (Pa.) 211.

*Rhode Island*—Clark v. Peckham, 10 R. I. 35; Hughes v. Providence R. Co., 2 R. I. 493.

*S. Carolina*—McLauchlin v. Charlotte etc. R. Co., 5 Rich. L. (S. Car.) 583.

*Tennessee*—Franklin Turnpike Co. v. Crockett, 2 Sneed (Tenn.) 263; Cheatham v. Shearon, 1 Swan (Tenn.) 213; Memphis R. Co. v. Hicks, 5 Sneed (Tenn.) 427; Wall v. Cloud, 3 Humph. (Tenn.) 181; Phillips v. Stocket, 1 Overt. (Tenn.) 200.

*Texas*—Shephard v. Barnett, 52 Tex. 638.

*Vermont*—Abbott v. Mills, 3 Vt. 529; s. c., 23 Am. Dec. 222; Hatch v. Vermont Cent. R. Co., 28 Vt. 142.

*Virginia*—Miller v. Truehart, 4 Leigh (Va.) 569; Beveridge v. Lacy, 3 Rand. (Va.) 63.

*West Virginia*—Talbot v. King, 32 W. Va. 6.

*Wisconsin*—Carpenter v. Mann, 17 Wis. 155; Hall v. Kltson, 4 Chand. (Wis.) 20; Godsell v. Fleming, 59 Wis. 52.



**2. Form of Action.**—The civil remedy at law is found in the action on the case when not modified by statute.<sup>1</sup>

This remedy has succeeded the ancient remedies of *quod permittat* and assize of nuisance. The former of these was a writ in the nature of a writ of right, commanding the defendant to permit the plaintiff to abate the nuisance complained of, or to show cause why he will not. Before the statute of Westminster, this was the only remedy where the originator of the nuisance had aliened the land on which it was situated, and the writ lay on behalf of an alienee of the property injured as well as against the alienee of the original wrongdoer.<sup>2</sup> This writ was abolished in *England* by statute,<sup>3</sup> and is entirely obsolete in the *United States*.

An assize of nuisance was a common-law writ, issued at the instance of the tenant of the freehold, complaining of some act done *ad nocumentum liberi tenementi sui*, and commanding the sheriff to summon a jury to view the premises; and if they found for the plaintiff, he was entitled to a judgment abating the nuisance and for damages.<sup>4</sup>

This writ has long been obsolete in *England*, and was finally abolished by statute.<sup>5</sup> It has been recognized in the *United States*, but hardly ever employed, and is now either abolished or

*United States*—*Miller v. Mayor* etc. of N. Y., 109 U. S. 385; *Georgetown v. Alexandria Canal Co.*, 1 Pet. (U. S.) 91; *Baird v. Shore Line R. Co.*, 6 Blatchf. (U. S.) 276; *Mississippi etc. R. Co. v. Ward*, 2 Black (U. S.) 485; *Woodman v. Kilbourn Mfg. Co.*, 1 Abb. (U. S.) 158; *Pennsylvania v. Wheeling etc. Bridge Co.*, 13 How. (U. S.) 565; *Spooner v. McConnell*, 1 McLean (U. S.) 337; *Tyler v. Wilkinson*, 4 Mason (U. S.) 397.

*District of Columbia*—*Nottingham v. Baltimore etc. R. Co.*, 3 McArthur (D. C.) 517.

*England*—*Hunt v. Peake*, 29 L. J. Ch. 785; *Weller v. Baker*, 2 Wils. 422; *Soltan v. DeHeld*, 9 Eng. L. & Eq. 102; *Butterfield v. Forrester*, 11 East 60; *Acton v. Blundell*, 12 M. & W. 324; *Atkinson v. Teassdale*, 3 Wils. 290; *Mellor v. Spateman*, 2 Saund. 346; *Flower v. Adam*, 2 Taunt. 314; *Hassard v. Cantrell*, 1 Lut. 107; *Wright v. Howard*, 1 Sim. & Stu. 190; *Greenhow v. Illsey*, Willes 610; *Stone v. Wake-man*, Noy 120; *Kelk v. Pearson*, L. R., 6 Ch. 809; *Allen v. Ormond*, 8 East 4; *Knight v. Gardner*, 19 L. T., N. S. 673; *Mason v. Hill*, 5 B. & Ad. 1; *Hobson v. Todd*, 4 T. R. 73; *Brown v. Windsor*, 1 Cr. & J. 27; *Rogers v. Taylor*, 27 L. J. Exch. 173; *Bankart v. Houghton*,

27 Beav. 425; *Wells v. Watling*, 2 W. Bl. 1233; *Dent v. Auction Mar. Co.*, L. R., 2 Eq. 238; *Bendlovs v. Kemp*, Cro. Eliz. 664; *Crossley v. Lightowler*, L. R., 3 Eq. 279; *Saunders v. Newman*, 1 B. & Ald. 258; *Ashby v. White*, 2 Ld. Raym. 938; *Pindar v. Wadsworth*, 2 East 155; *Martin v. Headon*, L. R., 2 Eq. 425; *Williams v. Morland*, 2 B. & C. 910; *Gaved v. Martyn*, 34 L. J. (C. P.) 353; *Fay v. Prentice*, 1 C. B. 828; *Fowler v. Sanders*, Cro. Jac. 446; *Brouge v. Moore*, Styles 428; *Ayre v. Pydombe*, Styles 164; *Smith v. Feverell*, 2 Mod. 6; *Sampson v. Hodinott*, 26 L. J., C. P. 148; *Fineux v. Hovenden*, Cro. Eliz. 664; *Morley v. Pragnell*, Cro. Car. 510; *Aldred's Case*, 9 Coke 58; *Cook v. Forbes*, L. R., 5 Eq. 166; *Tipping v. St. Helen's Smelting Co.*, 4 B. & S. 608; *Cook v. Corporation of Bath*, L. R., 6 Eq. 177; *Mary's Case*, 9 Coke 112.

1. Bacon's Abr., tit. Action on the Case for a Nuisance. *Codman v. Evans*, 7 Allen (Mass.) 431; s. c., 81 Am. Dec. 748.

2. 3 Black. Com. 221; F. N. B. 124; 5 Coke 100, 101.

3. 3 and 4 Wm. IV, ch. 27.

4. 3 Black. Com. 221; 1 Com. Dig. 422.

5. 3 and 4 Wm. IV, ch. 27.

obsolete.<sup>1</sup>

The court, after verdict in an action of the case at common law, is without power to order an abatement. For this reason and because of the superior utility and flexibility of the procedure in equity, the aid of a court of equity is generally invoked. Statutory modifications of the legal action have in some States supplied the omission of the right of abatement by order of the court. Mr. Wood, however, says that his researches lead him to the conclusion that it is only in extreme cases that a court of law will order the prostration or removal of a nuisance, even after conviction on an indictment.<sup>2</sup>

**3. Parties**—(See also PARTIES TO ACTIONS)—(a) *Parties Plaintiff*.—If the action is at law, those having distinct interests affected by the same nuisance must bring separate actions.<sup>3</sup>

If the suit is in equity, it would seem from the weight of authority that several whose injuries from the same nuisance vary only in degree may join.<sup>4</sup>

(b) *Parties Defendant*.—The person primarily liable for a nuisance is he who actually creates it, whether on his own land or not. The owner or occupier of land on which a nuisance is created, though not by himself or by his servants, may also be liable in certain conditions. If a man lets a house or land with a nuisance on it, he as well as the lessee is answerable for the continuance thereof, if it is caused by the omission of repairs which,

1. *Kintz v. McNeal*, 1 Den. (N. Y.) 436; *Brown v. Woodworth*, 5 Barb. (N. Y.) 550; *Ellsworth v. Putnam*, 16 Barb. (N. Y.) 565; *Hutchins v. Smith*, 63 Barb. (N. Y.) 251; *Tate v. Parrish*, 7 Mon. (Ky.) 325; *Livezey v. Gorgas*, 1 Binn. (Pa.) 251; *Barnet v. Ihrle*, 17 S. & R. (Pa.) 174; *Maris v. Parry*, 3 Rawle (Pa.) 413; *Clark v. Peckham*, 9 R. I. 455.

2. Wood on Nuisances (2nd ed.), § 843.

See for an examination of various statutory provisions in relation to abatement by order of court, *Weimer v. Lowery*, 11 Cal. 104; *Stiles v. Laird*, 5 Cal. 120; s. c., 63 Am. Dec. 110; *De Costa v. Massachusetts F. W. etc. Co.*, 17 Cal. 613; *Bear River etc. Co. v. Bates*, 24 Cal. 359; *Coburn v. Ames*, 52 Cal. 385; *Bracount v. State*, 5 Ind. 499; *Cromwell v. Lowe*, 14 Ind. 234; *Pettis v. Johnson*, 56 Ind. 739; *Williamson v. Yingling*, 93 Md. 42; *Bemis v. Clark*, 11 Pick. (Mass.) 452; *Codman v. Evans*, 7 Allen (Mass.) 431; s. c., 81 Am. Dec. 748; *Ottumwa v. Chinn* (Iowa, 1888), 39 N. W. Rep. 670; *Applegate v. Winebrenner* 66 Iowa 67; *Gribben v. Hansen*, 69 Iowa 255; *Hutchins v. Smith*,

63 Barb. (N. Y.) 251; *Crooke v. Anderson*, 23 Hun (N. Y.) 266; *Clark v. Peckham*, 9 R. I. 455; *Colstrum v. Minneapolis etc. R. Co.*, 33 Minn. 516; *Wetter v. Campbell*, 60 Ga. 266; *Holmes v. Jones*, 80 Ga. 659; *Lassater v. Garrett*, 4 Baxt. (Tenn.) 368; *Ankeny v. Fairview Milling Co.*, 10 Oreg. 390; *Kothenberthal v. Salem Co.*, 13 Oreg. 604.

3. *Great Falls Co. v. Worster*, 15 N. H. 412; *Hellams v. Switzer*, 24 S. Car. 39; *Fogg v. Nevada etc. R. Co.*, 20 Nev. 429.

4. In *Reid v. Gifford*, Hopk. Ch. (N. Y.) 419, such joinder was allowed, and so in *Peck v. Elder*, 3 Sandf. (N. Y.) 126, and in *Murray v. Hay*, 1 Barb. Ch. (N. Y.) 59; s. c., 43 Am. Dec. 773, thus establishing the rule in *New York*. In *Grant v. Schmidt*, 22 Minn. 1, these cases were followed, and so in *Snyder v. Cabell*, 29 W. Va. 48, and *Town of Sullivan v. Phillips*, 110 Ind. 320. In *Snyder v. Cabell*, the authorities were reviewed, and it was conceded that the English rule was the other way. In *New Jersey* it was held that separate suits were necessary. *Hendelman v. Patterson etc. R. Co.*, 17 N. J. Eq. 75;

as between himself and the tenant, he is bound to make,<sup>1</sup> but not otherwise.<sup>2</sup> If the landlord has not agreed to repair, he is not liable for defects of repair happening during the tenancy, even if he habitually looks to the repairs in fact.<sup>3</sup> It seems the better opinion that where the tenant is bound to repair, the lessor's knowledge, at the time of letting, of the state of the property demised makes no difference, and that only something amounting to an authority to continue the nuisance will make him liable.<sup>4</sup>

Again, an occupier who by licence (not parting with the possession) authorizes the doing on his land of something whereby a nuisance is created is liable.<sup>5</sup> But a lessor is not liable merely because he has demised to a tenant something capable of being so used as to create a nuisance, and the tenant has so used it.<sup>6</sup> Nor is an owner not in possession bound to take any active steps to remove a nuisance which has been created on his land without his authority and against his will.<sup>7</sup>

If one who has erected a nuisance on his land conveys the land to a purchaser who continues the nuisance, the vendor remains liable, and the purchaser is also liable if on request he does not remove it.<sup>8</sup>

So, too, any person who contributes to the production of a nuisance may be made chargeable therewith, although many others contributed thereto, and his act alone would not constitute a nuisance; but the combined effect of which is to create an actionable injury; as, if several persons drain their premises into the same ditch, the waters from which are discharged near the premises of another, and produce an injury, either to his estate or to its comfortable enjoyment, each of the persons so using the drain is liable, in separate actions, for the damages occasioned by him, or to indictment therefor.<sup>9</sup> Or if several persons use a private way in a manner different from what they have lawful right to use it, although there is no concert between them in its use, and each uses it on his own account and at different times, although the unlawful use by either one of the parties would not constitute an actionable obstruction, yet if the use, by all of them combined, creates a nuisance to others, an action may be

Morris etc. R. Co. v. Prudden, 20 N. J. Eq. 530; Demarest v. Hardham, 34 N. J. Eq. 469. In *Hellens v. Switzer*, 24 S. Car. 39, the question arose under the Code, and it was held that as the cause of action was legal rather than equitable, there could be no joinder.

1. *Todd v. Flight*, 9 C. B., N. S. 377.

2. *Pretty v. Bickmore*, L. R., 8 C. P. 401; *Gwinnell v. Eamer*, L. R., 10 C. P. 658.

3. *Nelson v. Liverpool Brewery Co.*, 2 C. P. Div. 311.

4. See cases cited in note 2, *supra*.

5. *White v. Jameson*, 18 L. R., Eq. 303.

6. *Rich v. Basterfield*, 4 C. B. 783.

7. *Saxby v. Manchester etc. R. Co.*, L. R., 4 C. P. 198.

8. *Penruddock's Case*, 5 Co. Rep. 101a; *Pollock on Torts* 350, 351.

9. *Duke of Buccleugh v. Cowan*, 5 Macph. 214; *McAuley v. Roberts*, 13 Grant's Cas. (U. C.) 565; *Crossley v. Lightowler*, L. R., 2 Ch. 486; *Chipman v. Palmer*, 9 Hun (N. Y.) 517; s. c., 77 N. Y. 51; s. c., 33 Am. Rep. 566.

maintained against each of the parties whose acts contribute to the nuisance.<sup>1</sup>

Where several have contributed to the creation or maintenance of the same nuisance, they may be sued jointly, under the rule applicable to joint tortfeasors,<sup>2</sup> or any one of them may be sued without joining the others.<sup>3</sup>

(c) *Where Premises Have Been Leased*.—See LANDLORD AND TENANT.

(d) *When Premises Have Been Sold*.—See VENDOR AND PURCHASER.

**4. Venue**—(See also VENUE).—If an abatement is sought, the action is local and must be brought in the county where the nuisance exists; and a variance between allegation and proof is fatal.<sup>4</sup> If, however, damages only are sought, it has been held in some jurisdictions that though the erection or thing from which the injury proceeds is in one county, an action may lie in another county wherein injury is inflicted.<sup>5</sup>

**5. Pleading**.—The declaration or complaint must specifically describe the nuisance complained of, and one of a materially different character cannot be shown.<sup>6</sup>

But it is not necessary that the word “nuisance” be used in describing the thing complained of; it is sufficient if the facts which render it a nuisance are alleged.<sup>7</sup>

1. *Thorpe v. Brumfitt*, 8 L. R., Ch. 654; *Wood on Nuisances* (2nd ed.), § 831; *Cooley on Torts* 608; *Chenango v. Lewis Bridge Co.*, 63 Barb. (N. Y.) 111.

2. *Irvin v. Wood*, 4 Robt. (N. Y.) 138; *Anderson v. Dickie*, 26 How. Pr. (N. Y.) 105; *Rogers v. Stewart*, 5 Vt. 215; s. c., 26 Am. Dec. 296; *Buddington v. Shearer*, 20 Pick. (Mass.) 477; *Grogan v. Pope Iron etc. Co.*, 87 Mo. 323.

3. All persons who aid or assist in creating and maintaining a nuisance (as here a powder magazine) are jointly liable for the damages. *Comminge v. Stevenson*, 76 Tex. 652.

4. It is no answer to an action against one for creating a nuisance that he only contributed in a slight degree to a nuisance for which others not parties are chiefly responsible. The plaintiff has a right to proceed against each one of the wrongdoers. *Thorpe v. Brumfitt*, 8 L. R., Ch. 650; *Blair v. Deakin*, 57 L. T. 522; *Nixon v. Tyne-mouth Rural Sanitary Authority*, 52 J. P. 504.

5. *Warren v. Webb*, 1 Taunt. 379; *Simmons v. Lillystone*, 8 Exch. 441; *Richardson v. Locklin*, 6 B. & S. 777; 34 L. J., Q. B. 225.

6. In the case of a rendering establishment in *New Jersey*, it was held that an action was maintainable in *New York* to recover damages for the offensive stenches proceeding therefrom. *Ruckman v. Green*, 9 Hun (N. Y.) 225. And in *Thompson v. Crocker*, 9 Pick. (Mass.) 59, it was held that an action to recover damages for an injury to a mill privilege might be brought in the county where the mill was located, though the dam from which the injury proceeded was in another county. And so in *Barden v. Crocker*, 10 Pick. (Mass.) 383. In *Deacon v. Shreve*, 22 N. J. L. 176, the court held likewise; but in *Jacks v. Moore*, 23 Ark. 31; *Oliphant v. Smith*, 3 P. & W. (Pa.) 180, and *Prevost v. Gorrell*, 2 W. N. C. (Pa.) 440, the rule was declared to be otherwise.

7. Anonymous, 1 Ld. Raym. 452; *O'Brien v. St. Paul*, 18 Minn. 176.

7. *Laffin & Rand Powder Co. v. Tearney*, 131 Ill. 322.

In case for obstructing a navigable river, to the plaintiff's injury, etc., where the declaration averred that on, etc., at the county of M (in which the suit was brought), the defendant built a dam across the east fork of White River, in said county, the said river

The particular use of the property complained of should be stated, but the particular mode of the creation of the nuisance need not be.<sup>1</sup>

While the defendant's title to the property need not be set forth, enough must be stated to show his liability for the existence of the nuisance.<sup>2</sup>

If the defendant's negligence is of the gist of the action, this also must be alleged, as, for example, where the cause of action arises from an explosion<sup>3</sup> or the undermining of a building by excavating,<sup>4</sup> or from the negligent acts of those charged with the extension of a public duty.<sup>5</sup> As a general rule, however, negligence is not an element in an action for a nuisance.

In certain cases, also, notice on the defendant's part must be set forth, as, for example, where the nuisance from which the injury resulted was a dangerous domestic animal.<sup>6</sup>

The declaration must also allege the special injury suffered by the plaintiff, if the nuisance is a public one; and this must be proved substantially as alleged.<sup>7</sup> But in actions for private nuisances all the damages which naturally and probably result may be recovered, whether specially alleged or not.<sup>8</sup>

The omission of an averment of special damage in a private action for a public nuisance is not cured by verdict.<sup>9</sup> Where the

being then and there a navigable stream, it was held that, after verdict, the declaration could not be objected to for not stating more explicitly that the river was a public highway. *Tyrrell v. Lockhart*, 3 Blackf. (Ind.) 136.

1. *Ellis v. Rowles*, Willes 638.

2. *Chipman v. Palmer*, 77 N. Y. 51; 33 Am. Rep. 566; *Rider v. Smith*, 3 T. R. 767; *Cheetham v. Hampson*, 4 T. R. 318.

3. *People v. Sands*, 1 Johns. (N. Y.) 78; s. c., 3 Am. Dec. 296; *Weir's Appeal*, 74 Pa. St. 234; *Losee v. Buchanan*, 51 N. Y. 476; s. c., 10 Am. Rep. 623.

4. *Panton v. Holland*, 17 Johns. (N. Y.) 92; s. c., 8 Am. Dec. 369; *Thurston v. Hancock*, 12 Mass. 220; s. c., 7 Am. Dec. 57; *Moody v. McClelland*, 39 Ala. 45; s. c., 84 Am. Dec. 770; *Lasala v. Holbrook*, 4 Paige (N. Y.) 169; s. c., 25 Am. Dec. 524.

5. *Johnson v. Atlantic etc. R. Co.*, 35 N. H. 569; *Waterman v. Connecticut etc. R. Co.*, 30 Vt. 610; s. c., 73 Am. Dec. 326; *Lawrence v. Great Northern R. Co.*, 4 Eng. L. & Eq. 265; 16 Q. B. 643.

6. *Partlow v. Haggerty*, 35 Ind. 178; *Kelley v. Tilton*, 2 Abb. Ct. App. Dec. (N. Y.) 459.

7. *Clark v. Peckham*, 9 R. I. 455; *Smith v. McConathy*, 11 Mo. 515;

*Venard v. Cross*, 8 Kan. 248; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 193.

8. *Panton v. Holland*, 17 Johns. (N. Y.) 92; s. c., 8 Am. Dec. 369; *Lasala v. Holbrook*, 4 Paige (N. Y.) 169; s. c., 25 Am. Dec. 524; *Thurston v. Hancock*, 12 Mass. 220; s. c., 7 Am. Dec. 57; *Moody v. McClelland*, 39 Ala. 45; s. c., 84 Am. Dec. 770.

In an action for a private nuisance from a steam cotton press, allegations of increased danger from fire and liability to explode, thereby rendering the plaintiff's dwelling unfit for residence, and impairing the value of his property, are sufficient. *Ryan v. Copes*, 11 Rich. L. (S. Car.) 217; s. c., 73 Am. Dec. 106.

Where the complaint alleges that the nuisance has occasioned several distinct injuries to the plaintiff, the amount of the damage caused by each injury must be averred, otherwise the complaint will be ambiguous and uncertain. *Grandona v. Lavdal*, 70 Cal. 161.

9. *Platte & Denver Ditch Co. v. Anderson*, 8 Colo. 131; *Clark v. Peckham*, 9 R. I. 455; *Venard v. Cross*, 8 Kan. 248; *O'Brien v. St. Paul*, 18 Minn. 176; *Smith v. McConathy*, 11 Mo. 517; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396; *Sampson v. Smith*, 8 Sim. 272; *Francis v. Schoellkopf*, 53 N. Y. 152; *Wesson v. Washburne Iron Co.*,

erection is not such as necessarily to imply an injury, and the nuisance complained of is not in the original erection, but in the defendant's wrongful use or maintenance of it, it is not necessary to allege who erected it, or that notice has been given to remove it.<sup>1</sup> The declaration must state the proximate cause of the injury; it is not competent to state the remote cause, and give all the intermediate matters in evidence, under the allegation that by means of the premises the injury was occasioned.<sup>2</sup>

*Plea.*—The plea, in the absence of a statute, is, as in actions on the case generally, the plea of not guilty. Special matter may be pleaded, and in the case of the statute of limitations must be, though generally this is not necessary, the plea of not guilty being broad enough to put in issue whatever should preclude the plaintiff's recovery.<sup>3</sup>

**6. Evidence.**—There are no rules of evidence peculiar to this class of actions.<sup>4</sup>

13 Allen (Mass.) 95; s. c., 90 Am. Dec. 181; *White v. Cohen*, 19 Eng. L. & Eq. 146.

1. *Beavers v. Trimmer*, 25 N. J. L. 97.

Where, in a second action founded on a nuisance, the *narr.* failed to set forth the previous verdict and judgment, and to charge a continuance of the nuisance, it was held that this was an irregularity which worked no injury to the defendant. *Ellis v. Academy of Music*, 120 Pa. St. 608.

2. *Fitzimons v. Inglis*, 5 Taunt. 534.

Where the nuisance was a hole into which the plaintiff fell, it was held that the declaration need not allege that the nuisance was unknown to plaintiff at the time the injury was sustained. *Morford v. Woodworth*, 7 Ind. 83.

3. 1 Chitty on Pleading 432.

4. It was held in *Smith v. McConathy*, 11 Mo. 517, that other injuries than those set forth in the declaration could not be shown. In *Loughran v. Des Moines*, 72 Iowa 382, it was held that the defendant might show that the damage was contributed to by other causes than those for which he was in fault. In *Baker v. Bohannon*, 69 Iowa 60, it was held that evidence that the plaintiff's husband kept his premises in a worse condition than those of the defendant was immaterial, it not appearing that the premises of the plaintiff's husband were so located as to be offensive to the plaintiff. In *Fay v. Whitman*, 100 Mass. 76, it was held that evidence that occupants of premises farther away from the location of the alleged nuisance than plaintiff's prem-

ises were also disturbed, was competent on the issue of the existence of the nuisance (stenches from a slaughter-house).

In *Watson v. Van Meter*, 43 Iowa 76, it was adjudged that the comparative healthfulness of the neighborhood before and after the creation of the alleged nuisance was material.

In *Hudson v. Densmore*, 68 Ind. 391, it was held that the testimony of a third person, that he had lived within a short distance of a similar nuisance for some time without injury, was inadmissible. In *Robinson v. Smith*, 7 N. Y. Supp. 38, in an action for a nuisance consisting of offensive smells, evidence of the condition of the atmosphere and of plaintiff's house down to the time of the trial was held admissible, as was evidence that, after the erection of the stable alleged to constitute the nuisance, there were innumerable flies about the plaintiff's premises. See, on questions of evidence depending upon the circumstances of the cases wherein it was offered, *House v. Metcalf*, 27 Conn. 631; *Harrison v. Sterrett*, 4 Har. & M. (Md.) 540.

In *Shepard v. Hill* (Mass. 1890), 24 N.E. Rep. 1025, where the nuisance charged was the noise made by a paper mill, it was held that evidence that the machinery used by the defendant was of the usual kind, and that it was customary to run paper mills night and day, was competent on the question whether the defendant was conducting his business in a reasonable manner; so it was held that the defendant was properly allowed to show the kind and amount of noise produced by his mill at various times

**7. Damages**—(See also DAMAGES)—(a) *Measure of Damages*.—The recovery of damages, in the first instance, is limited to the actual damages sustained.<sup>1</sup>

For injuries permanently affecting realty, the measure of damages is the difference between what the property would have sold for before and after the injury.<sup>2</sup>

after the bringing of the action, the power used being the same and the effect uniform; and that the defendant was properly allowed to describe the noise by testimony, that it was not greater than that of other paper mills of a similar character and capacity.

1. *Gillett v. Western R. Co.*, 8 Allen (Mass.) 560; *Fultz v. Wycoff*, 25 Ind. 321; *Howes v. Ashfield*, 99 Mass. 540; *Albert v. Bleeker St. etc. R. Co.*, 2 Daly (N. Y.) 389; *Taber v. Hutson*, 5 Ind. 322; s. c., 61 Am. Dec. 96; *Worcester v. Great Falls Mfg. Co.*, 41 Me. 159; *Luther v. Winnisimmet*, 9 Cush. (Mass.) 171; *Thayer v. Brooks*, 17 Ohio 489; s. c., 49 Am. Dec. 474; *Chipman v. Hibberd*, 6 Cal. 162; *Harsh v. Butler*, 1 Wright (Ohio) 99; *McKnight v. Ratcliff*, 44 Pa. St. 156; *Hatch v. Dwight*, 17 Mass. 289; s. c., 9 Am. Dec. 145; *Shaw v. Cummiskey*, 7 Pick. (Mass.) 76; *Dayton v. Pease*, 4 Ohio St. 80; *De Costa v. Massachusetts F. W. etc. Co.*, 17 Cal. 613; *Freeland v. Muscatine*, 9 Iowa 461; *Dutro v. Wilson*, 4 Ohio St. 101; *Hamer v. Knowles*, 6 H. & M. 454; *Ludlow v. Yonkers*, 43 Barb. (N. Y.) 493; *Kane v. Johnston*, 9 Bosw. (N. Y.) 154; *Sewell's Falls Bridge v. Fisk*, 23 N. H. 171; *Shadwell v. Hutchinson*, 2 B. & Ad. 97; *Lukin v. Godsall*, 2 Peake 15.

2. *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Dana v. Valentine*, 5 Met. (Mass.) 8; *Schuylkill Nav. Co. v. Farr*, 4 W. & S. (Pa.) 362; *Seely v. Alden*, 61 Pa. St. 302; s. c., 100 Am. Dec. 642; *Ruckman v. Green*, 9 Hun (N. Y.) 225; *McGuire v. Grant*, 25 N. J. L. 356; s. c., 64 Am. Dec. 49; *Chicago v. Huenerbein*, 85 Ill. 594; *Chase v. New York Cent. R. Co.*, 24 Barb. (N. Y.) 273; *Owens v. Missouri Pac. R. Co.*, 67 Tex. 679; *Fort Worth etc. R. Co. v. Hogsett*, 67 Tex. 685; *Baldwin v. Chicago etc. R. Co.*, 35 Minn. 354; *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa 576.

In an action against the owner of adjoining premises for knowingly permitting them to be used as a brothel, in consequence of which the plaintiff lost his tenants, the measure of damages is the depreciation in value of the proper-

ty and the loss of rents resulting from the nuisance; and in determining such depreciation it may be shown that the maintenance of the brothel in question led to the establishment of other brothels in the immediate neighborhood. *Givens v. Van Studdiford*, 4 Mo. App. 498.

In an action to recover for the caving in of land, caused by removing its lateral support, the measure of damages is the amount of its diminution in value, and not what it would cost to restore the land to its former condition, or to build a retaining wall. *McGuire v. Grant*, 25 N. J. L. 356; s. c., 67 Am. Dec. 49.

Injury to the plaintiff's feelings, by being deprived of the lateral support of land intended for a burial place, cannot be considered where the defendant intended no injury thereto, though he was grossly careless. *White v. Dresser*, 135 Mass. 150; s. c., 46 Am. Rep. 454.

The measure of damages for removal of lateral support is the loss of and injury to the soil, without regard to the cost of restoring the land to its former condition as to fences, shrubbery, etc. *Gilmore v. Driscoll*, 122 Mass. 199; s. c., 23 Am. Rep. 312. Nor to the cost of refilling. *Karst v. St. Paul etc. R. Co.*, 22 Minn. 118.

The measure of damages for diverting a stream, to the injury of a farm with an ore-bank thereon, is the difference in its market value immediately before and after the diversion, without regard to the fact that the stream had been used, or might subsequently be required, for washing the ore taken from the bank. *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. St. 279.

In an action for damages to real estate by blasting, plaintiff's mental anxiety concerning the personal safety of himself and family is not, no personal injury having resulted, a proper element of damage. *Wyman v. Leavitt*, 71 Me. 227; s. c., 36 Am. Rep. 303.

The damages for flooding land may be estimated by comparing the productiveness of the land when flooded with its productiveness when not so flooded.

For nuisances affecting the enjoyment and occupancy of realty, the measure of damages is generally the loss of rents or the depreciation in rental value.<sup>1</sup> Loss of profits resulting from an interference with a lawful business, or loss of crops may be an element of damage.<sup>2</sup>

*Spilman v. Roanoke Navigation Co.*, 74 N. Car. 675.

In an action for flooding the plaintiff's cellar, it is proper to consider both the damages to the house as a structure and as to its rental value. *Willey v. Hunter*, 57 Vt. 479.

1. *Beir v. Cooke*, 37 Hun (N. Y.) 38; *Wiel v. Stewart*, 19 Hun (N. Y.) 272; *Murray v. Archer*, 5 N. Y. Supp. 326; *Pinney v. Berry*, 61 Mo. 359; *Carli v. Union Depot etc. R. Co.*, 32 Minn. 101; *South Bend v. Paxson*, 67 Ind. 228; *Devereux v. Champion Cotton Press Co.*, 17 S. Car. 66.

The rule that in actions for nuisances to realty, the measure of damages is the difference between the market value of the land immediately before and immediately after the injury, has no application to such nuisances as may be removed directly after verdict, or for the continuance of which successive actions may be brought, or which may be abated by order of the court. In such cases the proper criterion is the loss in rental value. *Pinney v. Berry*, 61 Mo. 359.

Where land has been wrongfully overflowed, so as to deprive the owner of its use, the measure of damages is the fair rental value; the probable value of what might have been raised on the land, less cost of cultivation, etc., is too remote and speculative. *Chicago v. Huenerbein*, 85 Ill. 594; s. c., 28 Am. Rep. 626.

The diminished rental value of the property during the period of diversion is the measure of damages in an action for diverting or detaining the water of a stream from the plaintiff's tannery or mill. *Colrick v. Swinburne*, 105 N. Y. 503; *Woodin v. Wentworth*, 57 Mich. 278; *Crawford v. Parsons*, 63 N. H. 438.

In an action by a boarding-house keeper for damages caused by a nuisance consisting of offensive odors, the measure of damages was held to be the difference in rental value of the premises free from the stench and subject to it, and not to be affected by the circumstance of the loss or departure of boarders. *Wiel v. Stewart*, 19 Hun (N. Y.) 272.

Where premises are injured by defendant's pollution of a stream, the fact that the owner himself occupies the premises does not alter the application of the rule that the depreciation in rental value is the proper measure of damages. *Michel v. Monroe Co.*, 39 Hun (N. Y.) 47.

Where the premises affected by a nuisance are occupied by the plaintiff as a homestead, his damages are not limited to the depreciation in rental value; he may also recover for the interference with the comfortable enjoyment of the homestead. *Randolf v. Town of Bloomfield*, 77 Iowa 50.

2. *Lawson v. Price*, 45 Md. 123; *Shafer v. Wilson*, 44 Md. 268; *Gibson v. Fischer*, 68 Iowa 29; *Simmons v. Brown*, 5 R. I. 299; s. c., 73 Am. Dec. 66; *Terre Taute v. Hudnut*, 112 Ind. 542; *Georgia R. etc. Co. v. Berry*, 78 Ga. 744; *French v. Connecticut R. Lumber Co.*, 145 Mass. 261.

The measure of damages for injuries to growing crops by flooding is the value of the crops in the condition they are in at the time of the injury; and to ascertain this the average yield of like crops, under similar conditions, and the average market value of such grain during a reasonable period, less the expense of harvesting and marketing, may be shown. *Lommelnd v. St. Paul etc. R. Co.*, 35 Minn. 412; *Folsom v. Apple River etc. Co.*, 41 Wis. 602; *Grand Rapids Boom Co. v. Jarvis*, 30 Mich. 308; *Allison v. Chandler*, 11 Mich. 542; *Whitbeck v. New York Cent. R. Co.*, 36 Barb. (N. Y.) 644.

Where the crops are not yet up, the damage should be estimated upon the basis of rental value and the cost of seed, and of preparing the ground and planting. *Kankakee etc. R. Co. v. Horan*, 17 Ill. App. 650.

Damages for loss of grass crops for two succeeding seasons, in addition to the damages already sustained on account of injury to land by flooding, are too conjectural. *Clark v. Nevada etc. Min. Co.*, 6 Nev. 203.

In an action for damages caused by overflowing plaintiff's land and a highway adjoining, it was held that he was



For nuisances affecting health and personal comfort, injury sustained not only by the plaintiff but also by members of his family, whom he is bound to support, is a proper element of damage.<sup>1</sup>

The trouble and expense of prosecuting the action have been held proper elements of damage in actions for injuries by the obstruction of a highway,<sup>2</sup> but not proper in an action for flooding land.<sup>3</sup>

Under a general allegation of damage, the necessary and natural consequences of the nuisance may be proved. To warrant the recovery of damages, not a necessary though perhaps a natural consequence, there must be a special allegation.<sup>4</sup>

Unless the nuisance is permanent in character, and necessarily injurious, damages cannot be recovered for injuries resulting from it subsequent to the commencement of the action.<sup>5</sup> Where, how-

entitled to recover the value of the grass submerged in his pasture, but not the price of procuring new pastures, nor of driving his stock to them, nor the damage done to land in which he had no interest except a mere right to graze. Also that he could recover the value of horse feed consumed in carrying his children to school by another way. *Sabine etc. R. Co. v. Johnson*, 65 Tex. 389.

1. *Jarvis v. St. Louis etc. R. Co.*, 26 Mo. App. 253; *Pierce v. Wagner*, 29 Minn. 355.

2. *Linsley v. Bushnell*, 15 Conn. 225; s. c., 38 Am. Dec. 79; *Keay v. New Orleans Canal Co.*, 7 La. An. 259.

3. *Good v. Mylin*, 8 Pa. St. 51.

4. *Vanderslice v. Newton*, 4 N. Y. 130; *Griggs v. Fleckenstein*, 14 Minn. 92.

5. *Blunt v. McCormick*, 3 Den. (N. Y.) 283; *Duryea v. New York*, 26 Hun (N. Y.) 120; *Troy v. Cheshire R. Co.*, 23 N. H. 83; s. c., 55 Am. Dec. 177; *Brewster v. Sussex R. Co.*, 40 N. J. L. 57; *Dorman v. Ames*, 12 Minn. 451; *Hopkins v. Western Pac. R. Co.*, 50 Cal. 190; *Thayer v. Brocks*, 17 Ohio 489; s. c., 49 Am. Dec. 474; *Cumberland etc. Canal Corporation v. Hitchings*, 65 Me. 140; *Duncan v. Markley*, Harp. L. (S. Car.) 276; *Shaw v. Etterbridge*, 3 Jones L. (N. Car.) 300; *Polly v. McCall*, 37 Ala. 30; *Jones v. Laverder*, 55 Ga. 228; *Hargreaves v. Kimberly*, 26 W. Va. 787; s. c., 53 Am. Rep. 121; *Cobb v. Smith*, 38 Wis. 21; *Stadler v. Grieben*, 61 Wis. 500; *Freudenstein v. Heine*, 6 Mo. App. 287; *Pinney v. Barry*, 61 Mo. 359.

Evidence that dust from defendant's

mill was thrown on plaintiff's building after the commencement of the action is not admissible as a means of measuring the damages resulting from the same nuisance before that time. *Cooper v. Randall*, 59 Ill. 317.

But in *Commings v. Stevenson*, 76 Tex. 652; 13 S. W. Rep. 556, which was an action for damages to the value of property on account of the proximity of a powder magazine, the court said on the question of assessment of damages: "It is contended that the court erred in directing the jury to assess damages up to the time of the trial, if they should find in favor of plaintiff, because the recovery could be had for such damages only as had been sustained prior to the institution of the suit. The authorities sustain the proposition that in actions to recover damages resulting from a permanent or continuing nuisance, and where the damages are necessarily continuous, the recovery can be had for such damages only as had been sustained prior to bringing the suit. *Wood on Nuis.*, §§ 869, 870, 873; *Field on Dam.*, §§ 748, 749; *Pinney v. Berry*, 61 Mo. 359. But when the action is brought not only to recover damages, but to abate the nuisance, as in this case, we think it more in accord with the long established policy of our laws to prevent, as far as possible, a multiplicity of suits—to hold that the recovery may be had for all damages sustained down to the trial, rather than put the plaintiff to another action, after the nuisance has been abated, and to recover for damages sustained between the institution of the suit and the time of trial.

In *Barrick v. Schifferdicker*, 1 N. Y.

ever, the nuisance is permanent in its character, all damages, both past and prospective, are recoverable in the same action.<sup>1</sup>

Of nuisances that have been held not to be so permanent that all damages could be ascertained in one action the following are instances: Flooding land with surface water;<sup>2</sup> with water of stream;<sup>3</sup> obstructing a right of way;<sup>4</sup> obstructing street with trains of cars.<sup>5</sup>

(b) *Nominal Damages*.—Nominal damages, at the least, are recoverable where the plaintiff can show that a legal right of his has been infringed by the nuisance, even though he fails to prove actual damage;<sup>6</sup> or even though the property has actually been benefited by the nuisance.<sup>7</sup> Nor does the abatement of a nuisance by the plaintiff preclude him from recovering damages sustained before the time of the abatement.<sup>8</sup>

(c) *Exemplary Damages*.—Vindictive or exemplary damages are not recoverable in the absence of malice or wanton recklessness;<sup>9</sup>

Supp. 21, which was an action to restrain the continuance of a nuisance and also for damages, the court refused the injunction, but held that the plaintiffs would not be limited to a recovery of damages sustained up to the commencement of the action, but could recover all they had sustained up to the time of trial on the principle that a court of equity will award all the relief that the nature of the case demands. It will be noticed, however, that here the action was equitable rather than legal.

1. *Powers v. Council Bluffs*, 45 Iowa 652; s. c., 24 Am. Rep. 792; *Bizer v. Ottumwa Hydraulic Power Co.*, 70 Iowa 145; *Finley v. Hershey*, 41 Iowa 389; *Anonymous*, 4 Dall. (U. S.) 147; *Tucker v. Newman*, 11 Ad. & El. 41.

2. *Mellor v. Pilgrim*, 3 Ill. App. 476; *Freudenstein v. Heine*, 6 Mo. App. 287.

3. *Jones v. Lavender*, 55 Ga. 228; *Cobb v. Smith*, 38 Wis. 21.

4. *Brewster v. Sussex R. Co.*, 40 N. J. L. 57.

5. *Frankle v. Jackson*, 30 Fed. Rep. 398.

6. *Frank v. New Orleans etc. R. Co.*, 20 La. An. 25; *Tootle v. Clifton*, 22 Ohio St. 247; *Humphrey v. Irwin* (Pa. 1886), 6 Atl. Rep. 479; *Casebeer v. Mowry*, 55 Pa. St. 419; s. c., 93 Am. Dec. 766; *Pastorius v. Fisher*, 1 Rawle (Pa.) 27; *Ripka v. Sergeant*, 7 W. & S. (Pa.) 9; s. c., 42 Am. Dec. 214; *Blodgett v. Stone*, 60 N. H. 167; *Stowell v. Lincoln*, 11 Gray (Mass.) 434; *Chapman v. Copeland*, 55 Miss. 476; *Freudenstein v. Heine*, 6 Mo. App. 287; *Munroe v. Stickney*, 48 Me. 462;

*Munroe v. Gates*, 48 Me. 463; *Cory v. Silcox*, 6 Ind. 39; *Fisher v. Clark*, 41 Barb. (N. Y.) 329; *Cooper v. Randall*, 53 Ill. 23.

7. *Francis v. Schoellkopf*, 53 N. Y. 153; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95; s. c., 90 Am. Dec. 181; *Kimel v. Kimel*, 4 Jones L. (N. Car.) 121; *Marcy v. Fries*, 18 Kan. 353.

8. *Gleason v. Gary*, 4 Conn. 418; *Call v. Buttrick*, 4 Cush. (Mass.) 345.

9. *Hayes v. Askew*, 7 Jones L. (N. Car.) 272; *Morford v. Woodworth*, 7 Ind. 83; *Parrott v. Housatonic R. Co.*, 47 Conn. 575; *McFadden v. Ransach*, 119 Pa. St. 507.

Exemplary damages cannot be recovered in an action for nuisance if the defendant himself exercised due care and prudence, and the damages were caused by the neglect of his servants to follow his instructions. *Morford v. Woodworth*, 7 Ind. 83.

Where under legislative authority a shallow stream is dammed up, so as to make it navigable, and the land of an adjacent owner is thereby overflowed, he cannot recover punitive damages. *Silver Creek Navigation Co. v. Mangum*, 64 Miss. 682.

In *Pickett v. Crook*, 20 Wis. 358, which was an action for injuries inflicted by a ram permitted to run at large, and alleged to have been known by the defendant to be vicious and disposed to injure people, the court recognized the right to recover exemplary damages, if the defendant's conduct amounted to a reckless and wanton disregard of the safety of the public.

It is held in *South Carolina* that in

but malice may be inferred from the continuance of the nuisance after a verdict or judgment against it.<sup>1</sup>

(d) *Mitigation of Damages*.—It is no ground for mitigation of damages that the plaintiff might have abated or removed the nuisance, but did not.<sup>2</sup>

The voluntary abatement of a nuisance by the defendant after action commenced does not prejudice the rights of a diligent plaintiff.<sup>3</sup>

**8. Continuing Nuisances**.—Where the injury inflicted by a nuisance is not of such a character that it can be ascertained, both as to the past and future by a single action, successive actions lie for new damages so long as the nuisance is continued.<sup>4</sup>

A new action may be brought for the continuance of a nuisance while the first is pending, and judgment for the defendant in the second action will not conclude the plaintiff in the first.<sup>5</sup>

**9. Limitation**.—(See also LIMITATION OF ACTION, 13 Am. & Eng. Encyc. of Law 667).—If the nuisance is of a character so permanent that it may fairly be said that the entire damage accrues in the first instance, the statute of limitations begins to run from this time. If, on the other hand, the nuisance may be said to continue from day to day, and to create a fresh injury from

an action for obstructing a public way, the jury may award punitive damages. *Windham v. Rhame*, 11 Rich. L. (S. Car.) 283; s. c., 73 Am. Dec. 116; *Jefcoat v. Knotts*, 11 Rich. L. (S. Car.) 649.

"The damages awarded should be such as to lead to the abatement of the nuisance." *Bradley v. Ames*, 2 Hayw. (N. Car.) 399.

1. *Solan v. DeHeld*, 9 Eng. L. & Eq. 104; *Long v. Trexler* (Pa. 1887), 8 Atl. Rep. 620; *New Orleans etc. R. Co. v. Statham*, 42 Miss. 607; s. c., 97 Am. Dec. 418. See also *Dorsey v. Manlove*, 14 Cal. 553; *Keay v. New Orleans Canal Co.*, 7 La. An. 259; *Best v. Allen*, 30 Ill. 30; s. c., 81 Am. Dec. 338; *Nagle v. Mullison*, 34 Pa. St. 48; *Hodgson v. Millward*, 3 Grant Cas. (Pa.) 406.

2. *White v. Chapin*, 102 Mass. 138; *Jarvis v. St. Louis etc. R. Co.*, 26 Mo. App. 253.

3. *Heather v. Hearn*, 5 N. Y. Supp. 85.

4. *Battishill v. Reed*, 18 C. B. 717; *Staple v. Spring*, 10 Mass. 72; *Prentiss v. Wood*, 132 Mass. 486; *McDonough v. Gilman*, 3 Allen (Mass.) 264; s. c., 80 Am. Dec. 72; *Mellor v. Pilgrim*, 3 Ill. App. 476; *Plummer v. Harper*, 3 N. H. 88; s. c., 14 Am. Dec. 336; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143; s. c., 82 Am. Dec. 201; *Pillsbury v. Moore*, 44 Me. 154; s. c., 69 Am. Dec. 91; *Cum-*

*berland etc. Canal Corporation v. Hitchings*, 65 Me. 140; *Dorman v. Ames*, 12 Minn. 347; *Sloggy v. Dilworth*, 38 Minn. 179; *Byrne v. Minneapolis etc. R. Co.*, 38 Minn. 212; *Omaha etc. R. Co. v. Standen*, 22 Neb. 343; *Frankle v. Jackson*, 30 Fed. Rep. 398; *McGowan v. Missouri Pac. R. Co.*, 23 Mo. App. 203; *North Vernon v. Voegler*, 103 Ind. 314; *Fell v. Bennett*, 110 Pa. St. 181; *Uline v. New York Cent. etc. R. Co.*, 101 N. Y. 98; *Chicago etc. R. Co. v. Schaffer*, 124 Ill. 112; *Beckwith v. Griswold*, 29 Barb. (N. Y.) 291.

In *Frankle v. Jackson*, 30 Fed. Rep. 398, it was held that where a railroad company wrongfully allows its cars to stand on the track in a public street and thereby obstruct travel, each day's obstruction gives a new cause of action in favor of an abutting lot owner. So of each day's injury by discharging sewage on the plaintiff's land. *Reid v. Atlanta*, 73 Ga. 523.

In *Slight v. Gutzlaff*, 35 Wis. 675; s. c., 17 Am. Rep. 476, it was held that each successive burning of lime in a limekiln could not be regarded as a new and original nuisance, so as to hold a grantee of the premises liable for continuing the nuisance, without notice or demand to abate.

5. *Hazeltine v. Case*, 46 Wis. 391; s. c., 32 Am. Rep. 715.

day to day, there may be a right of action, although the original right of action has been lost by lapse of time. There is no question as to this rule of law, though there is sometimes difficulty in applying it to the facts of particular cases.<sup>1</sup>

**VI. ABATEMENT**—1. **Definition.**—To abate a nuisance is to take away, remove, or destroy the structure, object, or condition of things constituting the nuisance.<sup>2</sup>

2. **Private Nuisances.**—A private nuisance may be abated by one injured thereby to such an extent as to give him a right of action.<sup>3</sup> He acts, however, at his peril; that is, to justify his act the thing must be a nuisance and not an apprehended nuisance merely.<sup>4</sup> He must be guilty of no excess of abatement beyond that necessary to protect his right.<sup>5</sup>

1. *Staple v. Spring*, 10 Mass. 72; *Holmes v. Wilson*, 10 Ad. & El. 503; *Bowyer v. Cook*, 4 C. B. 236; *McConnell v. Kibbe*, 29 Ill. 483; *Troy v. Cheshire R. Co.*, 23 N. H. 101; s. c., 55 Am. Dec. 177; *Anonymous*, 4 Dall. (U. S.) 147; *Powers v. Council Bluffs*, 45 Iowa 652; *Kansas Pac. R. Co. v. Muhlman*, 17 Kan. 224; *Bonomi v. Backhouse*, 1 El. B. & E. 622; *Whitehouse v. Fellowes*, 10 C. B., N. S. 765; *Hamer v. Knowles*, 6 H. & N. 454; *Mueller v. Fruen*, 36 Minn. 273; *McGowan v. Missouri Pac. R. Co.*, 23 Mo. App. 203.

2. In 3 Black. Com. 5, it is said that a nuisance "may be abated, that is taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it."

3. *Baten's Case*, 9 Coke 55; *Norrice v. Baker*, 3 Bulst. 198; *Perry v. Fitzhowe*, 8 Ad. & El. N. S. 757; *Adams v. Barney*, 25 Vt. 225; *Amick v. Tharp*, 13 Gratt. (Va.) 564; s. c., 67 Am. Dec. 787; *Pendruddock's Case*, 5 Coke 101, n. a and b; *Roberts v. Rose*, L. R., 1 Ex. 82; *State v. Parrott*, 71 N. Car. 311; s. c., 17 Am. Rep. 5; *Rhea v. Forsyth*, 37 Pa. St. 503; s. c., 78 Am. Dec. 441; *Amoskeag Co. v. Goodale*, 46 N. H. 56; *Earl of Lonsdale v. Nelson*, 2 B. & C. 311; *Griffith v. McCullum*, 46 Barb. (N. Y.) 561; 1 Bish. Cr. Law 829; *Lancaster Turnpike Co. v. Rogers*, 2 Pa. St. 114; s. c., 44 Am. Dec. 179; *Gateswood v. Blincoc*, 2 Dana (Ky.) 158; *Cooley on Torts* 46; 1 Hilliard on Torts 605; *Manhattan Mfg. Co. v. Van Kueven*, 23 N. J. Eq. 251; *Calef v. Thomas*, 81 Ill. 478; *Earp v. Lee*, 71 Ill. 193; *Welch v. Stowel*, 2 Doug. (Mich.) 332; *Barclay v. Com.*, 25 Pa. St. 503; s. c., 64 Am. Dec. 715; *Hubbard v. Deming*, 21 Conn. 356; *Graves v. Shattuck*, 35 N. H. 257; s. c., 69 Am. Dec. 536; *Wetmore v.*

*Tracey*, 14 Wend. (N. Y.) 250; s. c., 28 Am. Dec. 525; *Hart v. Mayor etc. of Albany*, 9 Wend. (N. Y.) 571; s. c., 24 Am. Dec. 165; *Arundel v. McCulloch*, 10 Mass. 70; *Wood on Nuisances* (2nd ed.), § 844; *Thompson v. Allen*, 7 Lane. (N. Y.) 459; *Ronayne v. Loranger*, 63 Mich. 373; *Mayhew v. Burns*, 103 Ind. 328.

Assent to a nuisance will not take away the right afterwards to abate it. *Pilcher v. Hart*, 1 Humph. (Tenn.) 524.

4. "If a person have an intent to build a wall, and lay the foundation, you cannot pull this down." *Norrice v. Baker*, 1 Rolle 394. And again in the same case: "So, although boughs which hang over another's land may be cut, yet they cannot be cut unless they shall hereafter grow over." And again, in *Rolle's Abridgment*, title Nuisance, A: "A man cannot remove scaffolds, etc., for making a building which will be a nuisance when finished."

5. *Perry v. Fitzhowe*, 8 Ad. & El., N. S. 757; *Wright v. Moore*, 38 Ala. 593; s. c., 82 Am. Dec. 731; *Heath v. Williams*, 25 Me. 209; s. c., 43 Am. Dec. 265; *Jewell v. Gardiner*, 12 Mass. 311; *Dyer v. Depul*, 5 Whart. (Pa.) 584; *Hutchinson v. Granger*, 13 Vt. 394; *Gateswood v. Blincoc*, 2 Dana (Ky.) 158.

In abating a nuisance, no more injury must be done to the property than is absolutely necessary to effect the object. *State v. Moffett*, 1 Greene (Iowa) 247.

An owner of land, in abating a private nuisance, as shocks of corn left encumbering the ground by a tenant, is bound to use reasonable care to avoid unnecessary injury; he has no right to destroy the corn, unless there is no other reasonable way of enjoying the land. *Calef v. Thomas*, 81 Ill. 478.

**3. Public Nuisances.**—A public nuisance is abatable in criminal proceedings after a verdict upon an indictment,<sup>1</sup> or under a decree of a court of equity,<sup>2</sup> or in civil proceedings, as the statute may provide.<sup>3</sup> One who sustains a special injury from a public nuisance may abate it, for as to him it is a private nuisance.<sup>4</sup>

But he must so exercise his right as not to disturb the public peace.<sup>5</sup>

**4. Notice.**—And he must give a reasonable notice unless in the case of an emergency requiring immediate action or, perhaps, in

In the removal of a nuisance, the party abating it is only liable to the owner for a wanton or unnecessary injury. The kind of property constituting the nuisance, and the attending circumstances, must be considered in determining the question. *Indianapolis v. Miller*, 27 Ind. 394; *Northrop v. Burrows*, 20 Abb. Pr. (N. Y.) 365.

1. See this article, subtit. CRIMINAL PROCEEDINGS.

2. See INJUNCTION.

3. See this article, subtit. PRIVATE ACTION.

4. In *Adams v. Barney*, 25 Vt. 231, an entry upon private premises to abate a part of a dam was held lawful. See also *Roberts v. Rose*, L. R., 1 Exch. 82; *Hodges v. Raymond*, 9 Mass. 316; *Colburn v. Richards*, 13 Mass. 420; s. c., 7 Am. Dec. 16; *Elliott v. Fitchburg R. Co.*, 10 Cush. (Mass.) 179; s. c., 57 Am. Dec. 85. One may remove so much of a building as is necessary to prevent the fall of rain and snow upon his roof. *Cooper v. Marshall*, 1 Burr. 259; *Rosewell v. Prior*, 2 Salk. 459; *Rex v. Pappineau*, 2 Stra. 688; *Dyer v. Depul*, 5 Whart. (Pa.) 584.

In *Manhattan Mfg. Co. v. Van Keuren*, 23 N. J. Eq. 251, it was held that one might destroy so much of the machinery in a building as was necessary to abate a nuisance arising from the exercise of a noxious trade.

In *State v. Parrott*, 71 N. Car. 311; s. c., 17 Am. Rep. 5, it was held that one might remove so much of a bridge as prevented his passage.

In *Harvey v. Dewoody*, 18 Ark. 252, it was held that an unoccupied house which was a nuisance might be destroyed by the owner of adjoining property; otherwise in the case of an occupied house. *Perry v. Fitzhowe*, 8 Ad. & El., N. S. 757; *Davies v. Williams*, 16 Q. B. 546.

In *Finley v. Hershey*, 41 Iowa 389, it was held that one injured by a nuisance arising from a pond had no

right to fill up the pond, as the injury might have been stopped by acts short of this. Those who, at the request of one injured by a nuisance, assist him in abating it are not liable in damages. *Wood on Nuisances*, § 846. One may not kill a ferocious dog confined on its owner's premises. *Uhlein v. Cromack*, 109 Mass. 273. Nor horses on their own premises, though sick with a contagious disease. *Franz v. Hilterbrand*, 45 Mo. 121.

In *Williams v. Dixon*, 65 N. Car. 416, it was held that an ass might be killed by the owner of a cow, while attacking a cow. And see in relation to the right to kill dangerous animals, *Bost v. Mingues*, 64 N. Car. 44; *Ladue v. Branch*, 42 Vt. 574; *Clark v. Keliher*, 107 Mass. 406; *Spray v. Ammerman*, 66 Ill. 309; *Aldrich v. Wright*, 53 N. H. 398; s. c., 16 Am. Rep. 339; *Marshall v. Blackshire*, 44 Iowa 475. See on the general subject of the right of one sustaining a special injury from a public nuisance to abate it, *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Lansing v. Smith*, 8 Cow. (N. Y.) 146; *Pierce v. Dart*, 7 Cow. (N. Y.) 609; *Morris v. Nugent*, 7 Carr. & P. 572; *South Carolina R. Co. v. Moore*, 28 Ga. 398 s. c., 73 Am. Dec. 78; *Selman v. Wolfe*, 27 Tex. 68; *Arundel v. McCulloch*, 10 Mass. 70; *Hopkins v. Crombie*, 4 N. H. 520; *Lancaster Turnpike Co. v. Rogers*, 2 Pa. St. 114; s. c., 44 Am. Dec. 179; *Rogers v. Rogers*, 14 Wend. (N. Y.) 131; *State v. Parrott*, 71 N. Car. 311; s. c., 17 Am. Rep. 5; *Owens v. State*, 52 Ala. 400.

6. *Earp v. Lee*, 71 Ill. 193; *Mohr v. Gault*, 10 Wis. 513; s. c., 78 Am. Dec. 687; *Rex v. Rosewell*, 2 Salk. 459; *Rung v. Shoneberger*, 2 Watts (Pa.) 23; s. c., 26 Am. Dec. 95; *Baldwin v. Smith*, 82 Ill. 162; *Perry v. Fitzhowe*, 8 Q. B. 757; *Graves v. Shattuck*, 35 N. H. 257; s. c., 69 Am. Dec. 536; *Day v. Day*, 4 Md. 262; *Miller v. Burch*, 32 Tex. 208; s. c., 5 Am. Rep. 242.

the case of positive wrong or gross negligence on the part of the person maintaining the nuisance.<sup>1</sup>

**5. Who May Abate Public Nuisance.**—The question of the right of an individual to abate a public nuisance from which he sustains no special injury beyond that common to the public at large has given rise to considerable discussion, and to a supposed conflict of authority. There is a diversity of opinion among text-writers; Mr. Hilliard and Mr. Bishop believing that he may, Mr. Wood and Judge Cooley that he may not.<sup>2</sup> There are ancient authorities which, in the broad and general language used, appear to support the affirmative view; as, for example, Blackstone, who says that "If a bar or gate be wrongfully erected across the public highway, which is a common nuisance, any of the Queen's subjects passing that way may cut it down and destroy it."<sup>3</sup>

The cases bearing upon this question are cited below, those purporting or tending to afford support for the doctrine being somewhat carefully collated.<sup>4</sup> Mr. Wood thinks the seeming

1. *Harvey v. Dewoody*, 18 Ark. 252; *State v. Parrott*, 71 N. Car. 311; 17 Am. Rep. 5; *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397; *Jones v. Jones*, 1 H. & C. 1; *Davies v. Williams*, 16 Q. B. 546; *Burling v. Read*, 11 Q. B. 904; *Perry v. Fitzhowe*, 8 Q. B. 757; *Jones v. Williams*, 11 M. & W. 176; *Penruddock's Case*, 5 Rep. 101; *Van Wormer v. Mayor etc. of Albany*, 15 Wend. (N. Y.) 262; *Swett v. Sprague*, 55 Me. 190.

Where notice of the nuisance to be abated is necessary, a fence cannot be removed under a notice when it is the use of a lot sheltered by the fence that constitutes the nuisance. *Verder v. Ellsworth*, 59 Vt. 354.

In *Earl of Lonsdale v. Nelson*, 2 B. & C. 302, *BEST, J.*, said: "Nuisances by act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them without notice to the party who committed them; but there is no decided case which sanctions the abatement by an individual of nuisance from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting of these branches to extend so far beyond the soil of the owners of the trees is a most unequivocal act of negligence, which distinguishes this case from most of the other cases which have occurred. The security of lives and property may sometimes require

so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances persons should not take the law in their own hands, but follow the advice of Lord Hale and appeal to a court of justice."

2. 1 Hilliard on Torts 605; 1 Bishop Cr. Law, §§ 828; Wood on Nuisances, §§ 732, *et seq.*; Cooley on Torts 46.

3. 3 Black. Com. 5. And see *Batten's Case*, 9 Co. 53; *Penruddock's Case*, 5 Co. 101; *Rex v. Wilcox*, 2 Salk. 458; *Com. Dig.* Action upon the Case for a Nuisance, B.; *Hall's Case*, 1 Mod. 76.

4. The leading American case on this side of the question is *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397, where, during the cholera epidemic of 1832, an Albany tenement house, containing fifty or more persons, and a public nuisance was torn down. In an action of trespass it appeared that the defendant was a citizen of the ward and an alderman. He had a verdict and a new trial was refused. Mr. Wood, in commenting upon this case (Wood on Nuisance, 2nd ed., §§ 735, *et seq.*), lays stress upon what he deems to have been the defendant's personal interest in the abatement of the nuisance, and upon the extraordinary exigency of

the situation. We incline to believe, however, that the defendant's personal interest cut but a small figure in the case, and that the exigency of the situation afforded the ground of the decision. *Renwick v. Morris*, 7 Hill (N. Y.) 575, was an action of trespass for cutting away a part of a dam. Here the defendant justified on the ground that the dam was a public nuisance. It appeared that he was interested in the navigation of the river. Whether his action would have been justified had he been a stranger cannot be said.

In *Wetmore v. Tracy*, 14 Wend. (N. Y.) 250; s. c., 28 Am. Dec. 525, the court said: "Any person may abate a public nuisance," and cited 2 Burn's Justice 563, and Hawkins 408; but neither of these authorities support the statement of the learned judge, nor does the case of *Hart v. Mayor etc. of Albany*, 9 Wend. (N. Y.) 589; s. c., 24 Am. Dec. 165, also cited, the decision there having been put upon the ground that the defendant was an aggrieved party.

In *Arundel v. McCulloch*, 10 Mass. 70, the court said: "It is clear that, when any public way is unlawfully obstructed, any individual who wants to use it in a lawful way may remove the obstruction." The case goes no farther than this. In *Burnham v. Hotchkiss*, 14 Conn. 310, the court said: "We consider it to be well settled that a common nuisance may be abated by any person." But the authorities here cited hardly support so broad a statement, the authorities being LORD HALE, who said: "Any man may justify the removal of a common nuisance either by land or water, because every man is concerned in it." *James v. Haywood*, Cro. Car. 184, a case of a gate across a highway; *Lodie v. Arnold*, 2 Salk. 458, a case of a house across a highway; and 1 Hawk. P. C., § 61, where an obstruction to a highway was spoken of. In *Low v. Knowlton*, 26 Me. 128; s. c., 45 Am. Dec. 100, the court say, in passing, that a public nuisance is abatable by anyone, but this is clearly a dictum. *Adams v. Beach*, 6 Hill (N. Y.) 271, at most only assumes the truth of the doctrine.

In *Jones v. Williams*, 11 M. & W. 176, PARKER, B., after reviewing the authorities, says: "But it may be necessary in some cases where there is such immediate danger to life or health as to render it unsafe to wait, and make it lawful to remove without notice."

In *Perry v. Fitzhove*, 8 Q. B. 757, where a building was a nuisance, the court said: "While the plaintiff might have pulled down the house, yet he could not do it while anyone was in it, for it is well settled that no one may abate a nuisance in such a way as to disturb the peace." And see *Burling v. Read*, 11 Q. B. 904; *Davies v. Williams*, 16 Q. B. 546.

In *Harvey v. Dewoody*, 18 Ark. 252, the court said: "It seems that any person may abate a common nuisance." Here this language was not essential to the decision of the case, nor does *Dewey v. White, Moody & M.* 56, which was an action of trespass against fireman for pulling down a stack of chimneys in the vicinity of a fire, go further than to hold that the defendants were justified because the condition of the chimneys was such as to endanger the safety of those who pulled them down as well as of those at work.

In *Manhattan etc. Mfg. Co. v. Van-Keuren*, 23 N. J. Eq. 251, an injunction was refused by the vice-chancellor, and what was said in relation to the right of a citizen to abate a common law nuisance was not essential to the decision. In *Stiles v. Laird*, 5 Cal. 120; s. c., 63 Am. Dec. 110, there was an invasion of a private as well as of a public right.

In *Maxwell v. Palmerton*, 21 Wend. (N. Y.) 407, the court said: "If the dog be in fact ferocious, at large, and a terror to the neighborhood, the public should be justified in dispatching him at once."

In *King v. Kline*, 6 Barr (Pa.) 318, there is a dictum to the effect that a dog may be so ferocious as to become a public nuisance; and in such case if his owner permits him to run at large, any person may kill him.

In *Bowers v. Fitzrandolph*, Addison 215, it is said that a dog having bitten defendant was a nuisance, and that anybody might abate the nuisance, and in *Dunlap v. Snyder*, 17 Barb. (N. Y.) 561: "If a dog is so ferocious that of his own disposition he will bite men in the street, and is at large, he is a nuisance and may be killed by anyone." To the same effect is *Brown v. Carpenter*, 26 Vt. 638, and in *Gateswood v. Blincoe*, 2 Dana (Ky.). See also *Day v. Day*, 4 Md. 262; *King v. Sanders*, 2 Brev. 111; *State v. Dibble*, 4 Jones (N. Car.) 107; *Oliver v. Loftin*, 4 Ala. 240; *Stump v. McNairy*, 5 Humph. (Tenn.) 363; *Gunter v. Geary*, 1 Cal.

462; *Lancaster Turnpike Co. v. Rogers*, 2 Barr (Pa.) 114; *State v. Atkinson*, 24 Vt. 448.

On the other hand are the cases of *Griffith v. McCullum*, 46 Barb. (N. Y.) 561, where the court (MARVIN, J.) says, on the proposition that any one might abate a public nuisance: "I so conceded in *Peckham v. Henderson*, 27 Barb. (N. Y.) 207, without examining the question. Indeed, in the view taken in that case the question was of no importance," and then concurs with *Harrower v. Ritson*, 37 Barb. (N. Y.) 301, and concludes that "that which is exclusively a common or public nuisance cannot lawfully be abated by the private acts of individuals," cited the language quoted above from Blackstone, and deeming it not to afford authority for the contrary doctrine.

SHAW, C. J., in *Brown v. Perkins*, 12 Gray (Mass.) 89, said: "The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also, when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of the obstruction across a highway and an unauthorized bridge over a navigable watercourse, if he has occasion to use it, he may remove it by way of abatement. But this would not justify strangers being inhabitants of other parts of the commonwealth, having no such occasion to use it, to do the same. Some of the earlier cases, perhaps, in laying down the general proposition that private subjects may abate a common nuisance, did not expressly mark this distinction; but we think, upon the authority of modern cases, where the distinctions are more accurately made, and upon principle, this is the true rule of law." This was an action of tort against persons taking part in the abatement of a liquor nuisance and the destruction of the liquor.

In *Mayor of Colchester v. Brooke*, 72 B. 339, the defendant negligently ran his vessel into and destroyed an oyster bed unlawfully planted by the plaintiff, in the channel of a navigable river. Being sued for the damage, he claimed that as the oyster bed was a public nuisance, no action would lie for an injury to it; but the court held otherwise, DENMAN, C. J., saying: "However wrongful the act of the plaintiff may

have been, yet, as the defendant sustained no special inconvenience therefrom, he certainly could not be justified in wilfully infringing upon the beds and destroying the oysters even for the purpose of abating a public nuisance. . . . It is very important for the sake of the public peace and to prevent oppression, even on wrongdoers, not to confound common with private nuisances in this respect. In the case of private nuisances, the individual aggrieved may abate it, and a public nuisance becomes a private one to him who is specially and in some particular way inconvenienced thereby, as in the case of a gate across a highway which prevents a traveller from passing, and which he may therefore throw down; but the ordinary remedy for a purely public nuisance is by indictment, and each individual who is only injured as one of the public, can no more proceed to abate than he can bring an action."

In *Dimes v. Petley*, 15 Q. B. 276, CAMPBELL, C. J., says: "It is fully settled by the recent cases, that if there be a nuisance in a public highway, a private individual cannot, of his own authority, abate it, unless it does him a special injury, and then only to the extent necessary to enable him to exercise his right of passing over the highway. And we clearly think he cannot justify doing any damage to the property of individuals who have improperly placed the nuisance there, if avoiding it he could have passed on with reasonable convenience."

In *Bowden v. Lewis*, 13 R. I. 189; s. c., 43 Am. Rep. 21, the plaintiff had erected an oyster house in a tidal river, opposite the defendant's villa lots. It did not appear that the waters way to the lots had ever been used. The defendant demolished the oyster house, claiming that it obscured the view, obstructed the access to and injured the value of his lots. It was held, that as he did not show any special injury, he was not warranted in destroying the building.

In *Brown v. De Groff*, 50 N. J. L. 409, the defendant, in fishing for clams, injured the plaintiff's oysters, and when sued, sought to justify on the ground that plaintiff's maintenance of the oyster bed was a public nuisance; but the court held that, conceding this to be so, it was no defence.

In *Tissot v. Great Southern Tel. etc. Co.*, 39 La. An. 996, a telegraph com-



conflict of authority can be reconciled by keeping in view his definition of a mixed nuisance, viz, one which, though public, is private as well as to certain individuals. We incline to believe that a rule of law may be formulated without resorting to this theory. The true rule we believe to be this, that, *speaking generally, an individual has not the right to abate a public nuisance from which he sustains no special injury, but that circumstances may arise to secure the judicial recognition of such right, limited by the rule that his act must not be such as to create a breach of the peace, and by the further rule that nothing must be done in excess of that demanded by the exigency of the special case.* We believe that something of this kind has been in the minds of the learned judges and text-writers who have adverted to this question, and that the existence of a rule thus limited with reference to special circumstances may account for the numerous dicta. The case of *Meeker v. Van Rensselaer* clearly was one of a special and peculiar emergency, and while so peculiar in its facts as to stand alone, may not, as we believe, be disregarded as a precedent in such other peculiar and especial cases as may arise in the future.

pany sought to justify the cutting of branches of trees overhanging the highway on the ground that such branches constituted a nuisance, but the defence was held untenable.

*Gray v. Ayres*, 7 Dana (Ky.) 375; s. c., 32 Am. Dec. 107, was a case where the defendants sought to justify on the ground that the house thrown down by them was a place of resort for felons; and here also it was held that the conduct of the defendants was unlawful. See also *Graves v. Shattuck*, 35 N. H. 257. See also *School Dist. v. Neil*, 36 Kan. 617; *Blodgett v. Syracuse*, 36 Barb. (N. Y.) 529; *Moody v. Niagara Co.*, 46 Barb. (N. Y.) 659; *Welch v. Stowell*, 2 Doug. (Mich.) 332; *Gray v. Ayres*, 7 Dana (Ky.) 375; s. c., 32 Am. Dec. 107; *State v. Keeran*, 5 R. I. 497; *Cobb v. Bennett*, 75 Pa. St. 326; *State v. Parrott*, 71 N. Car. 311; s. c., 17 Am. Rep. 5; *Cooper v. Marshall*, 1 Burr. 260; *Bateman v. Black*, 81 Q. B. 870; *Broom's Com.* (4th ed.), 222; *Griffith v. McCullum*, 46 Barb. (N. Y.) 561; *Rogers v. Rogers*, 14 Wend. (N. Y.) 131; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Hicks v. Dom*, 42 N. Y. 47; s. c., 9 Abb. Pr., N. S. (N. Y.) 47; *United States Illuminating Co. v. Grant*, 7 N. Y. Supp. 788; *McGregor v. Boyle*, 34 Iowa 268; *Finley v. Hershey*, 41 Iowa 389; *Davies v. Mann*, 10 M. & W. 546; *Hopkins v. Crombie*, 4 N. H. 520; *Amoskeag Co. v. Goodale*, 46 N. H. 53; *Rung v. Shoneberger*,

2 Watts (Pa.) 23; s. c., 26 Am. Dec. 95; *Philiber v. Matson*, 14 Pa. St. 306; *Cobb v. Bennett*, 75 Pa. St. 326; *Brightman v. Bristol*, 65 Me. 426; s. c., 20 Am. Rep. 711; *Brown v. De Groff*, 50 N. J. L. 409; *Hartshorn v. South Reading*, 3 Allen (Mass.) 501; *Hubbard v. Deming*, 21 Conn. 356; *Bowdin v. Lewis*, 13 R. I. 189; s. c., 43 Am. Rep. 21; *Day v. Day*, 4 Md. 262; *Turner v. Holtzman*, 54 Md. 148; s. c., 39 Am. Rep. 361; *Sulman v. Wolfe*, 27 Tex. 68; *Clark v. Lake St. Clair etc. Ice. Co.*, 24 Mich. 508; *Shepard v. People*, 40 Mich. 487; *Owens v. State*, 52 Ala. 400; *Eastern Co. R. Co. v. Doring*, 5 C. B., N. S. 821; *Roberts v. Rose*, 3 H. & C. 162; *Earp v. Lee*, 71 Ill. 193; *Lansing v. Smith*, 8 Cow. (N. Y.) 146; *Ely v. Niagara Co.*, 36 N. Y. 297; *Jarvis v. Santa Clara Valley R. Co.*, 52 Cal. 438; *State v. Paul*, 5 R. I. 185; *Godsell v. Fleming*, 59 Wis. 52; *Larson v. Furlong*, 63 Wis. 323; *Moffett v. Brewer*, 1 Greene (Iowa) 348; *Miller v. Forman*, 37 N. J. L. 55; *Reg. v. Patton*, 13 L. Canada 311; *Reg. v. Mathias*, 2 Fost. & F. 570; *Ruff v. Phillips*, 50 Ga. 130; *Morris v. Nugent*, 7 Carr. & P. 572; *South Carolina R. Co. v. Moore*, 28 Ga. 398; s. c., 73 Am. Dec. 778; *Arundel v. McCulloch*, 10 Mass. 70; *Rex v. Pappineau*, 2 Stra. 688; *Barclay v. Com.*, 25 Pa. St. 503; s. c., 64 Am. Dec., 715; *Shaubut v. St. Paul R. Co.*, 21 Minn. 502; *Bridge v. Grand Junction R. Co.*, 3 Mees. & W.

**VII. PRESCRIPTION—1. As to Public Nuisances.**—The right to maintain a public nuisance cannot be acquired by prescription.<sup>1</sup> Nor, where the public nuisance works private injury, can a prescriptive right be urged against a private action for such injury.<sup>2</sup>

244; Mayor etc. of Colchester v. Brooke, 7 Q. B. 339; Gateswood v. Blincoe, 2 Dana (Ky.) 158; Vason v. South Carolina R. Co., 42 Ga. 631; Clark v. Lake St. Clair etc. Ice Co., 24 Mich. 508.

1. Weld v. Hornby, 7 East 199; Fowler v. Saunders, Cro. Jac. 446; Gerring v. Barfield, 16 C. B., N. S. 597; Reg. v. Brewster, 8 U. Can., C. B. 208; Mills v. Hall, 9 Wend. (N. Y.) 315; s. c., 24 Am. Dec. 160; People v. Cunningham, 1 Den. (N. Y.) 536; s. c., 43 Am. Dec. 709; Taylor v. People, 6 Park. Cr. (N. Y.) 347; Campbell v. Seaman, 2 Thomp. & C. (N. Y.) 231; s. c., on appeal, 63 N. Y. 568; 20 Am. Rep. 567; State v. Franklin Falls Co., 49 N. H. 240; s. c., 6 Am. Rep. 513; Rhodes v. Whitehead, 27 Tex. 304; s. c., 84 Am. Dec. 631; State v. Phipps, 4 Ind. 515; Pettis v. Johnson, 56 Ind. 139; Brookline v. Mackintosh, 133 Mass. 215; New Salem v. Eagle Mill Co., 138 Mass. 8; Morton v. Moore, 15 Gray (Mass.) 573; Com. v. Upton, 6 Gray (Mass.) 475; Arundel v. McCulloch, 10 Mass. 70; Stetson v. Faxon, 19 Pick. (Mass.) 147; s. c., 31 Am. Dec. 123; Com. v. Sickie, Bright. (Pa.) 69; Com. v. Miltenberger, 7 Watts (Pa.) 450; Howell v. McCoy, 3 Rawle (Pa.) 256; Com. v. Elburger, 1 Whart. (Pa.) 469; Lewis v. Stein, 16 Ala. 214; s. c., 50 Am. Dec. 177; Wright v. Moore, 38 Ala. 593; s. c., 82 Am. Dec. 731; Elkins v. State, 2 Humph. (Tenn.) 543; State v. Rankin, 3 S. Car. 438; s. c., 16 Am. Rep. 737; Cross v. Mayor of Morristown, 18 N. J. Eq. 305; Tainter v. Mayor of Morristown, 19 N. J. Eq. 46; Philadelphia etc. R. Co. v. State, 20 Md. 157; State v. Holman, 104 N. Car. 861; United States v. Hoar, 2 Mason (U. S.) 311. See also Boston Rolling Mills v. Cambridge, 117 Mass. 396; Mills v. Hall, 9 Wend. (N. Y.) 315; s. c., 24 Am. Dec. 160; Waterloo v. Union Mill Co., 72 Iowa 437; New Salem v. Eagle Mill Co., 138 Mass. 8; Ronayne v. Loranger, 66 Mich. 373.

2. Mills v. Hall, 9 Wend. (N. Y.) 315; s. c., 24 Am. Dec. 160; Kellogg v. Thompson, 66 N. Y. 88; Rhodes v. Whitehead, 27 Tex. 304; s. c., 84 Am.

Dec. 631; Veazie v. Dwinel, 50 Me. 479; Wood's Law of Nuisances (2nd ed.) 727, *et seq.*

In Mills v. Hall, 9 Wend. (N. Y.) 315; s. c., 24 Am. Dec. 160, which was an action for a nuisance created by the erection and maintenance of a dam across the outlet of Lake Paradox, corrupting the atmosphere and affecting the health of the plaintiff and his family, the defendants relied on the fact that the dam in its present condition had been maintained for more than twenty years, but the court (SUTHERLAND, J.), said on this point: "There is no such thing as a prescriptive right or any other right to maintain a public nuisance. Admitting that the defendant's dam has been erected and maintained more than twenty years, and that during the whole of that period it has rendered the adjacent country unhealthy, such length of time can be no defence to a proceeding on the part of the public to abate it, or to an action by any individual for the special and peculiar injury which he may have suffered from it. If the defendants have for twenty years been permitted to overflow the plaintiff's land with their mill pond, so far as the injury to the land is concerned they have by that length of possession acquired a right to use it in that manner, and are not responsible in damages to the plaintiff. So a man may overflow his own land; but if such overflow spread disease and death through the neighborhood, it may be abated, and he must respond in damages for the special injury which any individual may have sustained from it; and it would seem very absurd to contend that the defendants in a case like this would have greater rights or immunities."

JUDGE COOLEY in his work on Torts, p. 614, observes that "in any case of a public nuisance from which individual injury was received, it would seem anomalous, to say the least, that a portion of the sufferers should be at liberty to bring private suits and another portion not, or that a land owner who had lived near it should be precluded, but might sell to another who should come

But the fact that for a great many years the public, or the defendant, has been doing the act or maintaining the state of things complained of, sometimes influences the courts in determining whether such act or state of things amounts to a public nuisance.<sup>1</sup>

**2. As to Private Nuisances.**—With regard to private nuisances, it may be stated generally that when the defendant in an action for damages caused thereby, can show clearly that he has openly done the thing complained of for more than twenty years, or for the corresponding statutory period of limitation, that he has always done it in the same manner, without interruption, and that the evil effects have always been the same, he will be held to have established a prescriptive immunity from liability for the nuisance, and a right to maintain it.<sup>2</sup>

in with ample right. On the whole the better doctrine would seem to be that the acquisition of rights by prescription can have nothing to do with the case of public nuisances, either when the State or when individuals complain of them."

1. In *Rex v. Smith*, 4 Esp. 111, the defendant was indicted for obstructing a highway by depositing bags of clothes in it. It appeared that the place had been used as a market for the sale of clothes for over twenty years, and that the defendant put the bags of clothes there for the purpose of sale. LORD ELLENBOROUGH, C. J., said that, after an acquiescence of twenty years, it appearing to all the world that there was a fair or market kept at the place, he could not hold a man to be a criminal who came there under the honest belief that it was such fair or market, legally established.

An acquiescence for fifty years by the neighborhood will prevent an indictment for continuing a noxious trade. *Rex v. Neville*, Peake 93.

So for setting up a noxious manufactory in a neighborhood in which other offensive trades have long been endured, unless the public inconvenience is greatly increased. *Rex v. Neville*, Peake 93.

In *Peckham v. Henderson*, 27 Barb. (N. Y.) 207, it is said that the rule *nullum tempus occurrit regi* does not apply to the case of a simple encroachment upon a highway, which does not amount to an actual obstruction or substantial annoyance to the public.

2. *Bliss v. Hall*, 5 Scott 500; *Murgatroyd v. Robinson*, 7 El. & Bl. 391; *Elliottson v. Feetham*, 2 Bing. N.

C. 134; s. c., 2 Scott 174; *St. Helen Smelting Co. v. Tipping*, 11 H. L. Cas. 643; *Roberts v. Clark*, 18 L. T., N. S. 48; *Flight v. Thomas*, 10 Ad. & El. 590; *Weld v. Hornby*, 7 East 195; *Ballard v. Dyson*, 1 Taunt. 279; *Tapling v. Jones*, 11 H. L. Cas. 265; *Crossley v. Lightowler*, 3 L. R., Eq. 279; *Charity v. Riddle*, 14 F. C. (Sc.) 340; *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171; *Dana v. Valentine*, 5 Met. (Mass.) 8; *Grant v. Lyman*, 4 Met. (Mass.) 477; *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 247; *Crosby v. Bessey*, 49 Me. 539; s. c., 77 Am. Dec. 271; *Wood v. Kelley*, 30 Me. 47; *Gleason v. Tuttle*, 46 Me. 288; *Smith v. Russ*, 17 Wis. 227; *Horn v. Stillwell*, 35 N. J. 307; *Chicago etc. R. Co. v. Hoag*, 90 Ill. 339; *Simpson v. Coe*, 4 N. H. 301; *Bradley Fish Co. v. Dudley*, 37 Conn. 136; *Branch v. Doane*, 17 Conn. 402; *Stein v. Burden*, 24 Ala. 130; s. c., 60 Am. Dec. 453; *Wright v. Moore*, 39 Ala. 593; s. c., 82 Am. Dec. 731; *Polly v. McCall*, 37 Ala. 30; *Roundtree v. Brantley*, 34 Ala. 544; s. c., 73 Am. Dec. 470; *Brooks v. Curtis*, 4 Lans. (N. Y.) 283; *Stiles v. Hooker*, 7 Cow. (N. Y.) 266; *Russell v. Scott*, 9 Cow. (N. Y.) 279; *Rexford v. Marquis*, 7 Lans. (N. Y.) 257; *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Brady v. Weeks*, 3 Barb. (N. Y.) 156; *Dyer v. Dupui*, 5 Whart. (Pa.) 584; *Cooper v. Smith*, 9 S. & R. (Pa.) 26; s. c., 11 Am. Dec. 658; *Howell v. McCoy*, 3 Rawle (Pa.) 256; *Coe v. Wolcottville Mfg. Co.*, 35 Conn. 175; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Tracy v. Atherton*, 36 Vt. 503; *Townsend v. Downer*, 32 Vt. 183; *Shumway v. Simons*, 1 Vt. 53; *Sibley v. Ellis*, 11 Gray (Mass.) 417; *Marr v. Gilliam*, 1

**3. Continuous Injury.**—In order to create a prescription the defendant's act or business must have been actionable from the commencement of the period relied on; he must show not only that he committed the act or carried on the offensive trade with-

Coldw. (Tenn.) 488; *Stillman v. White Rock Co.*, 3 Woodb. & M. (U. S.) 549; *Solomon v. Vinters Co.*, 4 H. & N. 585; *Eaton v. Swansea Water Works Co.*, 17 Q. B. 267; *Winship v. Huds- peth*, 10 Exch. 5; *Greatrex v. Hay- ward*, 8 Exch. 291; *Evans v. Dana*, 7 R. I. 306; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Daniel v. North*, 11 East 372; *Nichols v. Aylor*, 7 Leigh (Va.) 546; *Smith v. Miller*, 11 Gray (Mass.) 148; *Wood v. Veal*, 5 B. & Ald. 454; *Yard v. Ford*, 2 Wm. Saund. 175; *Bodfish v. Bodfish*, 105 Mass. 317; *Allan v. Gomme*, 11 Ad. & El. 759.

In *Campbell v. Searman*, 2 Thomp. & C. (N. Y.) 231; s. c., 20 Am. Rep. 581, the court (POTTER, J.) said: "It is also urged that the doctrine of pre- scription applies to the defendant's right to use his premises as a brick yard. There are some *dicta* in the re- ported cases in *England* as well as in the elementary books suggesting that an individual may acquire a right to maintain an offensive trade by prescrip- tion, by an undisturbed use of such a business for over twenty years . . .

The English cases with their conflicts have been ably reviewed in our own courts. Whatever may be the rule in *England* or *Pennsylvania* on the sub- ject of gaining a right to continue nu- sances by prescription, and of the con- sideration of pecuniary profit to him who continues it, or benefit to trade and commerce, no such rule prevails in this State. 'Such a doctrine,' says DANIELS, J., in *Taylor v. People*, 6 Park. Cr. (N. Y.) 347, 'would render the property of others subordinate to the purposes of him who might, before they had erected their dwellings, have devoted his own to an offensive and un- wholesome business. There is no sound principle of law that will protect any man in thus depriving others of the substantial use and enjoyment of their property.' . . . So it was said by JEWETT, J., in *People v. Cunningham*, 1 Den. (N. Y.) 536; s. c., 43 Am. Dec. 709: 'No lapse of time will enable a party to prescribe for a nuisance.' An examination of the cases referred to by the learned judge, however, will

show that in both instances the court had in mind public nuisances only.

When the case of *Campbell v. Sea- man* reached the court of appeals (63 N. Y. 568; s. c., 20 Am. Rep. 567), that court, while not expressly asserting the doctrine of prescription, yet declared that delay on the part of the complain- ant might deprive him of equitable re- lief. EARL, J., on this point said: "It is true that if a party sleeps on his rights and allows a nuisance to go on without remonstrance or without taking measures either by suit at law or in equity to protect his rights, and allows one to go on making large expenditures about the business which constitutes the nuisance, he will sometimes be re- garded as guilty of such laches as to deprive him of equitable relief."

In an action for a nuisance consisting of a brick kiln, the defendant's pre- scriptive right to maintain another kiln, nearer to the plaintiff's house and almost in line with the kiln complained of, cannot be urged as a reason for not granting an injunction. *Bareham v. Hall*, 22 L. T., N. S. 116.

**Instances.**—Prescriptive rights to carry on offensive trades generating smoke, noise, noxious vapors, etc., and polluting streams, have been recognized in the following cases: *Charity v. Rid- dle*, 14 F. C. (Sc.) 340, glue factory; *Duncan v. Earl of Moray*, 15 F. C. (Sc.) 302, pits for containing *fuilze* or sewerage matter; *Bliss v. Hall*, 5 Scott 500, candle factory; *Roberts v. Clark*, 18 L. T., N. S. 48, brick kiln, causing both smoke and offensive stenches; *Flight v. Thomas*, 10 Ad. & El. 590, mixen works causing offensive stenches; *Murgatroyd v. Robinson*, 7 El. & Bl. 391, fouling water of stream with cinders; *Elliotson v. Feetham*, 2 Bing. N. C. 134, iron manufac- tory; *Goldsmid v. Turnbridge Wells Improvement Co.*, 1 L. R., Ch. 352, pollution of stream with sewerage; *Baxendale v. Murray*, 2 L. R., Ch. 790, pollution of stream with refuse from paper mill; *Dana v. Valentine*, 5 Met. (Mass.) 8, slaughterhouse, soap boil- ing and tallow factory; *Howell v. Mc- Coy*, 3 Rawle (Pa.) 256, pollution of stream by refuse from tannery.

out interruption during the whole period, but also that, from the beginning, it worked a legal injury to the plaintiff or his predecessors in interest.<sup>1</sup>

1. *Goldsmid v. Tunbridge Wells Imp. Co.*, 1 L. R., Eq. 352; *Sturges v. Bridgman*, 11 L. R., Ch. 852; *Roberts v. Clark*, 18 L. T., N. S. 48; *Flight v. Thomas*, 10 Ad. & El. 590; *Crosby v. Bessey*, 49 Me. 539; s. c., 79 Am. Dec. 271; *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171; *Postlethwaite v. Payne*, 8 Ind. 104; *Norton v. Valentine*, 14 Vt. 239; s. c., 39 Am. Dec. 220; *Baxter v. Taylor*, 4 B. & Ad. 72; *School District v. Lynch*, 33 Conn. 334; *Sargent v. Ballard*, 9 Pick. (Mass.) 251; *Gray v. Bond*, 5 Moore, 527; *Perrin v. Garfield*, 37 Vt. 311; *Ingraham v. Hough*, 1 Jones L. (N. Car.) 39; *Moore v. Rawson*, 3 B. & C. 332; *Atkins v. Chilson*, 7 Met. (Mass.) 52; *Embry v. Owen*, 4 Eng. L. & Eq. 466; *Durel v. Boisblanc*, 1 La. An. 407; *Webb v. Bird*, 13 C. B., N. S. 841; *Staffordshire Nav. Co. v. Birmingham Nav. Co.*, L. R., 1 H. L. 254; *Plunleigh v. Dawson*, 6 Ill. 544; s. c., 41 Am. Dec. 199; *McGregor v. Waite*, 10 Gray (Mass.) 75; s. c., 69 Am. Dec. 305; *Barker v. Richardson*, 4 B. & Ald. 579; *Watkins v. Peck*, 13 N. H. 360; s. c., 40 Am. Dec. 156; *Mebane v. Patrick*, 1 Jones L. (N. Car.) 26; *Edson v. Munzell*, 10 Allen (Mass.) 557; *Wallace v. Fletcher*, 30 N. H. 434; *Tyler v. Wilkinson*, 4 Mason (U. S.) 397; *Tucker v. Newman*, 11 Ad. & El. 40; *Bradbury v. Grinsel*, 2 Wm. Saund. 175 n.; *Bealy v. Shaw*, 6 East 216; *Powell v. Bagg*, 8 Gray (Mass.) 441; s. c., 69 Am. Dec. 262; *Livett v. Wilson*, 3 Bing. 115; *Blanchard v. Bridges*, 4 Ad. & El. 176; *Pollard v. Barnes*, 2 Cush. (Mass.) 191; *Lowe v. Carpenter*, 6 Exch. 825; *Mitchell v. Parks*, 26 Ind. 354; *Hogg v. Gill*, 1 McMull. L. (S. Car.) 329; *Nash v. Peden*, 1 Spear L. (S. Car.) 17; *Carr v. Foster*, 3 Q. B. 581.

In *Sturges v. Bridgman*, 11 L. R., Ch. 852, the defendant, a confectioner, had for more than 20 years used a mortar and pestle in his back yard, adjoining the residence of the plaintiff, a physician. A short time previous to the commencement of the action the plaintiff built an addition to his house, and used it as a consultation room. His patients being much annoyed by the noise produced by the operation of the defendant's mortar and pestle, he brought this action to enjoin the further continuance of the nuisance. The de-

fendant set up a prescriptive right by virtue of the 20 years' use; but the court held that, inasmuch as the noise produced no annoyance, and consequently created no cause of action until the erection of the consultation room, the prescriptive period did not begin until that time.

In *Flight v. Thomas*, 10 Ad. & El. 590, an action for creating offensive smells which passed over the plaintiff's premises, the defendant alleged that for more than 20 years prior to the action he and his predecessors had, without molestation, used a certain mixen upon his premises, and that said mixen caused the smells complained of, but he did not allege that the smells had gone over the plaintiff's land during the whole time. There was a verdict for the plaintiff, and on a motion for judgment *non obstante* LORD DENMAN, C. J., said: "There is no claim of an easement, unless you make it appear that the offensive smell has been used for 20 years to go over the plaintiff's land. The plea may be completely proved without proving that the nuisance has ever passed beyond the limits of the defendant's own land." LITLEDAL, J., in the same connection, observed that "the plea only shows that the defendant has enjoyed, as of right and without interruption for twenty years, the benefit of something that occasioned a smell on his own land."

In *Polly v. McCall*, 37 Ala. 30, the defendant dug a ditch and diverted into it the water of a stream which flowed through the plaintiff's land. For several years the ditch as thus maintained did no harm to the plaintiff, but it finally became clogged and overflowed the plaintiff's premises. In an action for the damages, the defendant asserted a right by prescription to maintain the ditch and divert the water, but the court held that the prescriptive period did not begin until the time when the plaintiff was first injured.

In *Smith v. Russ*, 17 Wis. 227; s. c., 84 Am. Dec. 739, it was held that the fact that defendant's dam had been maintained at a certain height for 20 years did not create a prescriptive right to maintain it at that height and thereby overflow land which had not been overflowed during the whole 20 years, but only since a more recent time.

It is not the extent of the claim of the right, but the extent of its actual exercise, which controls. A claim of right to do more than that which has been done effects nothing on the question of prescription.<sup>1</sup>

This principle lies at the foundation of the question of the right to invoke the doctrine of prescription in support of a nuisance consisting of noxious smells, gases, or vapors, the difficulty being not in maintaining theoretically that the law gives the right, but in furnishing the necessary proof that the right has been exercised to the same extent as at the time when the nuisance is complained of,<sup>2</sup> the burden of proving a prescriptive right being on him who asserts it.<sup>3</sup>

In *Crosby v. Bessey*, 49 Me. 539; s. c., 77 Am. Dec. 271, it was held that the proprietor of a tannery who had thrown refuse bark into a stream for more than 20 years acquired no prescriptive right as against lower riparian owners, unless he could show that the deposit of bark on their land by the action of the waters had taken place each year during the whole period, to their actual damage.

Somewhat opposed to this view is the case of *Dana v. Valentine*, 5 Met. (Mass.) 8, in which the plaintiffs, owners of dwelling-houses in the vicinity of the defendant's slaughterhouse, which he used also for the purpose of boiling soap and manufacturing candles, brought a bill to enjoin him from carrying on the business there, on the ground that the stenches created were offensive and unhealthful. The defendant relied on the fact that he had carried on the business in that place in the same manner for more than 20 years. The injunction was denied, the court saying: "Another objection to the defendant's title by prescription is that until *late*ly the plaintiffs suffered no damage from the alleged nuisance, and therefore could not interfere to prevent its continuance. But it is very clear that when a party's right of property is invaded, he may maintain an action for an invasion of his right without proof of actual damages."

1. *Noyes v. Morrill*, 108 Mass. 396; *Russell v. Scott*, 9 Cow. (N. Y.) 279; *Dyer v. Depui*, 5 Whart. (Pa.) 584; *Horn v. Stillwell*, 35 N. J. L. 307; *Rexford v. Marquis*, 7 Lans. (N. Y.) 251; *Wood v. Kelley*, 30 Me. 47; *Winnipeg Lake Co. v. Young*, 40 N. H. 420; *Gleason v. Tuttle*, 46 Me. 288; *McNab v. Adamson*, 6 U. C. Rep. 100.

2. See *Wood on Nuisances*, §§ 711, *et seq.*, for a criticism on certain dicta

which might seem to militate against the existence of the statement in the text; and see *Com. v. Upton*, 6 Gray (Mass.) 473; *Dana v. Valentine*, 5 Met. (Mass.) 8, and the ancient case of *Rotheram v. Green*, Noy 67; and, as bearing on the same subject, *Rogers v. Allen*, 1 Camp. 308; *Flight v. Thomas*, 10 Ad. & El. 590; *Fay v. Whitman*, 100 Mass. 76; *Colville v. Middleton*, 19 F. C. (Sc.) 339; *Millar v. Marshall*, 5 Mur. (Sc.) 32; *Roberts v. Clark*, 17 L. T., N. S. 49; *Jackson v. Stacy*, 1 Holt. 455; *Peardon v. Underhill*, 16 Q. B. 123; *Davies v. Williams*, 16 Q. B. 547; *Bower v. Hill*, 2 Bing. N. C. 339; *De Rutzen v. Loyd*, 5 Ad. & El. 456; *Allan v. Gomme*, 11 Ad. & El. 759; *Higham v. Rabett*, 5 Bing. N. C. 622; *Martin v. Goble*, 1 Camp. 320; *Bealey v. Shaw*, 6 East 208; *Chandler v. Thompson*, 3 Camp. 80; *Johnson v. Thoroughgood*, Hob. 64; *Bushwood v. Pond*, Cro. Eliz. 722; *Rotheram v. Green*, Nor. 67; *Congers v. Jackson*, Clay 19; *Corbett's Case*, 7 Coke 57; *Hickman v. Thorny*, Free. 211; *Kingsmill v. Bull*, 9 East 185; *Morewood v. Jones*, 4 T. R. 157; *Bailey v. Appleyard*, 3 Nev. & P. 257.

The cases containing the before-mentioned dicta are *Rex v. Frost*, 2 Carr. & P. 483, and possibly, *Taylor v. People*, 6 Park. Cr. (N. Y.) 347. The leading, if not the only case, directly opposed to the general current of authority is *Campbell v. Seaman*, 2 N. Y. Sup. Ct. Rep. 240; *aff'd* 63 N. Y. 568; s. c., 20 Am. Rep. 567. This case, when compared with the authorities cited for the doctrine announced in it and with the other cases, can hardly be deemed authority, if, indeed, it may not be so construed and explained as to bring it into line with the cases generally.

3. *Ball v. Ray*, 8 L. R., Ch. 467; 28

**4. Alteration of Nuisance.**—Where a prescriptive right has been acquired to carry on an offensive business, a change in the manner of conducting it, as by the use of new materials, does not destroy the right, provided that the injurious effects are not thereby materially changed or increased.<sup>1</sup>

**5. As Against Grantee.**—If one who has acquired a prescriptive right to pollute air or water conveys land within the range of the nuisance without reserving the right to continue the offensive business, he cannot, as against his grantee, set up the prescriptive right when sued on account of the nuisance.<sup>2</sup>

**6. How Right May be Lost.**—A prescriptive right cannot be lost after having been acquired, except by a nonuser for twenty years.<sup>3</sup>

**VIII. LEGISLATIVE CONTROL.**—Where persons or corporations are authorized by the legislature to do a particular thing, or to engage in a particular business, they are not liable to indictment or other proceedings on behalf of the public for any consequences of their exercise of such authority if they have kept strictly within its terms, and done only the very thing contemplated by the legislature, in a reasonably careful and proper manner.<sup>4</sup>

L. T. 346; *Richardson v. Pond*, 15 Gray (Mass.) 389; *Atwater v. Bodfish*, 11 Gray (Mass.) 152; *McCallum v. Germantown Water Co.*, 54 Pa. St. 40; *Moulse v. Butler*, 1 Rolfe's Rep. 83; *Williams v. East India Co.*, 3 East 199; *Lord Halifax's Case*, *Butler's N. P.* 298; *Powell v. Milbank*, 2 Bl. 851; *Rex v. Combs*, Comb 57; *Cooper v. Smith*, 9 S. & R. (Pa.) 26; s. c., 11 Am. Dec. 658; *Cooper v. Barber*, 3 Taunt. 99; *Hobson v. Todd*, 4 T. R. 71; *Bliss v. L'ice*, 17 Pick. (Mass.) 23; *Hapwood v. Scofield*, 2 M. & Rob. 34; *Shadwell v. Hutchinson*, 4 C. & P. 333; *Patrick v. Greenaway*, 2 Wm. Saund. 175.

1. *Baxendale v. Murray*, 2 L. R., Ch. 790; *Ball v. Ray*, 8 L. R., Ch. 467; *Stein v. Burden*, 24 Ala. 130; s. c., 60 Am. Dec. 453; *Goldsmid v. Tunbridge Wells Imp. Co.*, 1 L. R., Eq. 166; *Bailiffs of Tewksbury v. Bucknell*, 1 Taunt. 142; *Welcome v. Upton*, 6 M. & W. 536.

The fact that noise and vibration from machinery have never been complained of for more than twenty years does not deprive an adjoining owner of his right to prevent any increased noise, though such increase is slight. *Heather v. Pardon*, 37 L. T., N. S. 393.

2. In *Crossley v. Lightowler*, 3 L. R., Eq. 279, *Wood, V. C.*, said: "It certainly seems preposterous to me to say that a person can convey land to a riparian owner and then claim the right

of pouring his dirty water into it if he pleases." See also *Swansborough v. Coventry*, 19 Bing. 305; *Berridge v. Ward*, 10 C. B., N. S. 400; *Bicket v. Moris*, 4 H. L. (Sc.) 47; *Sampson v. Hoddinot*, 1 C. B., N. S. 590.

3. *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 142; *Hillary v. Waller*, 12 Ves. 239; *Doe v. Hilder*, 2 B. & Ald. 791; *Corning v. Gould*, 16 Wend. (N. Y.) 535; *Farrar v. Cooper*, 34 Me. 400; *Hatch v. Dwight*, 17 Mass. 289; s. c., 9 Am. Dec. 145; *Jennison v. Walker*, 11 Gray (Mass.) 425.

4. *Rex v. Pease*, 4 B. & Ad. 30; *Rex v. Morris*, 1 B. & Ad. 441; *Beckett v. Upton*, 33 Eng. L. & Eq. 108; *People v. New York Gaslight Co.*, 64 Barb. (N. Y.) 55; *Carhart v. Auburn Gaslight Co.*, 22 Barb. (N. Y.) 297; *People v. Platt*, 17 John. (N. Y.) 195; s. c., 8 Am. Dec. 382; *Davis v. Mayor etc. of N. Y.*, 14 N. Y. 506; s. c., 67 Am. Dec. 186; *Harris v. Thompson*, 9 Barb. (N. Y.) 350; *Miller v. Mayor etc. of N. Y.*, 109 U. S. 385; *Hamilton v. New York etc. R. Co.*, 9 Paige (N. Y.) 171; *People v. Law*, 34 Barb. (N. Y.) 494; *Briesen v. Long Island etc. R. Co.*, 31 Hun (N. Y.) 112; *Butler v. State*, 6 Ind. 165; *Danville etc. R. Co. v. Com.*, 73 Pa. St. 29; *Western Union Tel. Co. v. Hewett*, 4 Dist. of Columbia, 424; *New Albany etc. R. Co. v. Higman*, 18 Ind. 77; *Attorney General v. Hudson River R. Co.*, 9 N.

In other words, the legislature may, if it sees fit, give express sanction to an act or state of affairs which otherwise would constitute a public nuisance. But the courts look with jealousy upon such legislative indulgence, and hold the parties so favored to a strict observance of the limitations of their authority; and if their acts create what ordinarily would be a nuisance, and what cannot be clearly shown to be the natural and probable result of the privilege, or if by another method of proceeding the authorized object could have been accomplished without creating the nuisance, they cannot rely for protection upon the statutory authority. It is considered that such consequences were not contemplated by the legislature.<sup>1</sup>

J. Eq. 526; *Hinchman v. Paterson etc.* R. Co., 17 N. J. Eq. 75; *Easton v. New York etc. R. Co.*, 24 N. J. Eq. 49; *Com. v. Boston*, 97 Mass. 555; *Davis v. Chicago etc. R. Co.*, 46 Iowa 389; *Vason v. South Carolina R. Co.*, 42 Ga. 631; *State v. Louisville etc. R. Co.*, 86 Ind. 114; *Attorney General v. Ewart Booming Co.*, 34 Mich. 462; *People v. Detroit etc. Plank R. Co.*, 37 Mich. 195; *Randle v. Pacific R. Co.*, 65 Mo. 325; *Lewis v. Behan*, 28 La. An. 130; *Irwin v. Great Southern Telephone Co.*, 37 La. An. 63.

Works of internal improvement, erected by the State for the benefit of its citizens, do not become a public nuisance because they contribute to render the neighborhood unhealthy by the obstruction of running water and overflow of adjacent lands; nor does it alter the rule that the works have been transferred to a private corporation, with a requirement that they shall be kept up for the original purposes. *Com. v. Reed*, 34 Pa. St. 275; s. c., 75 Am. Dec. 661.

1. *Cogswell v. New York etc. R. Co.*, 103 N. Y. 10; s. c., 5 Am. Rep. 901; *Davis v. Sacramento*, 59 Cal. 596; *Cain v. Chicago etc. R. Co.*, 54 Iowa 255; *Quinn v. Lowell Electric Light Co.*, 140 Mass. 106; *Frankle v. Jackson*, 30 Fed. Rep. 398; *Baltimore etc. R. Co. v. Fifth Baptist Church*, 108 U. S. 317; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316; s. c., 56 Am. Rep. —; *Thompson v. Pennsylvania R. Co.*, 51 N. J. L. 42; *Missouri River Packet Co. v. Hannibal etc. R. Co.*, 79 Mo. 478; *Sheldon v. Western Union Tel. Co.*, 4 N. Y. Supp. 526; *London etc. R. Co. v. Canal Co.*, 1 R. Cas. 225; *Rex v. East & West India Docks R. Co.*, 2 R. Cas. 380; *Rickett v. Metropolitan R. Co.*, 2 H. L. 175; *Coates v. Clarence R. Co.*, 1 R. & M. 181; *Richardson v. Vermont Cent.*

*R. Co.*, 25 Vt. 465; s. c., 60 Am. Dec. 283; *Lawrence v. Great Northern R. Co.*, 4 Eng. L. & Eq. 265; *Freehold Investment Co. v. Metropolitan R. Co.*, Wk. Notes 1866, p. 66; *Matthews v. West London Water Works Co.*, 3 Camp. 402; *London etc. R. Co. v. Canal Co.*, 1 R. Cas. 225; *Waterman v. Connecticut etc. R. Co.*, 30 Vt. 610; s. c., 73 Am. Dec. 326; *Sabin v. Vermont Cent. R. Co.*, 25 Vt. 363; *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465; s. c., 60 Am. Dec. 283; *Reg. v. Train*, 2 B. & G. 640.

Legislative authority to operate a brick kiln is no defence to an action for a nuisance by reason of such operating. *States v. St. Louis Board of Health*, 16 Mo. App. 8.

One who maintains a public nuisance cannot justify under a licence from the county board of health to manufacture "fertilizers and materials." *Garrett v. State*, 49 N. J. L. 94; s. c., 60 Am. Rep. 592.

A case well illustrating the general doctrine is *Reg. v. Bradford Navigation Co.*, 6 B. & S. 631. There the defendants had been authorized by statute to construct and maintain a canal, using therefor the water of a certain stream. At the time of the grant the water of this stream was reasonably pure, but after the construction of the canal a town on the bank of the stream increased largely in population, and its sewerage was discharged into the stream, thus polluting it with offensive substances. The defendants, however, continued to draw the water of the stream into their canal, where it became stagnant and emitted very offensive and sickening odors from the sewerage contained in it. On proceedings to restrain them from further turning into the canal such sewerage or other



matter calculated to create a nuisance, the defendants insisted that, as they had been granted the right to use the water of that stream for their canal, and as the pollution thereof was not due to any act of theirs, they could not be held responsible for any consequences resulting from its use for the authorized purpose. But the court held that as at the time of the grant the water of the stream was pure, and while in that condition no harm would have resulted from its remaining stagnant, it could not be held as having been contemplated by parliament that the water would afterwards become impure and render its use in the canal a nuisance to the public; and the use of the water was enjoined, as was also such use of the canal as to in any way create a nuisance from noxious smells emitted from the water therein. CROMPTON, J., in delivering the opinion of the court, said: "The only way in which such a nuisance as this can be legitimated is by showing that the legislature intended to legitimate it. Here, power was given to the company to take the water of certain becks; but not to take the water at all times so as to cause pollution of the atmosphere and cause disease."

Plaintiff, whose mansion house and grounds adjoined a railway and sidings on which was a shed used for cleaning the engines, complained of smoke and noxious vapors from a large number of engines stabled at the sidings and sheds, created during the process of lighting the engine fires. The company, in an action to enjoin them from permitting the issue of such smoke and vapor, contended that the statute authorized them to commit even a nuisance, provided they worked their line properly and used due precautions, and that the use of the sheds and sidings for cleaning the engines and relighting the fires was a necessary and legitimate one, and incidental to a reasonable enjoyment of their statutory powers, and gave the plaintiff no ground of action. But the court held that the statute had not deprived him of his ordinary rights, and did not authorize the nuisance complained of; that the emission of smoke and noxious vapor during the operations of cleaning the engines and lighting the fires was not a necessary evil incident to the proper working of the line, or a reasonable user of the land for the company's purposes within the meaning of the statute. *Smith v.*

*Midland R. Co.*, 37 L. T., N. S. 224; 25 W. R. 861.

Power was given to a company to build a railway between certain points according to a plan deposited with a clerk of the peace, from which plan the company was not to deviate more than one hundred yards. The act recited that a railway between those points would be of great public utility, and would materially assist agricultural interests and the general traffic of the country. By a subsequent act the company was authorized to use locomotive engines upon the railway, which, when constructed, ran parallel and adjacent to an ancient highway, and in some places came within five yards of it. The company's engines frightened horses being driven in carriages along the highway. On indictment for nuisance, it was held that this interference with the rights of the public must be regarded as having been contemplated and sanctioned by the legislature, and that the company was not liable. *Rex v. Pease*, 4 B. & Ad. 30.

Where a railroad which is authorized to be constructed over a particular route is made over a different route, in whole or in part, it is a mere nuisance on every highway it touches in its illegal course. *Com. v. Erie etc. R. Co.*, 27 Pa. St. 339; s. c., 67 Am. Dec. 471; s. c., *Denver etc. R. Co. v. Denver City R. Co.*, 2 Colo. 673.

A statute prescribing the thickness of walls used for manufacturing or storing petroleum does not authorize the refining of petroleum in any locality where a necessary consequence is the emission of such offensive vapors as constitute a common-law nuisance. *Com. v. Kidder*, 17 Mass. 188.

In *Delaware etc. Canal Co. v. Com.*, 60 Pa. St. 367, it was held that where a canal company purchased a canal in the condition in which it had been constructed by the commonwealth, and thereafter water was allowed to escape through the bank of the towpath and form stagnant and offensive pools on adjacent land belonging to third persons, that the canal company was indictable for maintaining a public nuisance.

A statute authorized the commissioners of emigration, with the consent of the common council of New York city, to lease or purchase docks, etc., for the landing of emigrants. The council leased to the commissioners for a term of years a portion of the North Bat-

It is sometimes said that that which is authorized by the legislature cannot be a nuisance.<sup>1</sup> By this, however, a public nuisance is meant, and there may be, notwithstanding the legislative authority, a private right of action for damages. To hold otherwise would be to hold, in effect, that one's property may be taken without compensation. Unless, however, such damage is inflicted as may be deemed equivalent to an actual taking, there is not a right of action, if that authorized has been done in a lawful way and within the scope of the authority, even though inconvenience and annoyance may arise, for within certain limits such annoyance and inconvenience must be submitted to.<sup>2</sup>

**IX. MUNICIPAL CONTROL.**—See MUNICIPAL CORPORATIONS.

tery, in a thickly populated portion of the city, where the contemplated use of it would seriously endanger the health of the community. *Held*, that an injunction would be granted to restrain such use. *Brower v. Mayor etc. of N. Y.*, 3 Barb. (N. Y.) 254.

In *Delaware etc. Canal Co. v. Lee*, 22 N. J. L. 243, an action was held to lie against a canal company which, under the authority of its charter, constructed its canal on the land of a third person in such manner as to throw back the water of a natural water-course upon the plaintiff's land.

It is no defence to an action to abate a nuisance caused by maintaining a dam that it was erected by legislative authority, where the erection itself does not necessarily create the nuisance, but it arises from the manner of its construction. *Village of Pine City v. Munch*, 42 Minn. 342; *Burton v. Philadelphia R. Co.*, 4 Harr. (Del.) 252; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304; *Slatten v. Des Moines Valley R. Co.*, 29 Iowa 154; s. c., 4 Am. Rep. 205; *North Vernon v. Voegler*, 103 Ind. 314; *Terre Haute etc. R. Co. v. McKinley*, 33 Ind. 274; *Franklin Turnpike Co. v. Crockett*, 2 Sneed (Tenn.) 263; *King v. Morris etc. R. Co.*, 18 N. J. Eq. 397; *Tinsman v. Belvidere, Delaware etc. R. Co.*, 26 N. J. L. 148; *Spaulding v. Chicago etc. R. Co.*, 30 Wis. 110; s. c., 11 Am. Rep. 550; *Robinson v. New York etc. R. Co.*, 27 Barb. (N. Y.) 512; *Cott v. Lewiston R. Co.*, 36 N. Y. 214; *Fletcher v. Auburn etc. R. Co.*, 25 Wend. (N. Y.) 462; *Miller v. Auburn etc. R. Co.*, 6 Hill (N. Y.) 61.

1. *Easton v. New York etc. R. Co.*, 24 N. J. Eq. 49; *Hinchman v. Paterson etc. R. Co.*, 17 N. J. Eq. 75; *Danville etc. R. Co. v. Com.*, 73 Pa. St. 29; *People v. Detroit etc. Plank Road Co.*,

37 Mich. 195; *Griffing v. Gibb, McAll (U. S.)* 212; *Com. v. Boston*, 97 Mass. 555; *People v. Law*, 34 Barb. (N. Y.) 494; *Stoughton v. State*, 5 Wis. 291.

2. *Rickett v. Metropolitan R. Co.*, 2 H. L. Cas. 175; *North Staffordshire R. Co. v. Dale*, 8 El. & Bl. 836; *Biscoe v. Great Eastern R. Co.*, 16 L. R., Eq. 640; *Eagle v. Whaimy Cross R. Co.*, 2 L. R., C. P. 638; *Reg. v. Train*, 2 B. & S. 640; *Carhart v. Auburn Gas Light Co.*, 22 Barb. (N. Y.) 297; *People v. New York Gas Light Co.*, 64 Barb. (N. Y.) 55; *State v. Western etc. Nav. Co.*, 2 Johns. (N. Y.) 283; *Manhattan Gas Co. v. Barker*, 36 How. Pr. (N. Y.) 233; *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165; *People v. Platt*, 17 Johns. (N. Y.) 195; s. c., 8 Am. Dec. 382; *Cott v. Lewiston R. Co.*, 36 N. Y. 214; *Estabrooks v. Peterborough R. Co.*, 12 Cush. (Mass.) 224; *Curtiss v. Eastern R. Co.*, 14 Allen (Mass.) 55; *Wilson v. New Bedford*, 108 Mass. 261; s. c., 11 Am. Rep. 352; *Bradley v. New York etc. R. Co.*, 21 Conn. 305; *Hamden v. New Haven R. Co.*, 27 Conn. 158; *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201; *Tinsman v. Belvidere Delaware etc. R. Co.*, 26 N. J. L. 148; *Hinchman v. Paterson etc. R. Co.*, 17 N. J. Eq. 75; *Delaware etc. Canal Co. v. Wright*, 21 N. J. L. 469; *Lee v. Pembroke Iron Co.*, 57 Me. 481; s. c., 2 Am. Rep. 59; *Lyman v. White River Bridge Co.*, 2 Aik. (Vt.) 255; *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465; s. c., 60 Am. Dec. 283; *Eaton v. Boston etc. R. Co.*, 51 N. H. 504; s. c., 12 Am. Rep. 147; *Johnson v. Atlantic R. Co.*, 35 N. H. 569; *March v. P. & C. R. Co.*, 19 N. H. 372; *Nevins v. Peoria*, 41 Ill. 502; s. c., 89 Am. Dec. 392; *Phinizy v. Augusta*, 47 Ga. 263; *City of Bowling Green v.*

**NUL DISSEISIN.**—No disseisin. In pleading, the general issue in a real action.<sup>1</sup>

**NULL.**—Properly, that which does not exist; that which is not in the nature of things. In a figurative sense, it signifies that which has no more effect than if it did not exist.<sup>2</sup>

**NULLA BONA.**—No goods. The return made by a sheriff to an execution where he finds no goods on which he can levy.<sup>3</sup>

**NULLITY.**—(See also VOID AND VOIDABLE).—Such a defect as renders the proceedings in which it occurs totally null and void, of no avail or effect whatever, and incapable of being made so.<sup>4</sup>

Rolling Mill Co., 3 Bush (Ky.) 416; Lexington etc. R. Co. v. Applegate, 8 Dana (Ky.) 287; s. c., 33 Am. Dec. 497; Walker v. Board of Public Works, 16 Ohio 540; Fletcher v. Auburn etc. R. Co., 25 Wend. (N. Y.) 462; First Baptist Church v. Schenectady etc. R. Co., 5 Barb. (N. Y.) 79; Spencer v. London etc. R. Co., 8 Sim. 193; Brown v. Cayuga etc. R. Co., 12 N. Y. 487; Lawrence v. Great Northern R. Co., 16 Q. B. 643; Robinson v. New York etc. R. Co., 27 Barb. (N. Y.) 512; Mahon v. Railroad Co., Lalor's Supp. 156; Williams v. New York Cent. R. Co., 16 N. Y. 97; s. c., 69 Am. Dec. 651; Carpenter v. Cent. Park etc. R. Co., 11 Abb. Pr., N. S. (N. Y.) 416; Eastman v. Amoskeag Mfg. Co., 44 N. H. 143; s. c., 82 Am. Dec. 201; Morgan v. King, 35 N. Y. 454; People v. Law, 34 Barb. (N. Y.) 494; People v. Kerr, 37 Barb. (N. Y.) 357; Alton etc. R. Co. v. Deitz, 50 Ill. 210; s. c., 99 Am. Dec. 509.

A legislative grant to manufacture gas does not exempt the company from liability for damages from noxious smells emanating from the works. People v. New York Gas Light Co., 64 Barb. (N. Y.) 55; Bohan v. Port Jervis Gas Light Co. (N. Y. 1890), 25 N. E. Rep. 246.

Nor from liability for polluting the water of a stream by discharging into it refuse matter from the works. Carhart v. Auburn Gas Light Co., 22 Barb. (N. Y.) 297.

Authority to erect and maintain a steam engine does not justify the creation of a nuisance by the emission of soot from the smoke-stack of such engine. Sullivan v. Royer, 72 Cal. 248.

In Tinsman v. Belvidere Delaware R. Co., 26 N. J. L. 148, the liability of companies acting under statutory authority is placed upon the same footing

with that of private individuals who should use their property for similar purposes. The court say: "The grantee of a franchise for private emolument, as a railroad company, may be vested with the sovereign power to take private property for public use on making compensation, but is not clothed with the sovereign's immunity from resulting damages. This power leaves their common-law liability for injuries done in the exercise of their authority precisely where it would have stood if the land had never been acquired in the ordinary way." The court held in this case that the plaintiff could recover for damages sustained by being deprived of free access to the mouth of a creek, in which he had lumber privileges before the defendant company interfered with him, and that the fact that the creek was navigable and under the control of the legislature was no objection to his recovering.

One who buys land near which is an authorized ditch cannot recover damages from those maintaining the ditch if it is as carefully operated as is possible under the circumstances. Platte & Denver Ditch Co. v. Anderson, 8 Colo. 131.

1. Bouv. Law Dict.; Anderson's Law Dict.; Abb. Law Dict.

2. Bouv. Law Dict.

3. Bouv. Law Dict. See also EXECUTIONS, 7 Am. & Eng. Encyc. of Law 155; PROCESS.

4. Salter v. Hilgen, 40 Wis. 365.

"No order which a court is empowered, under any circumstances, in the course of a proceeding over which it has jurisdiction, to make, can be treated as a nullity merely because it was made improvidently, or in a manner not warranted by law or the previous state of the case. The only question in such a case is, had the court or tribunal the

## NULLUM TEMPUS, ETC.—NUNC PRO TUNC.

**NULLUM TEMPUS OCCURRIT REGI.**—No time runs against the king; or, translated more freely, laches is not imputable to the government, and against it no time runs to bar its rights. (See, for the application of this doctrine, LIMITATION OF ACTIONS, 13 Am. & Eng. Encyc. of Law 711.)

**NUMBER.**—(See also PLEADING; FIGURES, 7 Am. & Eng. Encyc. of Law 959; ABBREVIATIONS, 1 Am. & Eng. Encyc. of Law 15).—A collection of units.<sup>1</sup>

**NUNC PRO TUNC.**—(See also JUDGMENT; ORDERS; PLEADING; PRACTICE).—Now for then; that a thing is done at one time as of another time, when it should have been done.<sup>2</sup>

power, under any circumstances, to make the order or to perform the act? If this is answered in the affirmative, then its decision upon those circumstances becomes final and conclusive, until reversed by a direct proceeding for that purpose." DIXON, C. J., in Tallman v. McCarty, 11 Wis. 401.

"Absolute nullities were of two kinds, those resulting from stipulations derogating from the force of laws made for the preservation of public order, and those established for the interests of individuals. The former are not susceptible of ratification; but, if by subsequent dispositions of law or by succession of time such stipulations cease to be illegal, they may from that time be ratified." Clay v. Clay, 35 Tex. 530; Means v. Robinson, 7 Tex. 516.

**Nullity of Marriage.**—See DIVORCE, 5 Am. & Eng. Encyc. of Law 745; MARRIAGE, 14 Am. & Eng. Encyc. of Law 532.

**A Nullity Distinguished from an Irregularity.**—"It is difficult sometimes to distinguish between an irregularity and a nullity; but I think the safest rule to determine what is an irregularity and what is a nullity is to see whether a party can waive the objection. If he can waive it, it amounts to an irregularity; if he cannot, it is a nullity." COLERIDGE, J. Holmes v. Russell, 9 Dowl. 487; Jenness v. Lapeer Circuit Judge, 42 Mich. 471.

1. Bouv. Law Dict.

The singular number is included within the plural, as where a statute makes it felony to purloin from a postoffice "bank notes," it is within the prohibition to steal a single note; and so houses will apply to house, etc. Bishop on Stat. Crimes, § 213; State v. Nichols, 83 Ind. 228; Partridge v. Strange, 1 Plow (Eng.) 85; Hassel's Case, Leach 1; Carpenter

v. Lippitt, 77 Mo. 242; Catterlin v. Frankfort, 87 Ind. 54.

For the use of *defendants* for *defendant*, and *vice versa*, see Forsythe v. Van Winkle, 11 Biss. (U. S.) 111; Williams v. Muthersbaugh, 29 Kan. 734; Barnes v. Michigan etc. R. Co., 54 Mich. 243; Holcomb v. Tift, 54 Mich. 647.

**"Number of Days."**—The term, "a number of days" and "some days," may mean two days or more; neither necessarily indicates a greater number than two. Chase v. Cleveland, 44 Ohio St. 513.

**Number and Denomination.**—Where an indictment charged that the defendants feloniously took and carried away sundry bank notes, the number and denomination of which are unknown, the court uses the following language: "What is the meaning, the proper interpretation of the words 'number' and 'denomination'?" If the word had been *numbers* in the plural, we would be inclined to hold it referred to the serial numbers on the bills. Being in the singular number, it must be construed as expressing or relating to the number of bills alleged to have been stolen, not the numbers on the bills. The word '*denomination*' explains itself. It refers to the value or number of dollars the several bills represented." Duvall v. State, 63 Ala. 17.

2. In Gray v. Brignardello, 1 Wall. (U. S.) 627, the court said that a *nunc pro tunc* order may be made when the delay has arisen from the act of the court. In Mitchell v. Overman, 103 U. S. 65, the court entered a decree after the death of a party and after the final submission, as of the term when, in the lifetime of the party, the cause after argument was finally submitted. In Aetna Ins. Co. v. Boone, 95 U. S. 125, it was said that when a case was tried

## NUNCUPATIVE WILLS—(See also WILLS).

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**I. AT COMMON LAW—1. Definition.**<sup>1</sup>—A nuncupative<sup>2</sup> will is an oral will declared by the testator before a sufficient number of witnesses<sup>3</sup> and afterwards reduced to writing.<sup>4</sup>

**2. Origin.**—The practice of making such wills was derived from the Romans.<sup>5</sup>

**3. When Made; in Extremis.**—Before the reign of Henry VIII such wills were not necessarily made in the time of the last sick-

by the court, a finding of facts might, by order of the court, be filed at a subsequent term. In *Benedict v. State*, 44 Ohio St. 679, an omission from the docket of a recital of the reason of the discharge of the jury in a criminal case was supplied by an order *nunc pro tunc*. *Ex parte Beard*, 41 Tex. 234; *Smith v. State*, 1 Tex. App. 408, and *Ex parte Jones*, 61 Ala. 399, were criminal cases wherein the practice was similar. In *Rugg v. Parker*, 7 Gray (Mass.) 172, the record of a judgment was completed by a *nunc pro tunc* order, after the lapse of twenty years.

**1. Definition.**—Swinburne, § 12, p. 1; Perkins, § 476. To this definition the words "*in extremis*" must be added to define such wills in the sense now used. See Bouv. L. Dict., Kent, vol. 4, \*517; Jarman on Wills, vol. 1, 238; Schouler on Wills, § 360.

**2. Nuncupative.**—The word "nuncupative" comes from the Latin *nuncupatio*, for among the Romans the naming of the executor was of the essence of the will. Godolphin's Orphans Legacy, p. 13, holds that "Testaments are called nuncupative, when the testator without any writing doth declare

his will before a sufficient number of witnesses; and such nuncupative will is of as great force and efficacy (except for lands, tenements and hereditaments) as any written testament . . . Such testaments are supposed to be of the greatest antiquity and far more ancient than written wills, as being in use and practice before letters were known." Swinburne, § 12, pt. 1.

**3. Number of Witnesses**, see *infra* this title (c) NUMBER OF WITNESSES, COMPETENCY.

**4. In Writing**, see *infra* this title, (f) REDUCTION TO WRITING.

**5. Origin.**—LORD MANSFIELD says: (Cowp. 90), "As to personal estate, the law of England has adopted the rule of the Roman testament, yet a devise of lands in *England* is considered in a different light from a Roman will." The Institutes of Justinian declared that if any one wished to make a testament valid by the civil law, without writing, he might do so, if, in the presence of seven witnesses, he verbally declared his wishes; and that such a will would be perfectly valid according to the civil law. Justinian, lib. 2, tit. 10, § 14; s. c., Sandar's Justinian 243.

ness, but from that time the law seems to be well established in *England*, that, to be available, oral wills must be made *in extremis*.<sup>1</sup>

4. **Scope.**—At common law only personal property, and not real, could pass by nuncupative will;<sup>2</sup> to pass the former it was of as great force and effect as the written will.<sup>3</sup>

5. **Rules of Construction.**—In the earlier period of the common law when, through the illiteracy of the times, such testaments were in common use, they were favorably expounded;<sup>4</sup> but when reading and writing became more common, and the oral will became the vehicle for perpetrating the grossest frauds,<sup>5</sup> they

1. **Made In Extremis.**—Prince v. Hazleton, 20 Johns. (N. Y.) 502; s. c., 11 Am. Dec. 307, the leading American case on nuncupative wills. Redfield on Wills, vol. 1, \*186; Ellington v. Dillard, 42 Ga. 361. In a comparatively illiterate age, the art of writing was acquired by but few, and wills were made by words and signs. But "in the ages of Henry VIII and Elizabeth, letters had become so generally cultivated, and reading and writing so widely diffused, that nuncupative wills were limited to extreme cases and justified only on the plea of necessity." Prince v. Hazleton, 20 Johns. (N. Y.) 502; s. c., 11 Am. Dec. 307.

So that Perkins, who wrote during the reign of Henry VIII, defines such a will as one made when the testator "lieth languishing for fear of sudden death, dareth not to stay the writing of his testament, and, therefore, he prayeth his curate and others, his neighbors, to bear witness of his last will, and declareth by word what his last will is." Perkins, § 476.

And Swinburne, who wrote during the reign of James I, defines such a testament as made "when the testator, without any writing, doth declare his will before a sufficient number of witnesses;" thus making no mention of last sickness, he further declares, "this kind of testament is commonly made, when the testator is now very sick, weak and past all recovery." Swinburne, pt. 1, § 12, par. 1.

Bacon's Abridgment, published in 1736, in defining such wills, holds, "When a man is sick, and for fear that death or want of memory should surprise him, that he should be prevented if he stayed the writing of his testimony, desires his neighbors and friends to bear witness of his last will and then declares the same presently by word."

7 Bac. Abr. Wills 305; Wood on Conv., vol. 6, 574.

Blackstone says "That a nuncupative will depends merely upon oral evidence being declared by the testator *in extremis* before a sufficient number of witnesses and afterwards reduced to writing." 2 Black. Com. 500; Swift's System 420.

2. **Scope.**—"By the common law, no lands or tenements (except by particular custom) were devisable by any last will or testament; neither could they be transferred from one to another but by solemn livery of seisin, matter of record, or sufficient writing." Coke on Lit. 3, Comp. 90.

"At common law a will of chattels was good without writing." Kent Com., vol. 4, \*516; Swinburne on Wills, 6. The statutes of 32, 34 and 35, Henry VIII, by which devises of land were allowed and required to be in writing, left wills of personal property the same as before the statutes were passed. Note to Jarman on Wills by Randolph and Talcot 755.

3. Swinb., pt. 1, § 12, par. 3.

4. **Rules of Construction.**—Swinb. on Wills, pt. 1, § 12, par. 6. So where a daughter deposited £180 with her mother and afterwards made a will, and gave several legacies, but took no notice of the £180, but afterwards desired her mother if she thought fit to give the £180 to her niece, and, under the statute of frauds it was declared not good as a nuncupative will, yet the will was given effect by decreeing that the mother held the sum as trustee for the niece. Nab v. Nab, 10 Mod. 403; s. c., 1 Eq. Cases Abr. 404.

5. The words of the statute of 29 Car. II, ch. 3, § 19 (referring to nuncupative wills), have always been strictly construed . . . It was held, in the case of Bennett v. Jackson, 2 Phill.

were strictly construed<sup>1</sup> and probated by even more stringent proof than were written wills.<sup>2</sup>

**6. How Made; Formalities.**—Originally there was no particular way of making a nuncupative will, nor were there any formalities prescribed for their execution,<sup>3</sup> but this has been changed in part by the various statutes.<sup>4</sup>

**7. Abuse of, at Common Law.**—Such grave frauds came to be perpetrated in the probate of such wills that the statute of frauds was passed largely to remedy the same.<sup>5</sup>

**II. UNDER STATUTE**—**1. Now Regulated by**—(a) **STATUTE OF FRAUDS.**—The statute of frauds, passed 1676-1677,<sup>6</sup> marks an era in the history of nuncupative jurisprudence, all such testaments being placed under strong restrictions.<sup>7</sup> An exception

190; that the words were not spoken *animus testandi*, and that there was no *rogatio testium* when, after summoning several of the children of testatrix to her bedside, she used the following words: "Joseph Henry Bennett, your brother, is my heir, and all that I have is his. Tell him to pay all my debts; give my love to him and tell him to take me home and by no means to leave me here; tell him to be a father to you children." *Prince v. Hazleton*, 20 Johns. (N. Y.) 502; s. c., 11 Am. Dec. 307.

1. *Parsons v. Miller*, 2 Phil. 194. Such is the rule now under statute. See **FORMALITIES OF NUNCUPATIVE WILLS UNDER STATUTE**, *infra* this title, *Pierce v. Pierce*, 46 Ind. 86.

2. "The *factum* of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one, in addition to all the several requisites to its validity, under the statute of frauds, being duly proved, to entitle it to probate." *Leman v. Bon-sall*, 1 Addams 389; s. c., 2 Eng. Ec. Rep. 147.

3. **Formalities.**—"As for any precise form of words, none is required; neither is it material whether the testator do speak properly or improperly, so that his meaning do appear, as hath been heretofore confirmed by divers examples; but it is not sufficient for the testator to leave a sound in the ears of the witnesses, unless he do leave some understanding also of his will and meaning." Swinb., pt. 1, § 12, par. 7, § 26.

4. See **II. UNDER STATUTE**, (a) **Statute of Frauds**; (b) **Statute of Wills**; (c) **Code or Statute Provisions in the Several States**, *infra* this title.

5. **Abuse of.**—The question as to the expediency of allowing such wills was strongly emphasized in the case of *Cole v. Mordaunt*, 4 Vesey 196. In this case the testator, Cole, when advanced in years, married a young woman and shortly afterward died. At his death, his wife, who had behaved with questionable propriety during her married life with Cole, set up a nuncupative will, alleged to have been made *in extremis* before nine witnesses, in opposition to a written will made three years before, leaving £3,000 to charitable purposes. The probate of the will coming before the king's bench, conspiracy and such gross frauds were made apparent that the oral will was set aside; and the LORD CHANCELLOR was led to declare in the case that "He hoped to see one day a law, that no written will should ever be revoked but by writing;" and it was largely through the influence of this case that the section of the statute of frauds relating to wills was passed. *Prince v. Hazleton*, 20 Johns. (N. Y.) 502; s. c., 11 Am. Dec. 307.

Since the statute of frauds, all nuncupative wills, except those made by soldiers in actual service and mariners at sea, are void. *Ex parte Thompson*, 4 Bradf. (N. Y.) 154.

6. **Statute of Frauds.**—See note to *Cole v. Mordaunt*, 4 Vesey 196.

7. This statute, 29 Car. II, ch. 3, pp. 19-23, provided, that, except in case of soldiers in actual service, or mariners at sea, no nuncupative will should be good where the estate bequeathed exceeded the value of £30; unless—

1. It be proved by the oath of three witnesses at the making thereof.

2. Unless the testator at the time of

was made in the case of those of less than £30, and those of sailors and soldiers, which remained as before the statute. The result of this statute was that such wills came rapidly into disuse.<sup>1</sup>

(b) **STATUTE OF WILLS.**—Still further restrictions were thrown about such oral wills by the statute of wills,<sup>1</sup> which marks the second era in the legislative control of them. With the exception of soldiers and sailors, the new statute made nuncupative wills and testaments of all kinds informally executed, invalid. It declared that no will should be valid unless it were executed in writing.

(c) **CODE OR STATUTE PROVISIONS IN SEVERAL STATES.**—The American law<sup>2</sup> is almost wholly based upon either the statute of frauds or the statute of wills.

**2. Privileged Testators.**—(a) **THOSE LEAVING PETTY ESTATES.**—The tendency of recent State laws is to follow the statute of wills, doing away with oral wills, except in the case of soldiers

making the will bade the persons present, or some of them, bear witness that such was his will, or words to that effect.

3. Unless such will was made in the time of the testator's last sickness, in his dwelling house, or where he had resided ten days previous to making the will, except when he was surprised or taken sick while away from his own home and died before he returned.

4. Unless the substance of the testimony to prove such will were committed to writing within six days after the will were made.

5. In addition the statute required safeguards against hasty probate of such wills.

6. And provided that no written will should be altered or repealed by oral words not reduced to writing during the testator's life and acknowledged by him before at least three witnesses.

1. **Statute of wills**, passed 1837, act 1 Vict., ch. 26; quoted in 1 Williams' Exrs. 116; also in appendix Schouler on Wills 647.

2. **Statutes in several States.**—*Alabama*, Code of (1876), §§ 2298-2303. *Arkansas*, Digest of (1884), §§ 6504-6507.

*California*, Deering's Annot. Codes & Stat. of, vol. 2 (Civil Code), §§ 1276, 1288-1291.

*Colorado*, Gen. Stat. (1883), §§ 3483, 3484, 3500.

*Connecticut*, Gen. Stat. (1887), § 538.

*Delaware*, Code of (1874), p. 508, § 5.

*Florida*, McClellan's Dig. (1881), p. 988, § 10.

*Georgia*, Code of (1882), §§ 2479-2482.

*Illinois*, Rev. Stat. of (1889), ch. 148, §§ 15, 16.

*Indiana*, Rev. Stat. of (1888), §§ 2577, 2578.

*Iowa*, Rev. Code (1888), §§ 2324, 2325.

*Kansas*, Gen. Stat. of (1889), §§ 7273, 7274.

*Kentucky*, Gen. Stat. of (1873), p. 834, § 7.

*Louisiana*, Civil Code of (1866), arts. 1568-1576.

*Maine*, Rev. Stat. of (1883), p. 609, tit. 7, ch. 74, §§ 18-20.

*Maryland*, Public Gen. Laws of (1888), art. 93, § 318.

*Michigan*, Annot. Stat. (1882), § 5790.

*Massachusetts*, Public Stat. (1882), tit. 2, ch. 127, § 6.

*Minnesota*, Gen. Stat. (1888), vol. 1, p. 568, § 6.

*Mississippi*, Code (1880), §§ 1266-1269.

*Missouri*, Rev. Stat. of (1889), §§ 8892-8895.

*Nebraska*, Compiled Stat. (1887), p. 354, §§ 128, 129.

*Nevada*, Gen. Stat. (1885), §§ 3004-3006.

*New Hampshire*, Gen. Laws of (1878), ch. 193, § 16.

*New Jersey*, Revision of (1877), p. 1246, §§ 11, 13, 15, 16, 27.

*New York*, Rev. Stat., Codes and Laws of (1890), tit. Wills, §§ 7, 39, 41.

*North Carolina*, Code (1883), vol. 1, § 2148, par. 3.

*Ohio*, Rev. Stat. (1890), §§ 5991-



in actual service or mariners at sea; allowing them to make such wills of personal property.<sup>1</sup> But many of the States still follow more or less closely the statute of frauds.<sup>2</sup> Many of the States make such wills invalid if exceeding a fixed amount,<sup>3</sup> which varies from \$50<sup>4</sup> to \$1,000,<sup>5</sup> while others provide that such wills are not good if exceeding a certain amount unless executed with certain formalities.<sup>6</sup> Some States, not following the statute of wills, specify that only personal property can be bequeathed by soldiers and sailors by oral will,<sup>7</sup> while others, making no mention of this exempted class, provide that this is the only class of

'5993, 7809, 7821, 6019, 6167, 6266, 7802.

*Oregon*, Annot. Laws of (1887), §§ 3069, 3079-3081.

*Pennsylvania*, Brightley's *Purdon's Digest* (1885), p. 1710, §§ 8, 9.

*Rhode Island*, Public Stat. (1882), p. 472, § 10.

*South Carolina*, Rev. Stat. (1873), p. 447, §§ 24, 25, 27.

*Tennessee*, Code (1884), §§ 3006-3008.

*Texas*, Rev. Stat. (1879), §§ 1849, 1850.

*Vermont*, Rev. Laws of (1880), §§ 2043, 2044.

*Virginia*, Code of (1887), §§ 2514, 2516.

*West Virginia*, Code of (1887), ch. 77, §§ 3-5.

*Wisconsin*, Annot. Stat. (1889), §§ 2292-2294, 2296.

1. **Tendency of State Laws and Statute Provisions.**—(1) The statute of wills has been almost exactly followed in *California*, *Kentucky*, *Maryland*, *Massachusetts*, *Minnesota*, *New York*, *Oregon*, *Rhode Island*, *Virginia* and *West Virginia*, although the old law in these States followed the statute of frauds. See Digest of several State laws in note to vol. 3, Jarman on Wills 755; also CODE OR STATUTE PROVISIONS IN SEVERAL STATES, *infra* this title, also FORMALITIES, *infra* this title.

2. It is 80 in *Alabama*, *Maine*, *Michigan*, *Mississippi*, *Missouri*, *Nebraska*, *New Hampshire*, *New Jersey*, *Ohio*, *Pennsylvania*, *South Carolina*, *Tennessee*, *Wisconsin*. See CODE OR STATUTE PROVISIONS IN SEVERAL STATES, *infra* this title.

3. Such wills not good if exceeding \$500 in *Alabama* and *Arkansas*, \$200 in *Delaware* and *Missouri*, \$300 in *Iowa* and *Michigan*, \$100 in *Indiana* and *Vermont*. In States where amount that can be disposed of by nuncupative

will is limited, attempts to dispose of a greater amount or of real property will be carried out as far as such disposition would be valid. So in *Iowa* it has been held that an oral will is invalid for the excess. *Mulligan v. Leonard*, 46 Iowa 692.

In *Alabama*, a nuncupative will bequeathing personal property of more than \$500 in value, which is void under the *Alabama Code*, cannot be established in equity on the ground of the decedent's ignorance or mistake as to the change in the law made by the code. *Erwin v. Hammer*, 27 Ala. 296.

It has been held that a promissory note cannot be disposed of by such will, and in same case that, in the absence of affirmative proof that the actual value of property left by an oral will was less than \$300, such a will bequeathing such a note of the value of \$400 should not be admitted to probate.

4. In *South Carolina*, Rev. Stat. (1873), §§ 24-27.

5. In *California*, *Deering's Annot. Code and Stat.*, vol. 2 (Civil Code), §§ 1276, 1288-1291. The provisions of the law of *California* even add to those of the statute of wills by declaring that decedent must have been at the time of making the will in expectation of immediate death from an injury received the same day.

6. \$250 in *Tennessee*, \$150 in *Nebraska* and *Wisconsin*, \$100 in *Maine*, *Mississippi*, *New Hampshire* and *Pennsylvania*, and \$80 in *New Jersey*. See CODE AND STATUTE PROVISIONS IN THE SEVERAL STATES, *infra* this title.

7. Personal property only, bequeathed by soldiers and sailors, in *Alabama*, *Arkansas*, *Indiana*, *Iowa*, *Maine*, *Mississippi*, *Missouri*, *Michigan*, *New Jersey*, *Nebraska*, *Pennsylvania* and *Vermont*. CODE AND STATUTE PROVISIONS IN SEVERAL STATES, *infra* this title.

property of which such a will can be made;<sup>1</sup> and some make no mention of soldiers and sailors, or if they do, make no provision as to the kind of property that may be bequeathed by such will by other persons;<sup>2</sup> in the latter case it is usual that personal property only, passes,<sup>3</sup> though it was otherwise decided in *Ohio*.<sup>4</sup> In *Georgia* both real and personal property may be left by such will.<sup>5</sup>

(b) SOLDIERS AND SAILORS.—Soldiers in actual military service and mariners at sea were specially excepted from the provisions of the statute of frauds, and have, both in *England* and in this country always been permitted to dispose of personal property by nuncupative will, retaining in this respect the rights which they possessed at common law. It is not requisite that such wills made by these classes should be made during the last sickness;<sup>6</sup> no particular mode has been prescribed in respect to the manner of making the testament,<sup>7</sup> and no particular number of witnesses is required.<sup>8</sup>

(1) *Who Included as Such*.—The term "soldier" embraces every military grade from private to commander-in-chief;<sup>9</sup> it includes regulars and volunteers serving the government,<sup>10</sup> but does

1. So in *Delaware, South Carolina, Ohio, Illinois, Kansas and Colorado*. CODE AND STATUTE PROVISIONS IN SEVERAL STATES, *infra* this title.

2. So in *Arkansas, Florida, Indiana, Mississippi, Missouri, Wisconsin, North Carolina, New Hampshire, Michigan, New Jersey, Nevada, Tennessee, Nebraska*. CODE AND STATUTE PROVISIONS OF SEVERAL STATES, *infra* this title.

3. *What Property Passes by Oral Will*.—Under the Revised Statutes of *Texas*, in force in September, 1885, a nuncupative will, made at that date, is incompetent to pass real estate. *Moffett v. Moffett*, 67 Tex. 642; to same effect *Lewis v. Aylott*, 45 Tex. 190; *Smith-deal v. Smith*, 64 N. Car. 52; *Palmer v. Palmer*, 2 Dana (Ky.) 390. In *Indiana*, real property does not pass by an oral will, even if made by a soldier. *Pierce v. Pierce*, 46 Ind. 86. Real property cannot pass by oral will. *McLeod v. Dell*, 9 Fla. 451; *Campbell v. Campbell*, 21 Mich. 438; *Sadler v. Sadler*, 60 Miss. 251; *Miles' Will*, 4 Dana (Ky.) 1; *Cooke v. Cooke*, 3 Litt. (Ky.) 238. To the contrary, *Gills v. Weller*, 10 Ohio 463. *Ashworth v. Carleton*, 12 Ohio St. 381. In *Virginia*, it has been held that the profits of realty could not pass by oral will. *Page v. Page*, 2 Rob. (Va.) 424.

4. *Ashworth v. Carleton*, 12 Ohio St. 381.

5. Code of *Georgia* (1883), § 2482.

6. Oral will by soldiers and sailors need not be made *in extremis* to be valid. *Ex parte Thompson*, 4 Bradf. (N. Y.) 154; *Van Deuzer v. Gordon*, 39 Vt. 111; *Leathers v. Greenacre*, 53 Me. 561.

7. See above cases last cited under note 6.

8. A soldier's will may be established by the testimony of one witness. *Gould v. Safford*, 39 Vt. 498.

9. *Who Included*.—Schouler on Wills, § 366. A surgeon in the East India Company's service held to be within the exception. 2 Curt. (Eng.) 386.

10. *Soldier in Camp*.—An instrument signed by a soldier while in camp in *Massachusetts* was held invalid as a nuncupative will, he not being in "actual military service." Later, while in the enemy's country, he wrote to a friend referring to the former paper as his will. It was held that as the letter was written while the testator was in actual military service, within the meaning of the statute, it gave testamentary operation to said instrument. *Van Deuzer v. Gordon*, 39 Vt. 111. So a similar case in *Leathers v. Greenacre*, 53 Me. 561. A person who had enrolled himself in a volunteer company raised under a call by the government for troops in 1862, but had not been accepted and mustered into service, could not make a nuncupa-

not include militia and home reserves not in service.<sup>1</sup> The term "mariners" includes all in marine service either in the navy<sup>2</sup> or in the merchant service;<sup>3</sup> but does not embrace passengers.<sup>4</sup>

(2) *Character of Service Conferring Privilege.*—To come within the exception, soldiers must be in actual service.<sup>5</sup> If in barracks either at home<sup>6</sup> or in the colonies,<sup>7</sup> or at home on a furlough,<sup>8</sup> they are not privileged. Only seamen at sea are given this privilege.<sup>9</sup> The exception is held not to include a sailor en route to his ship,<sup>10</sup> or a mariner on a river.<sup>11</sup> The privilege continues though the ship be in harbor,<sup>12</sup> or the seamen temporarily on shore.<sup>13</sup>

### 3. Generally as to Nuncupative Wills.—(a) FORMALITIES.—When

tive will as a soldier. *Pierce v. Pierce*, 46 Ind. 86.

1. See cases cited under WHO INCLUDED, *infra* this title.

2. Includes purser of a man of war. *Goods of Hayes*, 2 Curt. (Eng.) 338.

3. *Who in the Marine Service.*—A nuncupative will may be made by the captain of a coaster, while on a voyage and at anchor in the mouth of a bay, and where the tide ebbs and flows. *Hubbard v. Hubbard*, 8 N. Y. 196.

If a mariner at sea, in prospect of death, on being asked as to the disposition of his property, states his wishes, it is sufficient to constitute a nuncupative will. It is not necessary that he should name an executor. *Hubbard v. Hubbard*, 8 N. Y. 166.

The decedent, a cook on board a steamboat, while his vessel was lying at the wharf at Bremen, desired that his deposit in the New York Seamen's Savings Bank should be sent to his mother in Scotland. *Held* a good nuncupative will. *Ex parte Thompson*, 4 Bradf. (N. Y.) 154. The same case declares that the term "mariner" applies to every person in the naval or mercantile service, to the cook or purser as well as to the sailor. *Morrill v. Morrill*, 1 Hag. (Eng.) 51.

4. A man, a mariner by profession, made his will in the river Delaware, on board a steamer which was towing a vessel in which he was to sail as a passenger to Chagres, there to take command of a lighter to lighten vessels arriving in the river. *Held*, that the will was not within the statutory exception in favor of mariners at sea—the testator, at the time of its execution, not being a mariner in service, and being on his way to engage in business not that of a mariner at sea. *Warren v. Harding*, 2 R. I. 133.

5. *Must be in Actual Service.*—"A soldier who falls sick upon the march, and is of necessity allowed to fall out and wait for returning strength, but who dies soon after he is carried into hospital, may properly be regarded as in actual military service." *Gould v. Safford*, 39 Vt. 498.

An officer in the army of the United States, in May, 1864, after it had commenced to move to Richmond, wrote and sent a letter to his sister, saying if he was killed or did not return he wanted her to have his property. He was killed in August, 1864. *Held*, that this portion of the letter was a valid will by a soldier, and should be admitted to probate as such. *Botsford v. Krake*, 1 Abb. Pr., N. S. (N. Y.) 112.

A volunteer, enrolled but not accepted and mustered into the service, could not make a nuncupative will. *Pierce v. Pierce*, 46 Ind. 86; *Goods of Johnson*, 2 Curt. (Eng.) 341; *In re Churchill*, 4 Not. Cas. 47; *Leathers v. Greenacre*, 53 Me. 561.

6. *Drummond v. Parish*, 3 Curt. 522.

7. *White v. Repton*, 3 Curt. 818; *Phipps, In re*, 2 Curt. 368; *Johnson, In re*, 2 Curt. 341.

8. A soldier at home on furlough cannot make a valid nuncupative will within the provisions usually made by statutes in favor of soldiers in actual military service. *Will of Smith*, 6 Phila. (Pa.) 104.

9. *Key v. Jordan*, 3 Curt. 522; *Earl etc. v. Seymour*, 2 Curt. 339.

10. *Warren v. Hardin*, 2 R. I. 133.

11. *Gwin's Will*, 1 Tuck. (N. Y.) 44.

12. *Hubbard v. Hubbard*, 8 N. Y. 196; *Ex parte Thompson*, 4 Bradf. (N. Y.) 154.

13. *Goods of Lay*, 2 Curt. 375.

nuncupative wills are made by unprivileged testators, the formalities prescribed by statute must be strictly observed.<sup>1</sup> No particular form is requisite,<sup>2</sup> but the intent to make a will must be plain.<sup>3</sup> A substantial compliance with the requirements of the statute is sufficient.<sup>4</sup> In some States it is held necessary to the validity of such will that the testator bid the witnesses notice that such is his will or words to that effect;<sup>5</sup> in others it is held unnecessary to request any person to be witnesses.<sup>6</sup>

(b) **MADE WHEN IN EXTREMIS.**—A nuncupative will must be made when *in extremis*, or when overtaken by sudden and violent illness, not affording an opportunity of making a written will. Declarations made in good health are not sufficient to establish a nuncupative will though death should occur soon

1. **Formalities of Statute Closely Followed.**—Succession of Dorriess, 37 La. Ann. 833; *Parsons v. Miller*, 2 Phill. (Eng.) 194; *Leman v. Bonsall*, 1 Ad. dams 389; *Bennett v. Jackson*, 2 Phill. (Eng.) 190; *Morgan v. Stevens*, 78 Ill. 287; *Taylor's Appeal*, 47 Pa. St. 31; *Biddle v. Biddle*, 36 Md. 630; *Mitchell v. Vickers*, 20 Tex. 377; *Lucas v. Goff*, 33 Miss. 629.

2. **No Particular Form Necessary.**—A mariner at sea, in his last sickness and within an hour of his death, being enquired of as to what disposition he wished to make of his property replied: "I want my wife to have all my personal property." This declaration was made in the presence of four witnesses. The testator was of sound mind and memory at the time, and under no restraint. *Held*, that this was a good nuncupative will. *Hubbard v. Hubbard*, 12 Barb. (N. Y.) 148; *Yarnall's Will*, 4 Rawle (Pa.) 46; s. c., 26 Am. Dec. 115; *Portwood v. Hunter*, 6 B. Mon. (Ky.) 538; *Weir v. Chidester*, 63 Ill. 453; *Parkison v. Parkison*, 12 Smed. & M. (Miss.) 678; *Harrington v. Stees*, 82 Ill. 50; s. c., 25 Am. Rep. 290. The language of the statute need not be used. *Baker v. Dodson*, 4 Humph. (Tenn.) 342; s. c., 40 Am. Dec. 650.

3. **Intent Must be Plain.**—*Kelly v. Kelly*, 9 B. Mon. (Ky.) 555; *Ridley v. Coleman*, 1 Sneed (Tenn.) 616; *Morgan v. Stevens*, 78 Ill. 287; *Gibson v. Gibson*, Walk. (Miss.) 364; *Lucas v. Goff*, 33 Miss. 629; *Smith v. Smith*, 63 N. Car. 637; *Campbell v. Campbell*, 21 Mich. 443. Where a nuncupative will is drawn from the decedent by interrogatories, full and clear proof of spontaneity of the *animus testandi* is indis-

pensable. *Dorsey v. Sheppard*, 12 G. & J. (Eng.) 192.

4. **Substantial Compliance Sufficient.**—*Ridley v. Coleman*, 1 Sneed (Tenn.) 616; *Gwin v. Wright*, 8 Humph. (Tenn.) 639; *Arnett v. Arnett*, 27 Ill. 247; s. c., 81 Am. Dec. 227; *Weir v. Chidester*, 63 Ill. 453; *Hatcher v. Millard*, 2 Coldw. (Tenn.) 30.

5. **Testator Must Bid Witnesses Notice Such Is Last Will.**—*Biddle v. Biddle*, 36 Md. 630; *Winn v. Bob*, 3 Leigh (Va.) 140; s. c., 23 Am. Dec. 258; *Yarnall's Will*, 4 Rawle (Pa.) 146; s. c., 26 Am. Dec. 115; *Dawson's Appeal*, 23 Wis. 69; *Arnett v. Arnett*, 27 Ill. 247; s. c., 81 Am. Dec. 227; *Garner v. Lansford*, 12 Smed. & M. (Miss.) 558; *Dockum v. Robinson*, 26 N. H. 372; *Babineau v. Le Blanc*, 14 La. Ann. 739; *Sampson v. Browning*, 22 Ga. 293; *Brown v. Brown*, 2 Murph. (N. Car.) 350; *Parsons v. Miller*, 2 Phill. (Eng.) 194; *Bennett v. Jackson*, 2 Phill. (Eng.) 190; *Broach v. Sing*, 57 Miss. 115; *Parsons v. Parsons*, 2 Me. 298; *Morgan v. Stevens*, 78 Ill. 287; *Andrews v. Andrews*, 48 Miss. 220; *Hatcher v. Millard*, 2 Coldw. (Tenn.) 30; *Burch v. Stovall*, 27 Miss. 725.

It is not sufficient that the testator declare his will to the witnesses separately and apart from one another. *Prince v. Hazleton*, 20 Johns. (N. Y.) 505; s. c., 11 Am. Dec. 307; *Weeden v. Bartlett*, 6 Munf. (Va.) 123; *Tally v. Butterworth*, 10 Yerg. (Tenn.) 501; *Offutt v. Offutt*, 3 B. Mon. (Ky.) 162; s. c., 38 Am. Dec. 183; *Yarnall's Will*, 4 Rawle (Pa.) 46; s. c., 26 Am. Dec. 115; *Wester v. Wester*, 5 Jones (N. Car.) 95.

6. *Mulligan v. Leonard*, 46 Iowa 692; *Hubbard v. Hubbard*, 8 N. Y. 196; *Kelly v. Kelly*, 9 B. Mon. (Ky.) 554.

afterward.<sup>1</sup> If the party recover, the nuncupative will falls to the ground.<sup>2</sup>

(c) WHERE MADE.—The common law imposed no restrictions as to the place where nuncupative wills were to be made. Under the statute of frauds such wills can be made only in one's dwelling, unless the testator is surprised or taken sick while absent from home and dies before his return.<sup>3</sup> The wills of soldiers and sailors and wills of petty amounts were not made subject to this rule. The State codes or statutes must now determine whether any such restraints still operate.<sup>4</sup>

(d) HOW MADE.—A nuncupative will must be made by spoken words or signs. It may be made in reply to interrogatories.<sup>5</sup>

1. *Made in Extremis*.—Where a decedent was able to come down stairs to receive and converse with visitors, and to walk in the street, and died the next day from a rupture of the lungs—held that this was not such an extremity of last sickness as authorized a nuncupative will under the statute of 1833 of Pennsylvania. *Werkheiser v. Werkheiser*, 6 W. & S. (Pa.) 184.

An alleged nuncupative will made by testatrix nine days before her death, in her last illness, cannot be admitted to probate where proof is clear that she had time and capacity subsequently to make a written will. *Carroll v. Bonham*, 42 N. J. Eq. 625.

So where six days intervened before death. *Morgan v. Stevens*, 78 Ill. 287. To same effect, *Yarnell's Will*, 4 Rawle (Pa.) 46; s. c., 26 Am. Dec. 115; *Prince v. Hazleton*, 20 Johns. (N. Y.) 502; s. c., 11 Am. Dec. 307; *Hubbard v. Hubbard*, 12 Barb. (N. Y.) 148; *Seese v. Hawthorne*, 10 Gratt. (Va.) 548; *O'Neil v. Smith*, 33 Md. 569; *Morgan v. Stevens*, 78 Ill. 287; *Haus v. Palmer*, 21 Pa. St. 296; *Sadler v. Sadler*, 60 Miss. 251; *Gwin v. Wright*, 8 Humph. (Tenn.) 639; *Jones v. Norton*, 10 Tex. 120. It is further held that the statute is a limitation of the common-law right which did not require such wills to be made *in extremis*; and therefore if a person, in a sickness from which he afterwards dies, being impressed with the probability of approaching death, deliberately makes his will in conformity to the statute, it will not be rejected because he may, in fact, have had time to reduce it to writing. It is not necessary that he have no hope of recovery. *Harrington v. Stees*, 82 Ill. 50; s. c., 25 Am. Rep. 290. So also *Johnson v. Glasscock*, 2 Ala. 242;

*Nolan v. Gardner*, 7 Heisk. (Tenn.) 215.

2. *Recovery Defeats Oral Will*.—*Carroll v. Bonham*, 42 N. J. Eq. 625; *Morgan v. Stevens*, 78 Ill. 287; *Werkheiser v. Werkheiser*, 6 W. & S. (Pa.) 184; *Sadler v. Sadler*, 60 Miss. 251.

3. *Statute of Frauds*.—Act 29 Car. II, § 19.

4. *Where Made*.—When a nuncupative will was not made at the habitation of the deceased, nor where he had resided for next ten days preceding, but was authenticated as the law required, it was held that the will ought to be established, notwithstanding his having been very unwell when he left home, if, afterwards, he was taken more dangerously ill, and died at the place where the will was made. *Marks v. Bryant*, 4 Hen. & M. (Va.) 91; *Nowlin v. Scott*, 10 Gratt. (Va.) 64; *Gwin v. Wright*, 8 Humph. (Tenn.) 639.

5. *Made by Words or Signs*.—*Hubbard v. Hubbard*, 8 N. Y. 196; *Mulligan v. Leonard*, 46 Iowa 692; *Dorsey v. Sheppard*, 12 G. & J. (Eng.) 198; *Biddle v. Biddle*, 36 Md. 630. Pauses made in dictating do not invalidate. *Starrs v. Mason*, 32 La. Ann. 8. A nuncupative will cannot be established where neither the words nor their substance, as used by the alleged testator, were committed to writing by anyone as proof of a bequest or to be preserved as such, and no proof was made of a request by testator to bystanders to bear witness that the words used were his will. *Taylor's Appeal*, 47 Pa. St. 31.

A paper writing, declared and signed as his will by a person who was sick, but was not *in extremis* at the time, and attested and witnessed, cannot, in any sense, be regarded as a nuncupative will. *Ellington v. Dillard*, 42 Ga. 361.

A will reduced to writing and signed by the testator,<sup>1</sup> or memorandum for instructions for making a will,<sup>2</sup> cannot be treated as a nuncupative will;<sup>3</sup> nor is a written will, drawn up by an attorney, but not signed, owing to the sickness of the testator, to be treated as a nuncupative will;<sup>4</sup> but, upon requisite proof, a paper, not perfected as a written will, may be established as a nuncupative will when its completion is prevented by act of God, or any other cause than an intention to abandon or postpone its consummation.<sup>5</sup> The presumption of the law is against the validity of a testamentary paper not completed.<sup>6</sup> An account in an account book is held not to be a nuncupative will.<sup>7</sup> There must be in the testator the *animus testandi*,<sup>8</sup> which is sometimes presumed from circumstances.<sup>9</sup>

(e) NUMBER OF WITNESSES AND COMPETENCY.—The number of witnesses requisite to prove an oral will, is generally regulated by statute in the different States.<sup>10</sup> The testimony of the wit-

1. **Not Nuncupative Will.**—Stamper v. Hooks, 22 Ga. 603; s. c., 68 Am. Dec. 511; Ellington v. Dillard, 42 Ga. 361; Reese v. Hawthorne, 10 Gratt. (Va.) 548; Hunt v. White, 24 Tex. 643.

2. **Instructions for making a will** have sometimes been admitted to probate; as where the instructions were in conformity with testator's intentions, and death prevented a more formal execution. Castle v. Torre, 2 Moo. P. C. (Eng.) 133; Goodman v. Goodman, 2 Lee's Ec. (Eng.) 109; *In Re* Bathgate, 1 Hag. Ecc. (Eng.) 67.

3. **A signed writing cannot be treated as a nuncupative will.** Stamper v. Hooks, 22 Ga. 603; s. c., 68 Am. Dec. 511; Reese v. Hawthorne, 10 Gratt. (Va.) 548.

4. *In Re* Hebden's Will, 20 N. J. Eq. 473.

5. **Incomplete Written Will Established as an Oral Will.**—Offut v. Offut, 3 B. Mon. (Ky.) 163; s. c., 38 Am. Dec. 183; Guthrie v. Owen, 2 Humph. (Tenn.) 202; s. c., 36 Am. Dec. 311; Scott v. Rhodes, 1 Phill. (Eng. Ecc.) 12; Green v. Shipworth, 1 Phill. (Eng. Ecc.) 53; Thomas v. Wald, 3 Phill. (Eng. Ecc.) 23; L'Huille, v. Wood, 2 Lee Ecc. Cases 22; Lamkin v. Babb, 1 Lee Ecc. Cases 1; Sikes v. Snaith, 2 Phill. (Eng. Ecc.) 351; Lewis v. Lewis, 3 Phill. (Eng. Ecc.) 109.

A letter written by one person announcing to another the death of the testator, and, in a general way, his disposition of his estate, is not a nuncupative will. Taylor's Appeal, 47 Pa. St. 31.

6. **Presumption of Law Against In-**

**complete Testamentary Papers.**—Wood v. Medley, 1 Hag. Ecc. (Eng.) 645; Reay v. Cowcher, 2 Hag. Ecc. (Eng.) 249.

7. Williams v. Pope, Wright (Ohio) 406.

8. **There Must be in Testator Animus Testandi.**—No words can be sustained as a nuncupative will, unless the person using them has the *animus testandi*, and believes himself that he is making a will. Gibson v. Gibson, 1 Walk. (Mich.) 364.

Verbal directions and instructions for drawing up a written will, although spoken in the presence of the proper number of witnesses required to bear witness thereto, and reduced to writing, do not constitute a nuncupative will. To have such testamentary effect, the words must be spoken by the testator, with the intention thereby to make a final disposition of his property. Dockum v. Robinson, 26 N. H. 372; Lucas v. Goff, 33 Miss. 629.

9. **Animus Testandi Presumed.**—Where a decedent, upon his deathbed, several times expressed a desire that certain persons should have his property, it was held that the *animus testandi* would be presumed, and his property disposed of in accordance with such desire to the extent to which a nuncupative will would be valid. Mulligan v. Leonard, 46 Iowa 602; Hubbard v. Hubbard, 8 N. Y. 196.

10. **Number of Witnesses.**—By statute, two witnesses are necessary in the following States: *Arkansas, California, Colorado, Delaware, Illinois, Iowa, Kansas, Mississippi, Missouri, Michi-*

nesses must substantially agree.<sup>1</sup> The testator must request the witnesses to bear witness that such is his last will.<sup>2</sup>

(f) REDUCTION TO WRITING.—The time within which a nuncupative will must be reduced to writing, is generally regulated by statute in the various States.<sup>3</sup> The exact words of the verbal

*gan, Nevada, North Carolina, Ohio, Pennsylvania, South Carolina and Tennessee.* See also *Yarnall's Will*, 4 Rawle (Pa.) 46; s. c., 26 Am. Dec. 115; *Boyer v. Frick*, 4 W. & S. (Pa.) 357; *Werkheiser v. Werkheiser*, 6 W. & S. (Pa.) 184; *Haus v. Palmer*, 21 Pa. St. 206; *Gibson v. Gibson*, 21 Pa. Ch. (Mich.) 364.

Three witnesses are necessary in *Florida, Georgia, Indiana, Maine, New Hampshire, New Jersey, Nebraska, Texas and Wisconsin.* See also *Mitchell v. Vickers*, 20 Tex. 377; *Dorsey v. Shepherd*, 12 G. & J. (Eng.) 201; *Biddle v. Biddle*, 36 Md. 630; *Panaud v. Jones*, 1 Cal. 488; *Castro v. Castro*, 6 Cal. 160; *Tebis v. Pitcher*, 10 Cal. 465; *Emerick v. Alvarado*, 64 Cal. 565.

1. **Testimony of Witnesses Must Agree Substantially.**—*Mitchell v. Vickers*, 20 Tex. 377. Under the Illinois statute at least two witnesses must agree that they were present and hear the testator pronounce the words of the will; that they believe him to have been of sound mind and memory; that he did at the time desire the persons present, or some of them, bear witness that such was his will. *Morgan v. Stevens*, 78 Ill. 287.

2. **Witnesses to Nuncupative Will.**—It is indispensable to the validity of a nuncupative will that the testator should request those present to bear witness that such was his last will; or that he should say or do something equivalent to such an expression. *Arnett v. Arnett*, 27 Ill. 247; s. c., 81 Am. Dec. 227; *Sampson v. Browning*, 22 Ga. 293; *Babineau v. LeBlanc*, 14 La. Ann. 739; *Garner v. Lansford*, 12 Smed. & M. (Miss.) 558; *Parkison v. Parkison*, 12 Smed. & M. (Miss.) 672; *Brown v. Brown*, 2 Murph. (N. Car.) 350; *Gwin v. Wright*, 8 Humph. (Tenn.) 639; *Winn v. Bob*, 3 Leigh (Va.) 140; s. c., 23 Am. Dec. 258; *Biddle v. Biddle*, 36 Md. 630; *Dawson's Appeal*, 23 Wis. 69.

Under the Pennsylvania statute requiring the testator to bid some persons present bear witness to the will, "or to that effect," it has been held that it was not a sufficient compliance with the statute for the testatrix to state what was her will, looking at the witnesses,

but not by word asking them to bear witness. *Meisenhelter's Will*, 15 Phila. (Pa.) 561.

A nuncupative will under private signature need not be shown to have been dictated by the testator when written out of the presence of the witnesses. *Pfarr v. Belmont*, 39 La. Ann. 294.

The statements of a sick woman, as to the disposal of her property, although made in the presence of two witnesses, cannot be probated as her nuncupative will, if she neither mentions a will nor calls any one to note her language. *Broach v. Sing*, 57 Miss. 115.

After an oral will is reduced to writing within the statutory period, it must be shown to, and approved by each of the attesting witnesses as correct. *Wellington v. Owings*, 9 Gill (Md.) 467.

Witnesses must be disinterested. They must be able to testify as to substance of will, intent to make will, the call upon them to bear witness to it as a will, and the necessity for making such will verbally. *Haus v. Palmer*, 21 Pa. St. 296; *Tally v. Butterworth*, 10 Yerg. (Tenn.) 501; *Baker v. Dodson*, 4 Humph. (Tenn.) 342; s. c., 40 Am. Dec. 650.

The oral will of a soldier in actual military service, made *in extremis* may be established in a court controlled by the common law, upon the testimony of one witness only. *Gould v. Safford*, 39 Vt. 498.

In *Iowa*, it has been held that it is not essential that the witnesses by whom a nuncupative will is established should have been called upon to witness such will by the testator. *Mulligan v. Leonard*, 46 Iowa 692.

A nuncupative will cannot be translated to a foreigner, not understanding the language of testator and make the foreigner a competent witness. *Succession of D'Auterive*, 39 La. Ann. 1092.

A statute requiring two witnesses is not satisfied by making the same oral declaration to one witness at one time and to another witness at another time. *Wester v. Wester*, 5 Jones (N. Car.) 95.

3. **Time Within Which Reduced to Writing.**—Within three days in *Del-*

declaration need not be used if the substance be preserved.<sup>1</sup> If, in reducing the words to writing, a part of them be left out, the omission of that part will not vitiate the rest.<sup>2</sup>

(g) STRICTNESS OF PROOF OF.—Nuncupative wills are not favorites of the law, and cannot be established except upon strict proof and compliance with all the requisites of the law.<sup>3</sup> They must be proved within the time allowed by law.<sup>4</sup> If made by interrogatories, stricter proof is required than in other cases.<sup>5</sup>

(h) REPEAL OF WRITTEN WILL BY.—A nuncupative will cannot revoke a written will.<sup>6</sup>

### OATH—(See also AFFIDAVIT; PERJURY).

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| II. History; General Nature, 1018. | 3. Others, 1020.                     |
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ware; six days in *Alabama, Florida, Maine, Mississippi, New Hampshire, New Jersey, Nebraska, Texas, Vermont, Wisconsin*; ten days in *Kansas, North Carolina, Ohio, Tennessee*; fifteen days in *Arkansas, Indiana*; twenty days in *Illinois*; thirty days in *Missouri, Georgia*; sixty days in *Kentucky*. See also Taylor's Appeal, 47 Pa. St. 31; *George v. Greer*, 53 Miss. 495; *Welling v. Owings* 9 Gill (Md.) 470.

1. Substance of Verbal Declaration Only Necessary.—*Landry v. Tomatis*, 32 La. An. 113.

2. Omission of Part of Verbal Declaration Does Not Invalidate.—*Marks v. Bryant*, 4 Hen. & M. (Va.) 91.

3. Strictly Proved.—On proceedings to establish an alleged nuncupative will, made by deceased three days before his death, whereby he gave nearly all his property to his widow, to the exclusion of his children, it was held proper to charge the jury that such will must be strictly proved in all essential points; that it must have been made as a matter of necessity and not as a matter of choice; that it must appear that the deceased was *in extremis* when he made the will; and that the jury should find against the nuncupative will if they believed from the evidence that deceased had plenty of time and opportunity to execute a formal written will. *Scaife v. Emmons*, 84 Ga. 619.

An oral will must substantially conform to the law, and it must clearly appear that a will was then intended. Where A, a few days before her death, stated how she wished her property di-

vided, but did not ask anyone to bear this in mind as her will, and had been heard not long before to say that she wished "to fix up her affairs," but it was too late, as everything had been recorded, it was held insufficient as an oral will. *Ridley v. Coleman*, 1 Sneed (Tenn.) 616.

Such wills are to be restricted to cases falling clearly within the reason of the statute. *Pierce v. Pierce*, 46 Ind. 86. See also *Mitchell v. Vickers*, 20 Tex. 377; *Jones v. Norton*, 10 Tex. 120; *Biddle v. Biddle*, 36 Md. 630; *Yarnell's Will*, 4 Rawle (Pa.) 46; s. c., 26 Am. Dec. 115; *Boyer v. Frick*, 4 W. & S. (Pa.) 357; *Werkheiser v. Werkheiser*, 6 W. & S. (Pa.) 184; *Woods v. Ridley*, 27 Miss. 119; a nuncupative will cannot be attacked collaterally. *Wells v. Harris*, 5 J. J. Marsh. (Ky.) 4.

4. Must be Proved in Time Allowed by Law.—A nuncupative will must be probated within ten days in *Kentucky*; within three months in *Nevada*; within six months in *Alabama, California, Delaware, Florida, Georgia, Indiana, Kansas, Maine, Mississippi, Missouri, Nebraska, North Carolina, New Hampshire, New Jersey, Ohio, Texas, Vermont, Wisconsin*; within twelve months in *South Carolina*, and within "reasonable time" in *Colorado*.

5. *Dorsey v. Shepherd*, 12 G. & J. (Eng.) 192; *Green v. Skipworth*, 1 Eng. Ec. 32.

6. *McCune v. House*, 8 Ohio 144; *Brook v. Chappell*, 34 Wis. 405. See CODE OR STATUTE PROVISIONS IN SEVERAL STATES, *infra* this title.



**I. DEFINITION.**—An oath is an outward pledge given by the person taking it that his attestation or promise is made under an immediate sense of his responsibility to God.<sup>1</sup> It is a solemn affirmation, strengthened by the party's invoking the divine vengeance in case he speaks falsely.<sup>2</sup>

**II. HISTORY AND GENERAL NATURE.**—Oaths are not peculiar to the courts of justice, nor are they the creations of municipal law, having been in use from the earliest ages; and no matter how abused, an oath has in every age been considered to supply the strongest hold on the consciences of men, either as a pledge of future conduct or as a guarantee for the veracity of narration.<sup>3</sup> The substance of an oath has nothing to do with Christianity; the forms have always been different in different countries, but still the substance is the same, which is, that God in all of them is called upon to witness to the truth of what is said.<sup>4</sup> The oath

1. Tyler on Oaths 15; 2 Bouv. L. Dict., art., Oath; PERJURY, Am. & Eng. Encyc. of Law.

"An affirmation, negation or promise, corroborated by the attestation of the Divine Being, an appeal to God." Wharton. See also Jacobs's L. Dict., art. Oath.

In its broadest sense the term includes all forms of attestation by which a party signifies that he is bound in conscience to perform the act faithfully and truly. In a more restricted sense it excludes all those forms of attestation or promise which are not accompanied with an imprecation. 2 Bouv. L. Dict., Oath.

2. 2 Abb. L. Dict., art. Oath; Blocker v. Burrus, 2 Ala. 354.

In *Ohio* it has been defined as "the calling upon God to witness that what is said by the person sworn is true, and invoking the divine vengeance upon his head if what he says is false." Brock v. Mulligan, 10 Ohio 123.

"A religious asseveration by which a person renounces the mercy and imprecates the vengeance of heaven if he do not speak the truth." King v. White, 1 Leach Cr. Cas. (Eng.) 430.

In Best's Principles of Evidence (p. 43) it is maintained that the "imprecation is no part of the essence of an oath, but is a mere adjunct of questionable propriety, as calculated to divert attention from the true meaning of the ceremony and fix it on some external observance."

Where a taxpayer was asked by an assessor, "You take your oath that this is all, do you?" and answered, "Certainly I do," this was held *not* to be a lawful

oath. Arnold v. Middletown, 41 Conn. 206.

3. Best's Prin. of Evid., p. 42; there a full history and description of the character of the oath is given.

4. Such infidels who believe a God, that he will punish them if they swear falsely, may be admitted as witnesses. And such infidels (if any such there be) who either do not believe a God, or if they do, do not think he will either reward or punish them in this world or in the next, cannot be witnesses in any case nor under any circumstances . . . because an oath cannot possibly be any tie or obligation upon them. 2 Bouv. Insts., § 3184; Ormichund v. Barker, 1 Willes (Eng.) 545; s. c., 1 Smith's L. C. 194; And. L. Dict., Oath. See also Wakefield v. Ross, 5 Mason (U. S.) L. 9; United States v. Kennedy, 3 McLean (U. S.) 175; Bush v. Com., 80 Ky. 248.

The oath is the means adopted by most civilized nations to ensure the engagement of the witness that he will tell the truth and confirm his testimony; it is an institution established as a precaution against inconstancy or unfaithfulness of man, and to add by the fear of divine punishment to the other assurances which he from whom it is required cannot give or which it would be unjust to ask him. Ormichund v. Barker, 1 Willes (Eng.) 545.

In an oath two things may be observed, viz, an invocation by which we take as witness the God of truth who knows all things; and the imprecation by which we ask Him as just and Almighty to avenge our perjury. This imprecation is either express or implied,

used in profane swearing is of the same character as the judicial oath, save that it is unnecessary and irreverent.<sup>1</sup>

**III. FORM.**—The form of the oath varies greatly, according to where and for what purpose it is used; the form is regulated principally by usage, and a slight variance, even where the form is prescribed by law, is not fatal.<sup>2</sup>

**IV. SEVERAL KINDS.**—1. **Judicial.**—Oaths which are used in court generally and in judicial proceedings are known as judicial oaths; they embrace principally oaths administered to witnesses. Extrajudicial oaths are those taken without authority of law; and, although binding *in foro conscientie*, they do not render a party liable for perjury if violated.<sup>3</sup>

2. **Promissory.**—The most prominent example of this character of an oath is the oath of public officers, by which they strengthen their promise faithfully to perform their duties;<sup>4</sup> under this head

"as you shall answer to God at the great day," is in the express form, while it is implied in the usual formula, "so help me God." Bouv. Inst., § 3184.

Bentham, in very forcible language, combats the propriety of this latter part of an oath, saying: "The supposition of its efficacy is absurd in principle. It ascribes to man a power over his Maker; it places the Almighty in the station of a sheriff's officer; it places Him under the command of every justice of the peace. It supposes Him to stand engaged, no matter how, but absolutely engaged, to inflict on every individual by whom the ceremony, after having been performed, has been profaned, a punishment, no matter what, which, but for the ceremony and the profanation. He would not have inflicted." He condemns it as impious, and further says: "The power which leaves Omnipotence no alternative is the power which any and every individual in the State, who is rash enough and foolish enough, may exercise at any time and any number of times at pleasure, on so simple a condition as that of getting a justice of the peace to join in the performance of the instantaneous ceremony." Bentham, 1 Rat. of Jud. Evid., 366-371, note. See also Bouv. Inst., § 3184; *Ormichund v. Barker*, 1 Atk. (Eng.) 48.

See, for a strong argument in favor of the abandonment of the use of the oath, 29 Alb. L. J. 344; Best's Prin. of Evid. 43.

Missouri Rev. St., § 1421, making it a misdemeanor to make, under oath, "any false certificate, affidavit or statement of any nature, for any purpose," provides

for an offence distinct from perjury. *State v. Boland*, 12 Mo. App. 74.

A notary public is an "officer authorized to administer oaths" within the purview of said statute. *State v. Boland*, 12 Mo. App. 74.

1. For this subject see **BLASPHEMY**, 2 Am. & Eng. Encyc. of Law 423-4. See also **PROFANITY**.

2. Thus where a statute required the official oath to be in the words, "I promise and affirm," one in the words, "I declare and affirm," was held sufficient. *Bassett v. Den*, 17 N. J. L. 432.

Where the oath administered to a surveyor was, "I, J B, do solemnly and sincerely promise and swear (or affirm) that I will, etc.," and at the bottom "affirmed before me, one of the justices of the county, Samuel Clarke," it was held that though the oath was exceedingly irregular, yet the superfluous parts might be rejected as surplusage, the remaining part being correct. *State v. Shreve*, 4 N. J. L. 297. See also *Farrar v. Parker*, 7 Met. (Mass.) 43.

As to the forms of oath generally, see Best's Prin. of Ev. 161-5-6; Bouv. Inst., § 3199; 1 Archbold's Crim. Prac. and Plead. 461-2.

3. 2 Bouv. L. Dict., art. Oath.

Since perjury consists in taking a false judicial oath (*Anderson's L. Dict.*, Oath) it follows that it is only under this class of oaths that will support the offence of perjury . . . But this idea is not fully entertained. 2 Abb. L. Dict., Perjury. See also **PERJURY**.

4. 2 Bouv. L. Dict., art. Oath. These are frequently known as *official oaths*,

might be classed the oath of a juror, since he is a *quasi* public officer. The offence of perjury cannot be founded upon such an oath as is embraced within this class.<sup>1</sup>

**3. Other Kinds.**—There are also other oaths used in particular cases.<sup>2</sup>

or oaths of office. 2 Abb. L. Dict., art. Oath.

1. 2 Bishop's Crim. Law, § 1026; State v. Dayton, 23 N. J. L. 49; s. c., 53 Am. Dec. 278.

**2. Assertory oaths** are those required by law other than in judicial proceedings and upon induction to office, *e. g.*, custom-house oaths. 2 Bouv. L. Dict., Oaths. See also 2 Bishop's Crim. Law, § 1023. Such an oath will support perjury.

**Corporal Oath.**—A corporal oath is one taken by the form of laying the hands on or kissing a copy of the Gospels. 2 Abb. Law Dict., Oath.

Mr. Bouvier, in his Law Dictionary, gives the following additional oaths (except the last one):

**Oath Against Bribery.**—One which could have been administered to a voter at an election for members of parliament. Abolished in 1854. Whart. Lex.

**Oath of Calumny.—In Civil Law.**—An oath which a plaintiff was obliged to take that he was not actuated by a spirit of chicanery in commencing his action, but that he had *bona fide* a good cause of action. Pothier Pand., lib. 5, tit. 16, § 124. This oath is somewhat similar to our affidavit of a cause of action. See Dunl. Adm. Pr. 289, 290.

**Oath Decisory.—In Civil Law.**—An oath which one of the parties defers or refers back to the other for the decision of the cause. The decisory oath has been practically adopted in the district court of the United States for the district of Massachusetts; and admiralty causes have been determined in that court by the oath decisory. But the cases in which this oath has been adopted have been where the tender has been accepted; and no case is known to have occurred there in which the oath has been refused and tendered back to the adversary. Dunl. Adm. Pr. 290, 291.

**Oath Ex Officio.**—The oath by which a clergyman charged with a criminal offence was formally allowed to swear himself to be innocent; also the oath by which the compurgators swore that

they believed in his innocence. 3 Black Com. 101, 447; Moz. & W.

**Oath in Litem.**—An oath which in the civil law was deferred to the complainant as to the value of the thing in dispute, on failure of other proof, particularly when there was a fraud on the part of the defendant and he suppressed proof in his possession. Greenl. Ev., § 348; Tait Ev. 280; 1 Vern. 207; 1 Eq. Cas. Abr. 229; 1 Me. 27; 1 Yeates (Pa.) 34; 12 Viner Abr. 24.

In general the oath of the party cannot, by the common law, be received to establish his claim, but is admitted in two classes of cases: first, where it has been already proved that the party against whom it was offered has been guilty of some fraud or other tortious or unwarrantable act of intermeddling with the complainant's goods, and no other evidence can be had of the amount of damages. Tayloe v. Riggs, 1 Pet. (U. S.) 591; Riggs v. Tayloe, 9 Wheat. (U. S.) 486; Taunton Bank v. Richardson, 5 Pick. (Mass.) 436; Jackson v. Frier, 16 Johns. (N. Y.) 193.

**Oath Purgatory.**—An oath by which one destroys the presumptions which were against him, for he is then said to purge himself, when he removes the suspicions which were against him; as, when a man is in contempt for not attending court as a witness, he may purge himself of the contempt by swearing to a fact which is an ample excuse. 2 Bouv. L. Dict., art. Oath Purgatory.

**Oath Suppletory.—In Civil and Ecclesiastical Law.**—An oath required by the judge from either party in a cause upon half proof already made, which being joined to half proof supplies the evidence required to enable the judge to pass upon the subject. 3 Black Com. 270. See also And. L. Dict., Oath; New Haven etc. Co. v. Goodwin, 42 Conn. 230.

**Test Oath.**—An oath of loyalty toward the existing government. And. L. Dict., Test Oath 1026.

In *England* and *France* test oaths have been limited to the affirmation of the person's belief or disinterestedness toward the government with no refer-

**V. WHEN USED.**—There are several cases in which, owing to the importance and effect of the statement made, it is considered necessary in order to more surely secure the truth, or the performance of a promise, to require an oath. For example, witnesses testifying in a case in court are required first to take oath;<sup>1</sup> likewise jurors about to sit, in any case;<sup>2</sup> public officers about to commence the duties of their office;<sup>3</sup> also *quasi* public officers, *e. g.*, bailiffs appointed to take charge of the jury during a recess in the proceedings;<sup>4</sup> a party applying for an extraordinary remedy or process, *e. g.*, attachment,<sup>5</sup> search-warrant,<sup>6</sup> warrants to apprehend an offender;<sup>7</sup> where a party intends taking advantage of bankrupt laws;<sup>8</sup>

ence to past conduct. The clause in the constitution of Missouri which requires clergymen, before they may exercise their profession, to take an oath that they have not committed certain designated acts, some of which at the time were innocent in themselves, constituted a bill of attainder and an *ex post facto* law, and were therefore in violation of the constitution. *Cummings v. Missouri*, 4 Wall. (U. S.) 318; *And. L. Dict.*, Test.

1. 1 Greenleaf on Evid., § 328. See also WITNESSES.

2. JURY AND JURY TRIAL, vol. 12, p. 362. The same is true of grand jurors. See GRAND JURIES, vol. 9, p. 1.

3. It is required by the United States constitution and by all of the State constitutions that the chief executive officer, and generally that all other officers shall, before entering upon the duties of the office, take an oath that they will support the constitution, etc., and faithfully perform the duties of their office. U. S. Const., art. 2, § 1, par. 8; *Id.*, art. 6, § 3; Va. Const. (1869), art. 3, § 5. See also *People v. Perry*, 79 Cal. 105; *People v. Clinton* (Cal.), 21 Pac. Rep. 423-426.

The failure of a duly elected revenue commissioner to take the prescribed anti-duelling oath leaves the office vacant, with the right on the part of his predecessor to hold over until some one is legally elected and qualifies. *Branham v. Long*, 78 Va. 352.

The legal presumption is that public officers exercising their office have been duly sworn. *Nelson v. People*, 23 N. Y. 293. So also in case of *quasi public* officers. *Dayton v. Johnson*, 69 N. Y. 419.

It is held, however, that a police officer appointed under Mass. Gen. Stat.,

ch. 18, § 38, need not be sworn. *Com. v. Cushing*, 99 Mass. 592. See also *McAlister v. State*, 6 Bush (Ky.) 581; PUBLIC OFFICERS.

**Proof of Oath of Office.**—If the town records state that the selectmen chosen, "being present, took the oath of office by law prescribed," it is sufficient proof of their qualification as such, without stating before whom the oath was taken. *Mason v. Thomas*, 36 N. H. 302.

A memorandum on the books of the town clerk, that certain persons were "sworn to office" as assessors, signed by the clerk as a justice of the peace, and not as town clerk, is a sufficient certificate of the official oath, according to the requirements of the statutes. *Ware v. Bradbury*, 3 Sumn. (U. S.) 186. See also *Halbeck v. Mayor etc. of N. Y.*, 10 Abb. Pr. (N. Y.) 439; *State v. Green*, 15 N. J. L. 88.

4. JURY AND JURY TRIAL, vol. 12, p. 371.

5. ATTACHMENT, vol. 1, p. 901; AFFIDAVIT, vol. 1, p. 314.

6. See also SEARCH WARRANTS; U. S. Const., Amd., art. 4. The United States constitution and those of most of the States require that "no warrants (*i. e.*, to search) shall issue but upon probable cause, supported by oath or affirmation." See also *State v. Mann*, 5 Ired. L. (N. Car.) 45; 1 Archbold's Prac. & Plead. 128; 2 Wils. (Eng.) 283; *Sanford v. Nichols*, 13 Mass. 286.

7. *State v. J. H.*, 1 Tyler 444; 1 Archbold's Cr. Prac. & Plead. 103, in which last authority the statutes of the various States on the subject are collected.

8. See BANKRUPTCY, vol. 2, p. 75, note. As a clerk of the United States courts, it would seem, has no authority to administer oaths out of court (but

and in certain pleadings in chancery.<sup>1</sup> A party who is referee in a case, or parties who are commissioners appointed to make partition or admeasurement are usually required to take oath, before proceeding, that they will faithfully perform what is incumbent upon them in that relation, etc.<sup>2</sup> The same is true of arbitrators.<sup>3</sup> And in some of the States it has been held necessary to the validity of an assignment that it should be sworn to by the assignor.<sup>4</sup>

**VI. HOW ADMINISTERED OR TAKEN.**—The oath is administered to witnesses and jurors, in the open court, by the clerk;<sup>5</sup> in case of a party applying for an extraordinary process it is administered by the officer who is to issue such process;<sup>6</sup> in case of public

ample authority *coram judice*), the jurats attached to a petition and schedules of a bankrupt will be taken to have been verified in court, if not proved to be otherwise. *Schermerhorn v. Talman*, 14 N. Y. 93.

1. Dan. Ch. Prac. 686-688, 785.

2. Baylie's Trial Prac. 263; 330-336; N. Y. Code Civ. Proc., §§ 1550; Cooper on References and Referees 61.

But it is said that the omission of the referee to take the proper oath before proceeding to take testimony in a case where all the parties are of full age and present, in person or by attorney, is at most a mere irregularity and not a jurisdictional defect. *Nason v. Luddington*, 56 How. Pr. (N. Y.) 172; *McGowan v. Newman*, 4 Abb. (N. Y.) N. Cas. 80.

And the omission of a referee to be sworn is not, in any case, a ground for setting aside a judgment upon his report. *Katt v. Germania Fire Ins. Co.*, 26 Hun (N. Y.) 429. See also *Whalen v. Albany Co.*, 6 How. Pr. (N. Y.) 278.

3. Abbott's Trial Evid. 466; *Browning v. Wheeler*, 24 Wend. (N. Y.) 258; s. c., 35 Am. Dec. 617. But if a defendant proceeds without them it is considered as a sufficient evidence of a waiver. *Day v. Hammond*, 57 N. Y. 479; s. c., 15 Am. Rep. 522. See also *ARBITRATION*, vol. 1, p. 674.

4. Thus in *New Hampshire*, the assignor is required to make oath "that he has placed and assigned, etc., in the hands of his assignee all his property of every description except such as is by law exempt from attachment and execution, to be divided among all his creditors in proportion to their respective claims." See *Flint v. Clinton Co.*, 12 N. H. 430.

In *Massachusetts*, under the statute of 1836, the debtor was required to make oath to similar effect; in *New*

*Jersey* the debtor is required to verify his inventory by oath or affirmation. In *Maine*, the assignor is required to make oath to the truth of the assignment, likewise in *Indiana*. Burrill on Assignments (3rd ed.) 248.

5. Usually by requiring them to hold up their right hands while they look upon the Bible he holds; or by placing their hands upon the book or in some cases kissing it. The manner of administering is governed almost entirely by usage. *Regina v. Frost*, 9 Carr. & P. (Eng.) 129; Bouv. L. Dict., Oath.

A statute which requires an oath to be administered "by the court or judge," is complied with if the oath is administered by the clerk in open court, under the direction of the court, and tested by the clerk. *Oaks v. Rodgers*, 48 Cal. 197.

Where an act of congress requires an oath to be administered, such oath under the usage of the proper department of government, may be administered by a State officer having authority to administer oaths. *United States v. Winchester*, 2 McLean (U. S.) 135; *United States v. Bailey*, 9 Pet. (U. S.) 238.

See generally as to who may administer oaths: *United States v. Barton*, 1 Gilp. (U. S.) 439; *Herman v. Herman*, 4 Wash. (U. S.) 555; *Sugar v. Davis*, 13 Ga. 462.

Where the oath was administered by a deputy clerk of the circuit court in *Indiana* it was held to be as obligatory as if it had been administered by one of the judges. *Servir v. State*, 2 Blackf. (Ind.) 35.

6. A statutory provision that certain officers may "administer oaths necessary in the performance of their duties," relates to matters filed with or business

officers it is by some one appointed by law for the purpose and in a manner prescribed by law or usage.<sup>1</sup> The administering must be reverent and in the form provided for the particular occasion;<sup>2</sup> and must also be according to the peculiar ceremonies of the religion to which the person sworn adheres.<sup>3</sup> In case a party is prevented by his religious convictions from taking an oath, he is allowed, now, simply to "solemnly affirm," and this affirmation has the same legal effect, for all purposes, as an oath.<sup>4</sup> In general the manner

transacted before the officer in which an oath is required, and in reference to which some duty is enjoined upon him. *Wheat v. Ragsdale*, 27 Ind. 191.

1. The President of the United States has the oath administered to him by the chief justice of the supreme court; in the several States the chief justice of the State court administers the oath to the chief executive. As to oath of office, see PUBLIC OFFICERS.

Under the *California Practice* act of 1851, ch. 8, § 442, the mayor of San Francisco has no right to administer oaths of office. *Payne v. San Francisco*, 3 Cal. 122.

2. 1 Dan. Ch. Pr. 746.

An oath, administered substantially according to the prescribed form is valid. That the witness did not repeat the words "So help me God," as required by the statute regulating the form of oaths, is immaterial. *State v. Mazon*, 90 N. Car. 676.

3. The court may enquire of a witness before he is sworn what form of oath he considers as most binding and cause him to be sworn accordingly. See 1 Greenl. on Ev., § 371, and authorities cited; *McKinney v. People*, 7 Ill. 541; 8. c., 43 Am. Dec. 65; *Gill v. Caldwell*, 1 Ill. 53.

A Jew is sworn on the Pentateuch or on the Old Testament, with his hat on, closing his oath with "so help me *Yehovah*," instead of "so help me *God*." 1 Stra. (Eng.) 821; *Newman v. Newman*, 7 N. J. Eq. 26. A Mohammedan on the Koran. *Rex v. Morgan*, 1 Leach (Eng.) 54; C. C. Best's Prin. of Ev. 162. A Gentoo, by touching with his hand the foot of a Brahmin or priest of his religion. A Brahmin by touching the hand of another such priest. 1 Wils. (Eng.) 549; Best's Prin. of Ev. 162; *Ormichund v. Barker*, 1 Atk. (Eng.) 21. A Chinaman by breaking a china saucer. The swearing of a Chinaman is done thus: "On getting into the witness box he knelt down, and a china saucer having been placed in his hand,

he struck it against the brass rail in front of the box and broke it. The officer then administered the oath in these words, which were translated into the Chinese language by the interpreter, 'You shall tell the truth and the whole truth; the saucer is cracked, and if you do not tell the truth your soul will be cracked like the saucer.' *Reg. v. Entrehman etc.*, 1 Carr. & M. 248. In another case the saucer was first filled with salt." Best's Prin. of Ev. 162.

But in the case of *State v. Chyo Chiagk*, 92 Mo. 395, it was held that where the statute required the witness to be sworn according to the peculiar ceremonies of his own religion, and the interpreter states that "the joss-stick burning" is the true oath among the Chinese it is error to compel him to be sworn in any other manner. See also 4 Minor's Insts. (2nd ed.) 697-8; 2 Bouv. L. Dict., art. Oath; 1 Starke's Ev. 21, 22; Best's Prin. of Ev. 162, 165, 166.

In the case of *Com. v. Buzzell*, 16 Pick. (Mass.) 153, Roman Catholics were directed by the court to be sworn upon the Holy Evangelists, on the ground that those who profess the Catholic faith generally regard this to be the most solemn form of administering the oath.

In the case of *United States v. Bailey*, 9 Pet. (U. S.) 238, it was held that, where a State officer authorized to administer oaths in his own State administered the oath to a party making a claim against the United States, although the officer was not authorized by act of congress to administer such oaths, yet since it was in conformity with the usages of the treasury department, he was sufficiently authorized in such cases to constitute a false swearing, under such oath, perjury.

4. This is true of the oath of witnesses, of officers and all others. See U. S. Const., art. 2, § 1, par. 8; 1 Greenl. on Ev. (4th ed.), § 371;

in which an oath or affirmation is administered is presumed to be correct unless it appear otherwise by the record.<sup>1</sup>

*Ormichund v. Barker*, 1 Atk. (Eng.) 21, 46; *Best's Prin. of Ev.* 165, 166.

"Oath," as used in district court act includes affirmation or declaration. 1 L. 1857, 729, ch. 344, § 80 (N. Y.); N. Y. Code Crim. Proc., § 957.

In *England* it is said that in acts of parliament passed since the end of 1850, "the words 'oath,' 'swear,' and 'affidavit,' shall include affirmation, declaration, affirming and declaring, in

the case of persons by law allowed to declare or affirm instead of swearing." §. 4, 13 & 14 Vict., ch. 21; *Vf.* § 3 Interpret. act 1889.

"Proof made upon oath" (§ 32, Solicitor's act, 1843, 6 & 7 Vict., ch. 73). "I think that admits proof on affidavit, but is not confined to it." Per *ESHER*, M. R., *Osborne v. Milman*, 56 L. J., Q. B. 264.

*i. Coxe v. Field*, 13 N. J. L. 215; *Dayton v. Johnston*, 69 N. Y. 419.

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